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14 On behalf of Central Delta Water Agency,
15 South Delta Water Agency, Lafayette Ranch,
16 Heritage Lands, Mark Bachetti Farms
17 and Rudy Mussi Investments L.P.

18 **STATE OF CALIFORNIA**

19 **STATE WATER RESOURCES CONTROL BOARD**

20 Hearing in the Matter of California
21 Department of Water Resources and
22 United States Department of the Interior,
23 Bureau of Reclamation Request for a
24 Change in Point of Diversion for
25 California Water Fix

26 **TESTIMONY OF DANTE JOHN
27 NOMELLINI, SR. IN SUPPORT OF THE
28 SOUTH DELTA WATER AGENCY
PARTIES' CASE-IN-CHIEF FOR PART 1B
OF THE CALIFORNIA WATERFIX
CHANGE PETITION**

I, Dante John Nomellini, Sr., declare:

1. I am the Manager and Co-counsel for the Central Delta Water Agency, I have since 1976 resided on Middle Roberts Island (RD 524) where my wife and I through our revocable trust own a home and the adjoining approximately 36 acres which is riparian to and abuts the San Joaquin River. The salinity of the water in the San Joaquin River abutting our home and in our domestic well has substantially degraded over the 40 years to the point where our primary source of drinking water is now bottled.

1 2. My Statement of Qualifications (SWRCB-150) is true and correct.

2 3. The exhibits referred to herein which are copies of documents or excerpts from
3 such documents are true and correct copies. Highlighting, underlying and any notations are
4 obvious and are my additions.

5 4. Testimony

6 **THE CURRENT PROCEEDINGS ARE PREMATURE AND REFLECT THE**
7 **PREDETERMINATION OF STATE AND FEDERAL ACTION TO CONSTRUCT**
8 **AND OPERATE AN ISOLATED CONVEYANCE FACILITY ACROSS THE DELTA**
9 **WITH THREE NEW INTAKES ON THE SACRAMENTO RIVER.**

10 **The Decision to Proceed with an Isolated Conveyance, i.e., Peripheral Canal/Tunnels,**
11 **WaterFix Has Been Made in Advance of the Analysis and Preparation of the Draft**
12 **EIR/EIS and RDEIR/SDEIS and has Destroyed the Impartiality for a Good Faith Effort**
13 **at Full Disclosure and Analysis of Impacts, Alternatives and Mitigation.**

14 NEPA requires full disclosure of the potential effects of major actions proposed by
15 federal agencies and accompanying alternatives, impacts and possible mitigation. NEPA also
16 requires that environmental concerns and impacts be considered during planning and decision
17 making so that steps may be more easily taken to correct or mitigate the impacts of an action.
18 Compliance with NEPA should result in more informed decisions and the opportunity to avoid
19 or mitigate for potential environmental effects before an action is implemented. The NEPA
20 process is intended to identify and evaluate alternatives in an impartial manner. (See
21 Reclamation's NEPA Handbook dated February 2012.)

22 CEQA requires adequacy, completeness and a good faith effort at full disclosure. The
23 EIR is to inform the decision makers and the public of the environmental impact of proposed
24 actions. (See CEQA Guidelines sections 15002 and 15003.) The purposes include identifying
25 ways to avoid or significantly reduce environmental damage and preventing significant,
26 avoidable damage to the environment by requiring changes in projects through the use of
27 feasible alternatives or mitigation measures.

28 //

1 The environmental review for BDCP and now the California Water Fix has been
2 orchestrated to justify the new Sacramento River Intakes and the Isolated Conveyance Facility.
3 Such actions reflect bad faith and have resulted in inadequate disclosure and analysis of
impacts, alternatives and mitigation.

4 1) Participation in the BDCP Steering Committee was conditioned on agreement to
5 The Bay Delta Conservation Plan Points of Agreement for Continuing into the Planning
6 Process dated November 16, 2007, which includes agreement to new points of diversion on the
Sacramento River and an isolated conveyance facility.

7 The agreement provides:

8 “2.3 Conveyance Facilities

9
10 The Steering Committee agrees that the most promising approach
11 for achieving the BDCP conservation and water supply goals
12 involves a conveyance system with new points of diversion, the
13 ultimate acceptability of which will turn on important design,
14 operational and institutional arrangements that the Steering
15 Committee will develop and evaluate through the planning
16 process. The main new physical feature of this conveyance system
17 includes the construction and operation of a new point (or points)
18 of diversion in the north Delta on the Sacramento River and an
19 isolated conveyance facility around the Delta. Modifications to
20 existing south Delta facilities to reduce entrainment and otherwise
21 improve the State Water Project’s (SWP) and Central Valley
22 Project’s (CVP) ability to convey water through the Delta while
23 contributing to near and long-term conservation and water supply
goals will also be evaluated. This approach may provide enhanced
operational flexibility and greater opportunities for habitat
improvements and fishery protection. During the BDCP process,
the Steering Committee will evaluate the ability of a full range of
design and operational scenarios to achieve BDCP conservation
and planning objectives over the near and long term, from full
reliance on the new facilities to use of the new facilities in
conjunction with existing facilities.” (Exhibit SDWA-154)
(Emphasis added.)

24 Excluded from such planning process agreement is design and operation of the SWP
25 and CVP without an isolated conveyance facility and/or new intake facilities on the
26 Sacramento River.

27 Exhibit SDWA-153 is a copy of the January 27, 2009, letter from Karen Scarborough,
28 Undersecretary of the State of California Resources Agency and Chair of the BDCP Steering
Committee to Dante John Nomellini, Manager and Co-Counsel of the Central Delta Water

1 Agency requiring consent to the new intakes on the Sacramento River and an isolated
2 conveyance facility. The letter provides:

3 “As you are also aware, consent to the ‘Points of Agreement’ and other
4 prior decisions of the Steering Committee is requisite for a seat on the
5 Steering Committee.”

6 Exhibit SDWA-154 is a copy of The Bay Delta Conservation Plan: Points of
7 Agreement for Continuing Into the Planning Process (November 16, 2007).

8 Exhibit SDWA-155 is a copy of the August 26, 2008, letter from Dean Ruiz, attorney
9 for the Central Delta Water Agency, to Karen Scarborough requesting membership on the
10 BDCP Steering Committee.

11 Exhibit SDWA-156 is a copy of the November 13, 2008, letter from Dante John
12 Nomellini, Manager and Co-Counsel of the Central Delta Water Agency, to Karen
13 Scarborough, et al. stating willingness to execute the October 6, 2006, Planning Agreement but
14 disagreeing with the provision in the November 16, 2007 “Points of Agreement.”

15 2) The Department of Water Resources as lead agency for CEQA and the United
16 States Department of Interior’s Bureau of Reclamation as a co-lead agency under NEPA are
17 both signatories to the March 2009 Memorandum of Agreement Regarding Collaboration On
18 the Planning, Preliminary Design and Environmental Compliance for the Delta Habitat
19 Conservation and Conveyance Program in Connection With the Development of the Bay Delta
20 Conservation Plan. The Memorandum includes the above referenced November 16, 2007,
21 Points of Agreement to construct and operate an isolated conveyance facility as Exhibit 2
22 thereto. Said Memorandum is Exhibit SDWA-157. DWR and the USBR are both signatories
23 to the December 15, 2011, First Amendment To The Memorandum of Agreement Regarding
24 Collaboration On the Planning, Preliminary Design and Environmental Compliance For The
25 Delta Habitat Conservation and Conveyance Program In Connection With the Development of
26 the Bay Delta Conservation Plan. Said First Amendment confirms the ongoing commitment to
27 the BDCP and DHCCP including the March 2009 MOA which is Exhibit SDWA-157 and
28 further references in paragraph J. the November 2007 “Points of Agreement.” The First
Amendment dated December 15, 2011, is Exhibit SDWA-158.

3) The Draft EIS/EIR is written in a manner advocating the Conservation Strategy of the
BDCP plan which is to construct and operate an isolated conveyance as a standalone
conveyance or as part of dual conveyance and is evidence that the decision is predetermined.
The lack of objective and impartial presentation and analysis is apparent. The Executive
Summary for the Bay Delta Conservation Plan SWRCB-5 at page 10 sets forth the
Conservation Strategy for “Water Flow and Conveyance” as follows:

“Water Flow and Conveyance

Water flow and conveyance conservation measures provide for the
development and operation of new water conveyance infrastructure and

1 the establishment of operational parameters associated with existing and
2 new facilities. New north Delta intake facilities along the Sacramento
3 River will divert water through state of the art positive barrier fish screens
4 into an isolated tunnel/pipeline to the south Delta. In conjunction with the
5 existing south Delta facilities (referred to as dual operations), this
6 improved operational flexibility will improve conditions for covered fish
7 species and restore water supply reliability. Water diversion rates and
8 bypass flows in the Sacramento River at the north Delta diversions will be
9 informed by seasonal movement patterns of covered fish species. The
10 conservation measures summarized in the following sections are discussed
11 in detail in Chapter 3, Conservation Strategy.” (Emphasis added.)

12 The Executive Summary for the BDCP Draft EIR/EIS (November 2013) Exhibit
13 SWRCB-4 at page ES-1, paragraph 3 provides:

14 “. . . The BDCP is a comprehensive conservation strategy for the
15 Sacramento-San Joaquin Delta (Delta) to advance the planning goal of
16 restoring ecological functions of the Delta and improving water supply
17 reliability in the state of California. The conservation strategy is designed
18 to restore and protect ecosystem health, water supply, and water quality
19 within a stable regulatory framework. The BDCP reflects the outcome of
20 a multiyear collaboration between DWR, Reclamation, state and federal
21 fish and wildlife agencies, state and federal water contractors,
22 nongovernmental organizations, agricultural interests, and the general
23 public. The BDCP sets out a comprehensive conservation strategy for the
24 Delta designed to restore and protect ecosystem health, water supply, and
25 water quality within a stable regulatory framework through the following.

- 26 • New and/or modified state water conveyance facilities and
27 operation of the SWP and the CVP in the Delta.” (Emphasis added.)

28 At page ES-2, it is provided:

“The conservation strategy is based on the best available science and was
built upon the following broad conservation goals.” (Emphasis added.)

These statements issued in advance of the completion of the EIR/EIS process
reflect the predetermination and intended lack of objectivity in the preparation of the
environmental documents and analysis.

4) The pretense that the isolated conveyance facility was a Conservation Measure
(CM1) has been removed however the lack of good faith effort at full disclosure remains. Two
forty foot (40ft) diameter tunnels 35 miles long which have the capacity depending on intakes
to convey 15,000 cfs or more of water from the Sacramento River to the export pumps with no
outlets for maintaining Delta water quality certainly do not constitute a measure to protect and
enhance the unique cultural, recreational and agricultural values of the Delta as an evolving

1 place. During much of the time the capacity of the tunnels to direct water will exceed the flow
2 available in the Sacramento River at the intake location. As clearly demonstrated the SWP and
3 CVP have not developed sufficient supply to meet the desires of contractors or even the
4 preconditions to their permits to operate. There is no basis to assume that regulatory restraints
5 will not continue to be avoided through emergency actions and there is no basis to assume that
6 water supply will be developed in sufficient quantities to meet regulatory requirements, senior
obligations and contractual desires. Disregarding operation the impacts of construction and the
physical facilities themselves will severely damage the Delta in violation of the statutory
mandate to protect and enhance.

7 5) Top Public official actions have gone far beyond simple preference of a
8 particular project and have resulted in the lack of impartiality of the public agencies under their
9 direction which is necessary to a good faith full disclosure in the environmental documents.

10 Jerry Brown, Governor of the State of California has been emphatic in his advocacy of
11 the BDCP tunnels. See Exhibit SDWA-159 which is a May 28, 2014 Article wherein he is
12 quoted as saying "I just want to get sh*t done,". "Sh*t" appears to be the BDCP tunnels which
13 are the alternative to his previously emphatically supported peripheral canal, but with no
14 outlets to maintain Delta water quality. Those within the Governor's Department of Water
15 Resources and Department of Fish and Wildlife (agencies responsible for good faith full
16 disclosure in the BDCP EIR/EIS) would be fools to misread the direction from the top. They
17 have not misread the direction.

18 Secretary of Interior Ken Salazar, the head of the U.S. Bureau of Reclamation
19 and U.S. Fish & Wildlife Service has also signaled his emphatic support for the BDCP Tunnels
20 in remarks to the Commonwealth Club, San Francisco, CA, September 19, 2011, Exhibit
21 SDWA-160. After referencing debate raging in Washington, D.C. relating to water supplies
22 we depend on in the west. He explains:

23 "It's a battle between pragmatism and ideology.
24 Collaboration versus cynicism."

25 "In California's Bay Delta, a plan to modernize and secure
26 the State's aging and inadequate water system is always the target
27 of pot shots. Yet the bottom line is the health of the Delta is
28 inextricably linked to the security of safe and reliable water
supplies."

Mr. Salazar goes on to provide:

"That solution is the Bay Delta Conservation Plan.
The Bay Delta Conservation Plan is the most important - and most
complex - long-term water and habitat management plan ever
undertaken.

1 The BDCP provides a comprehensive approach that includes new
2 habitat for endangered fish species, coordinated measures to attack
3 toxics that are fouling delta waters, and improvements to the
4 state's water infrastructure.

4 Rather than simply pumping water from north to south through the
5 Delta - which places immense strain on the system and is
6 unreliable - a new conveyance system would reduce direct
7 conflicts between water supply and fisheries, as the Delta Vision
8 Blue Ribbon Task Force and many independent scientists have
9 recommended.

8 This type of a comprehensive approach is long overdue. We
9 simply must find a way to put California on a path to restore the
10 delta and protect in-Delta interests - while also securing a more
11 reliable water supply for its future. These are the 'co-equal goals'
12 required by the landmark law that the California legislature passed
13 in 2009.

13 That's why, for the past two and a half years, my Department has
14 committed a vast amount of energy to advancing the BDCP."

14 The reference to "a new conveyance system" rather than "simply pumping water from
15 north to south through the Delta" is to the BDCP common strategy for Water and Conveyance
16 which is the "isolated tunnel/pipeline to the south Delta". Mr. Salazar's characterization of
17 criticism as "pot shots" does not encourage those within his departments to make a good faith
18 disclosure of adverse impacts of the project which he apparently favors.

18 It would appear that those public officials who will control the decisions have
19 moved well beyond support to a predetermination to move forward with the isolated
20 conveyance in advance of completion of the EIR/EIS process.

20 6) Further evidence of the predetermination of proceeding with the isolated
21 Tunnel/pipeline conveyance prior to completion of the EIR/EIS is the Department of Water
22 Resources establishment of an organization within the Department called the Delta
23 Conveyance Facility Design and Construction Enterprise to support the design and
24 construction of Conservation Measure 1. See Exhibit SDWA-161. In a presentation to the
25 Metropolitan Water District of Southern California, Special Committee on the Bay Delta Mark
26 Cowin, Director of the Department of Water Resources was quoted as saying:

25 "So that's what I wanted to say about the DCE,' he said. 'The
26 memo that I put out to all staff as Randall indicated, really is just
27 our first steps as an organization to prepare ourselves for
28 implementation of this project so we're taking our existing
resources and starting to move them into an organization that can
engage both with the DCE and ultimately with the implementation

1 office for BDCP as well.” (Exhibit SDWA-162) (Emphasis
2 added.)

3 The candid admission by Jerry Meral, then Deputy Secretary of Resources who
4 was quoted to say:

5 “BDCP is not about, and never has been about saving the delta.
6 The delta cannot be saved.”

7 is further evidence that there has been a predetermination as to the construction of the isolated
8 conveyance facility. See Exhibit SDWA-163.

9 The isolated conveyance is the only measure for which the BDCP EIR/EIS provides
10 project level review. The lack of inclusion of Delta levee improvements as part of the project to
11 facilitate export operation when the Sacramento River intakes cannot be safely operated lends
12 more weight to the evidence that going forward with the isolated conveyance has been
13 predetermined. The State administration determination is contrary to State law which requires
14 that the unique cultural, recreational, natural resource and agricultural values of the Delta be
15 protected and enhanced and that water shall not be diverted from the Delta for use elsewhere
16 unless adequate supplies for the Delta are first provided.

17 In April of 2015, before completion of environmental review, the Design and
18 Construction Enterprise (DCE) developed a CM1 Property Acquisition Management Plan
19 focused only on Alternative 4 which includes the Sacramento River intakes and the isolated
20 tunnels along the chosen route for Alternative 4A. This planning effort focus on only one
21 alternative and one route is yet another commitment of resources to the single preferred
22 alternative thus inhibiting objective review of other alternatives. See Exhibit SDWA-164.

23 On August 25, 2015 the DWR and USBR submitted to the SWRCB a petition for
24 change in their specific water permits to allow the three new intakes on the Sacramento River
25 for Alternative 4A. This commitment of resources and reflection of intent to move forward
26 with Alternative 4A and only 4A is yet another confirmation of the predetermination for new
27 intakes on the Sacramento River and the isolated conveyance tunnels. See Exhibit SWRCB-1.

28 On August 27, 2015 California Natural Resources Secretary John Laird gave an update
to a committee of the San Diego Water Authority explaining the split of the tunnel project into
two projects. He explained “By doing two 30-mile tunnels and by doing habitat restoration, it
lowers the amount of approval that needs to be done, and you can move ahead with the
habitat...”. “I should just say that the Governor is very committed to doing this,” he said, “He
wants to get it done. One of the interesting things in working for him is that he is fearless. He
says what he really thinks; it doesn’t matter how unpopular it is, if he thinks it’s in the long-
term interest, he is determined to spend whatever capital it takes to get it done, and this is on
that list for him.” The predetermination as to the tunnels is again confirmed. See Exhibit
SDWA-165.

1 On September 21, 2015 the USACE gave notice that the DWR applied for a permit to
2 place fill material in approximately 775.02 acres of waters of the United States to construct and
3 operate a new water conveyance facility consisting of three intakes along the Sacramento River
4 and duel tunnels conveying up to 9,000 cubic feet per second of water to the existing Clifton
Court Forebay. See Exhibit SDWA-166. This application is specific to the 4A tunnels and
three Sacramento intakes adding to the evidence of predetermination.

5 The actions of Federal Officials and Agencies reflect an intentional violation and
6 circumvention of 40 CFR section 1506.1(a) which precludes actions which would “Limit the
7 choice of reasonable alternatives” until an agency issues a record of decision as provided in
8 section 1505.2. Such actions clearly run contrary to a good faith effort to rigorously explore
and objectively evaluate all reasonable alternatives as required by 40 CFR section 1502.14.

9 The actions of State Officials and departments clearly show that the project with three
10 intakes on the Sacramento Rivers and two tunnels connecting to Clifton Court has already been
11 determined to be the selected project regardless of the fact that environmental review has not
been completed.

12 **NEPA POLICY AND PROCEDURAL REQUIREMENTS TO ASSURE**
13 **OBJECTIVITY IN THE PREPARATION OF THE EIS HAVE BEEN AND ARE**
14 **BEING CIRCUMVENTED.**

15 The BDCP Draft EIR/EIS Purpose Statement is a confusing mix of State Water Project
16 (SWP), federal Central Valley Project (CVP), State Water Contractor and federal Water
Contractor purposes and needs.

17 The SWP and State Water Contractors obviously want to construct the isolated
18 conveyance facility and operate the SWP to maximize the export of water from the Delta.

19 The CVP (U.S. Bureau of Reclamation) although clearly in favor of construction of the
20 isolated conveyance has not forthrightly sought authority to join in construction, but obviously
21 plans to convey CVP water through such facility and seeks to protect the “ability of the SWP
and CVP to deliver up to full contract amounts, . . .”

22 The SWP contractors and CVP contractors who are to receive the water exported from
23 the Delta obviously are isolated conveyance and full delivery proponents.

24 The roles of regulating agencies and applicants, lead agencies and cooperating agencies
25 has been mixed in a manner which circumvents the procedural mechanisms to assure NEPA
26 required objectivity.

27 The SWP and SWP contractors seeking take permits from the U.S. Fish & Wildlife
28 Services (USFWS) and National Marine Fisheries Service should be viewed as applicants and
the Services as co-lead agencies. In such case, the EIS should have been prepared directly by
the Services or by a contractor selected by them or where appropriate under 40 CFR section

1 1501.6(b), a cooperating agency which has a similar interest. 40 CFR section 1506.5(c) in part
2 provides:

3 “It is the intent of these regulations that the contractor be chosen
4 solely by the lead agency, or by the lead agency in cooperation
5 with cooperating agencies, or where appropriate by a cooperating
6 agency to avoid any conflict of interest.” (Emphasis added.)

7 Allowing DWR, the USBR and their respective contractors to run the show is not
8 appropriate.

9 Although 40 CFR section 1506.2 directs cooperation to the fullest extent possible to
10 reduce duplication between NEPA and state and local requirements, it does not suggest that
11 compliance with requirements to avoid conflict of interest and assure objectivity can be
12 avoided. Joint selection of common consultants in compliance with NEPA requirements and
13 subsequent sole direction of the common consultants by USFWS and NMFS as to NEPA
14 compliance would avoid duplication and could have helped avoid the conflict of interest
15 deterioration of objectivity. Such has not been the case. The USBR is not a regulatory or
16 permitting agency for BDCP in the same sense as the USFWS and NMFS. It has its own
17 responsibilities for compliance with federal ESA. It’s consultations with USFWS and NMFS
18 require that it comply with NEPA, but its role in protecting endangered species is conflicted
19 with its role in serving its water contractors and in coordinating the CVP operations with those
20 of the SWP. The USBR is not an adequate representative for the interests and NEPA
21 responsibilities of the USFWS and NMFS and should not be a co-lead and particularly the sole
22 lead.. Exhibit SDWA-167 is a copy of the First Amendment to the Memorandum of
23 Agreement Regarding Collaboration on the Planning, Preliminary Design and Environmental
24 Compliance for the Delta Habitat Conservation and Conveyance Program in Connection with
25 the Development of the Bay Delta Conservation Plan dated August 31, 2011. This copy
26 contains signatures by the DWR and USBR. Whether the State and Federal Contractors signed
27 is not known. This First Amendment can be contrasted to another First Amendment (which
28 may be the Second Amendment) dated December 15, 2011 and is Exhibit SDWA-158. The
USFWS and NMFS are not parties to either First Amendment. Both First Amendments
provide essentially the same language as to contracting, directing and communicating with the
consultants regarding the BDCP related environmental documents.

II.E. of Exhibit SDWA-158 provides:

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“E. DWR is taking the lead role in preparing and, after
consultation with the Parties, shall direct the consultants regarding
the content of the BDCP, including those elements of the BDCP
intended to be incorporated in the EIS/EIR. DWR has also
contracted with the consultants preparing the EIS/EIR and shall
continue to administer the contract. DWR shall solicit, in a timely
manner, from the Department of Fish and Game (‘DFG’), the
Public Water Agencies, and the NEPA Co-lead Agencies,

1 comments on the draft work products in support of the completion
2 of tasks, pursuant to the schedules in Exhibit 1 and 1A. As set
3 forth in Paragraph B above, Reclamation shall be responsible for
4 coordinating with the NEPA Co-lead Agencies and coordinating
5 with DWR on the NEPA Co-lead Agencies' comments that DWR
6 shall submit to the Consultants in accordance with the schedules in
7 Exhibit 1 and 1A. In the event agency comments are not received
8 consistent with the schedules in Exhibit 1 and 1A, DWR may
9 proceed with preparation of the BDCP and DWR, and Reclamation
10 may proceed with the preparation of the EIS/EIR. DWR shall
11 direct the Program Manager on preparation of the BDCP and
12 EIS/EIR as necessary to maintain the schedule or consider
13 necessary revisions as described in subsection II.C. The DWR
14 Director shall concurrently advise the Parties of the direction
15 provided to the Program Manager. Nothing in this section or
16 elsewhere in this First Amended MOA modifies the Federal
17 responsibilities for the content of the draft and final EIS and
18 preparation of the ROD." (Emphasis added.)

19 II.F. of Exhibit SDWA-158 and Exhibit SDWA-167 in pertinent part provides:

20 "F. DWR has retained a consultant with extensive project
21 management experience to be the BDCP and DHCCP Program
22 Manager. The Program Manager shall report to and be directed by
23 the Director of DWR. The Director of DWR shall implement the
24 responsibilities of DWR as set forth in Subsection II.E. above. The
25 Director of DWR may fulfill this responsibility through the
26 Program Manager, who is delegated to carry out the day-to-day
27 management activities of the BDCP and to closely coordinate with
28 Reclamation regarding preparation of the EIS/EIR. . . ."
(Emphasis added.)

II.Q. of Exhibit SDWA-158 (12-15-11) provides:

"Q. The Parties may retain consulting services as necessary to
complete the BDCP and DHCCP Planning Phase, including the
BDCP and EIS/EIR. No consultants will be retained for BDCP
work unless they are approved by DWR. Before retaining
consultants for EIS/EIR work DWR shall, in accordance with
NEPA, its implementing regulations and the Lead Agency
Agreement, consult with the NEPA Co-Lead Agencies. Consistent
with Section II.F, above, the Director of DWR shall manage the
retained consultants to carry out the BDCP and EIS/EIR."
(Emphasis added.)

1 II.Q. of Exhibit SDWA-167 (8-31-11) provides:

2 “Q. The Parties may retain consulting services as
3 necessary to complete the BDCP-DHCCP Planning Phase,
4 including the BDCP and EIS/EIR. Consistent with Section II.F,
5 above, the Director of DWR shall manage the retained consultants
6 to carry out the BDCP and EIS/EIR.” (Emphasis added.)

6 III.I. of Exhibit SDWA-158 and Exhibit SDWA-167 provides:

7 “I. In the event DWR designates SFCWA as a
8 consultant contract administrator, DWR shall continue collecting
9 funds from the Public Water Agencies, including but not limited to
10 those member agencies identified in Exhibit 2, pursuant to the
11 BDCP-DHCCP Planning Phase funding agreements, and DWR
12 shall distribute those funds to SFCWA to fund the consultants that
13 are contracting directly with SFCWA for the completion of the
14 BDCP-DHCCP Planning Phase.” (Emphasis added.)

13 The USFWS and NMFS, the agencies with the most direct responsibility for protection
14 of endangered species and the parties expected to grant the essential permits have been
15 relegated to a back seat role. They don't hire or direct the consultants; their submission of
16 comments must be through the USBR and thence through DWR to the consultants. If their
17 comments are untimely DWR and Reclamation make the call. USFWS and NMFS cannot
18 even hire consultants unless they are approved by DWR and DWR can even delegate
19 administration of the consultant contracts to the water contractors.

17 The manipulation of the lead, co-lead and cooperating agencies and the delegation of
18 responsibilities by the State and federal agencies has left the most conflicted parties in charge
19 of the NEPA environmental process. Although the ultimate approval is left with the respective
20 agencies, the thousands of pages of text and studies is virtually impossible to adequately
21 review. The 132 page Executive Summary can be contrasted to the 15 page normal summary
22 referenced in 40 CFR section 1502.12 and the thousands of pages in the DEIS/EIR can be
23 contrasted to the 150 to 300 pages referenced in 40 CFR section 1502.7. The impartiality and
24 avoidance of conflicts whether financial or otherwise, of the consultants is critical to the
25 objective analysis required by NEPA. Those who contract with the consultants and most
26 important those who direct the consultants will have the greatest impact on objectivity. As
27 related to BDCP the DWR and in turn the USBR are essentially the agents of their respective
28 contractors and should be viewed as applicants for the purpose of NEPA compliance. 40 CFR
section 1506.5(c) specifies that a consulting firm involved in preparing an EIS must execute a
disclosure statement setting forth any “financial or other interest in the outcome of the project.”
Whether this was done and by whom is of interest however, even with such disclosure,
direction of the consultants will greatly dictate the bounds of objectivity.

1 Objectivity to assure the need to “rigorously explore and objectively evaluate all
2 reasonable alternatives” is made more critical by the revolving door of employees between
3 federal and state agencies and export water contractors.

4 For NEPA purposes, USFWS and NMFS should now engage independent consultants
5 which they direct to review, revise and supplement the already prepared BDCP documents and
6 issue their own draft EIS for public comment and final action. The cost for such effort should
7 be paid in advance by the contractors.

8 At this juncture the Independent Science Board or some other independent body should
9 be authorized and funded to review, revise and supplement the already prepared BDCP
10 documents and issue a new CEQA draft for public comment and final action. The cost for
11 such effort should be paid in advance by the expert water contractors.

12 In the face of the obvious predetermination and corruption of required objectivity the
13 SWRCB should not proceed with permitting of the three intakes and tunnels until an
14 independently directed and corrected draft EIS and EIR is circulated for public review and
15 comment and completed in good faith compliance with law.

16 **THE FEDERAL CENTRAL VALLEY PROJECT (CVP) AND STATE WATER
17 PROJECT (SWP) HAVE FAILED TO ACT IN GOOD FAITH TO MEET THE
18 CONDITIONS OF THEIR PERMITS, TO DILGENTLY DEVELOP SURPLUS
19 WATER TO MEET THEIR RESPECTIVE OBLIGATIONS AND TO HONOR
20 SENIOR RIGHTS AND PUBLIC TRUST RESPONSIBILITY.**

21 **The State and Federal agencies with public trust responsibilities including the
22 State Water Resources Control Board have failed to uphold such trust.**

23 The failure of the CVP and DWP to meet the SWRCB permit conditions and
24 other obligations in the watersheds of origin is clear. Whether or not the projects can if they so
25 desired, operate the projects to meet such obligations is not clear. It is obvious that there has
26 been no attempt to carryover sufficient stored water to meet such obligations through a
27 reoccurrence of a six year or longer drought.

28 Whether in the context of initiation of a new water right or further evaluation of
performance under existing permits the true and legally permissible firm yield of the projects
needs to be established. Mitigation of the CVP and SWP adverse project impacts and the
burden for satisfying the affirmative obligations of such projects should not be shifted onto
others in the Bay-Delta watershed including those in and upstream of the Bay and Delta.

 Limiting exports to water which is truly surplus to the present and future needs of the
Delta and other areas of origin including fish and wildlife needs is the cornerstone of the
promises and law. Urban development and permanent crops in areas dependent upon exports
from the Delta cannot be sustained on an infirm supply. A forthright recognition of the
inability to deliver the desired export quantities from the Bay-Delta watershed will help avoid
the wasteful expenditure of billions of dollars on the tunnel related facilities which will cause

1 great harm to the watersheds of origin and result in little or no benefit to the exporters.
2 Reduced reliance on exports from the Delta and a focus on developing self-sufficiency in
3 importing areas is the better course. Water conservation, water reclamation, desalination of
4 brackish groundwater and where feasible seawater could help reduce the need for restrictions
5 on arid land development and limitations on the planting of permanent crops with infirm
6 supplies.

7 The promises and law restricting exports from the Delta to truly surplus water are
8 reflected in the representations and promises made at the inception of both the CVP and SWP.

9 A summary of the promises made on behalf of the United States to those in the areas of
10 origin is contained in the 84th Congress, 2D Session House Document No. 416, Part One
11 Authorizing Documents 1956 at Pages 797-799 as follows:

12 “My Dear Mr. Engle: In response to your request to Mr. Carr, we have assembled
13 excerpts from various statements by Bureau and Department officials relating to
14 the subject of diversion of water from the Sacramento Valley to the San Joaquin
15 Valley through the operation of the Central Valley Project.

16 A factual review of available water supplies over a period of more than 40 years
17 of record and the estimates of future water requirements made by State and
18 Federal agencies makes it clear that there is no reason for concern about the
19 problem at this time.

20 For your convenience, I have summarized policy statements that have been made
21 by Bureau of Reclamation and Department of the Interior officials. These
22 excerpts are in the following paragraphs:

23 On February 20, 1942, in announcing the capacity for the Delta-Mendota Canal,
24 Commissioner John C. Page said, as a part of his Washington D.C., press release:

25 “The capacity of 4,600 cubic feet per second was approved, with the
26 understanding that the quantity in excess of basic requirements mainly for
27 replacement at Mendota Pool, will not be used to serve new lands in the San
28 Joaquin Valley if the water is necessary for development in the Sacramento
29 Valley below Shasta Dam and in the counties of origin of such waters.”

30 On July 18, 1944, Regional Director Charles E. Carey wrote a letter to Mr. Harry
31 Barnes, chairman of a committee of the Irrigation Districts Association of
32 California. In that letter, speaking on the Bureau’s recognition and respect for
33 State laws, he said:

34 “They [Bureau officials] are proud of the historic fact that the reclamation
35 program includes as one of its basic tenets that the irrigation development in the
36 West by the Federal Government under the Federal reclamation laws is carried
37 forward in conformity with State water laws.”

1
2 On February 17, 1945, a more direct answer was made to the question of
3 diversion of water in a letter by Acting Regional Director R. C. Calland, of the
4 Bureau, to the Joint Committee on Rivers and Flood Control of the California
5 State Legislature. The committee had asked the question, "What is your policy in
6 connection with the amount of water that can be diverted from one watershed to
7 another in proposed diversions?" In stating the Bureau's policy, Mr. Calland
8 quoted section 11460 of the State water code, which is sometimes referred to as
9 the county of origin act, and then he said:

7 "As viewed by the Bureau, it is the intent of the statute that no water shall be
8 diverted from any watershed which is or will be needed for beneficial uses within
9 that watershed. The Bureau of Reclamation, in its studies for water resources
10 development in the Central Valley, consistently has given full recognition to the
11 policy expressed in this statute by the legislature and the people. The Bureau has
12 attempted to estimate in these studies, and will continue to do so in future studies,
13 what the present and future needs of each watershed will be. The Bureau will not
14 divert from any watershed any water which is needed to satisfy the existing or
15 potential needs within that watershed. For example, no water will be diverted
16 which will be needed for the full development of all of the irrigable lands within
17 the watershed, nor would there be water needed for municipal and industrial
18 purposes or future maintenance of fish and wildlife resources."

15 On February 12, 1948, Acting Commissioner Wesley R. Nelson sent a
16 letter to Representative Clarence F. Lea, in which he said:

17 "You asked whether section 10505 of the California Water Code, also
18 sometimes referred to as the county of origin law, would be applicable to the
19 Department of the Interior, Bureau of Reclamation. The answer to this question
20 is: No, except insofar as the Bureau of Reclamation has taken or may take
21 assignments of applications which have been filed for the appropriation of water
22 under the California Statutes of 1927, chapter 286, in which assignments
23 reservations have been made in favor of the county of origin.

22 The policy of the Department of the Interior, Bureau of Reclamation, is
23 evidenced in its proposed report on a Comprehensive Plan for Water Resources
24 Development—Central Valley Basin, Calif., wherein the Department of the Interior
25 takes the position that "In addition to respecting all existing water rights, the
26 Bureau has complied with California's 'county of origin' legislation, which
27 requires that water shall be reserved for the presently unirrigated lands of the
28 areas in which the water originates, to the end that only surplus water will be
29 exported elsewhere."

27 On March 1, 1948, Regional Director Richard L. Boke wrote to Mr. A. L.
28 Burkholder, secretary of the Live Oak Subordinate Grange No. 494, Live Oak,
Calif., on the same subject, and said:

1
2 "I can agree fully with the statement in your letter that it would be grossly unjust
3 to 'take water from the watersheds of one region to supply another region until all
4 present and all possible future needs of the first region have been fully determined
5 and completely and adequately provided for.' That is established Bureau of
6 Reclamation policy and, I believe, it is consistent with the water laws of the State
7 of California under which we must operate."

8
9 On May 17, 1948, Assistant Secretary of the Interior William E. Warne wrote a
10 letter to Representative Lea on the same subject, in which he said:

11 "The excess water made available by Shasta Reservoir would go first to such
12 Sacramento Valley lands as now have no rights to water."

13 Assistant Secretary Warne goes on to say, in the same letter:

14 "As you know, the Sacramento Valley water rights are protected by: (1)
15 Reclamation law which recognizes State water law and rights thereunder; (2) the
16 State's counties of origin act, which is recognized by the Bureau in principle; and
17 (3) the fact that Bureau filings on water are subject to State approval. I can assure
18 you that the Bureau will determine the amounts of water required in the
19 Sacramento Valley drainage basin to the best of its ability so that only surplus
20 waters would be exported to the San Joaquin. We are proceeding toward a
21 determination and settlement of Sacramento Valley waters which will fully
22 protect the rights of present users; we are determining the water needs of the
23 Sacramento Valley; and it will be the Bureau's policy to export from that valley
24 only such waters as are in excess of its needs."

25 On October 12, 1948, Secretary of the Interior Krug substantiated former
26 statements of policy in a speech given at Oroville, Calif. Secretary Krug said,
27 with respect to diversion of water:

28 "Let me state, clearly and finally, the Interior Department is fully and completely
committed to the policy that no water which is needed in the Sacramento Valley
will be sent out of it."

He added:

"There is no intent on the part of the Bureau of Reclamation ever to divert from
the Sacramento Valley a single acre-foot of water which might be used in the
valley now or later."

The California Water Resources Development Bond Act provides in Water Code
Section 12931 that the Sacramento-San Joaquin Delta shall be deemed to be within the
watershed of the Sacramento River.

1 Exhibit SDWA-168 is a copy of the 1960 ballot argument in favor of the California
2 Water Resources Development Bond Act which spawned the State Water Project (SWP). Of
particular note are the following representations:

3 “No area will be deprived of water to meet the needs of another
4 nor will any area be asked to pay for water delivered to another.”

5 “Under this Act the water rights of Northern California will remain
6 securely protected.”

7 “A much needed drainage system and water supply will be
8 provided in the San Joaquin Valley.”

9 In ES.1.2.2 Exhibit SWRCB-3 of the RDEIR/SDEIS it is stated that State policy
10 regarding the Delta is summarized in the Sacramento-San Joaquin Delta Reform Act of 2009.
11 Reference is made only to Water Code Sections 85001, subd. (c) and 85002 while failing to
recognize sections 85031(a), 85054, 85021 and others.

12 Water Code section 85031(a) provides:

13 “(a) This division does not diminish, impair, or otherwise affect
14 in any manner whatsoever any area of origin, watershed of origin,
15 county of origin, or any other water rights protections, including,
16 but not limited to, rights to water appropriated prior to December
17 19, 1914, provided under the law. This division does not limit or
18 otherwise affect the application of Article 1.7 (commencing with
19 Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505,
20 10505.5, 11128, 11460, 11461, 11462, and 11463, and Sections
21 12200 to 12220, inclusive.” (Emphasis added.)

19 Water Code Sections 11460 et seq. and 12200 et seq. are particularly specific in
20 defining the limitation on the export of water from the Delta by the SWP and CVP. Water
21 Code Section 11460 et seq. were added by Statutes 1943, c. 370, p. 1896 around the time of
22 commencement of the CVP. Water Code Section 12200 et seq. was added by Statutes 1959, c.
1766, p. 1766 around the time of commencement of the State Water Project.

23 The limitation of the projects to the export of only surplus water and the
24 obligation of the projects to provide salinity control and assure an adequate water supply
25 sufficient to maintain and expand agriculture, industry, urban, and recreational development in
the Delta is clear.

26 Water Code "12200 through 12205 are particularly specific as to the requirements to
27 provide salinity control for the Delta and provide an adequate water supply in the Delta
28 sufficient to maintain and expand agriculture, industry, urban and recreational development.

1 For ease of reference, the following Water Code sections are quoted with emphasis
2 added:

3 **'12200. Legislative findings and declaration**

4 The Legislature hereby finds that the water problems of the Sacramento-San Joaquin
5 Delta are unique within the State; the Sacramento and San Joaquin Rivers join at the
6 Sacramento-San Joaquin Delta to discharge their fresh water flows into Suisun, San Pablo and
7 San Francisco bays and thence into the Pacific Ocean; the merging of fresh water with saline
8 bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an
9 acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta;
10 the State Water Resources Development system has as one of its objectives the transfer of
11 waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-
12 deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water
13 surplus to the needs of the areas in which it originates is gathered in the Delta and thereby
14 provides a common source of fresh water supply for water-deficient areas. It is, therefore,
15 hereby declared that a general law cannot be made applicable to said Delta and that the
16 enactment of this law is necessary for the protection, conservation, development, control and
17 use of the waters in the Delta for the public good. (Added by Stats. 1959, c. 1766, p. 4247, '1.)

18 **'12201. Necessity of maintenance of water supply**

19 The Legislature finds that the maintenance of an adequate water supply in the
20 Delta sufficient to maintain and expand agriculture, industry, urban, and
21 recreational development in the Delta area as set forth in Section 12220, Chapter
22 2, of this part, and to provide a common source of fresh water for export to areas
23 of water deficiency is necessary to the peace, health, safety and welfare of the
24 people of the State, except that delivery of such water shall be subject to the
25 provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code.
26 (Added by Stats. 1959, c. 1766, p 4247, '1.)

27 **'12202. Salinity control and adequate water supply; substitute water supply;**
28 **delivery**

Among the functions to be provided by the State Water Resources Development
29 System, in coordination with the activities of the United States in providing
30 salinity control for the Delta through operation of the Federal Central Valley
31 Project, shall be the provision of salinity control and an adequate water supply for
32 the users of water in the Sacramento-San Joaquin Delta. If it is determined to be
33 in the public interest to provide a substitute water supply to the users in said Delta
34 in lieu of that which would be provided as a result of salinity control no added
35 financial burden shall be placed upon said Delta water users solely by virtue of
36 such substitution. Delivery of said substitute water supply shall be subject to the
37 provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code.
38 (Added by Stats. 1959, c. 1766, p 4247, '1.)

1 **'12203. Diversion of waters from channels of delta**

2 It is hereby declared to be the policy of the State that no person, corporation or
3 public or private agency or the State or the United States should divert water from
4 the channels of the Sacramento-San Joaquin Delta to which the users within said
5 Delta are entitled. (Added by Stats. 1959, c. 1766, p 4249, '1.)

6 **'12204. Exportation of water from delta**

7 In determining the availability of water for export from the Sacramento-San
8 Joaquin Delta no water shall be exported which is necessary to meet the
9 requirements of Sections 12202 and 12203 of this chapter. (Added by Stats.
10 1959, c. 1766, p 4249, '1.)

11 **'12205. Storage of water; integration of operation and management of release**
12 **of water**

13 It is the policy of the State that the operation and management of releases from
14 storage into the Sacramento-San Joaquin Delta of water for use outside the area in
15 which such water originates shall be integrated to the maximum extent possible in
16 order to permit the fulfillment of the objectives of this part. (Added by Stats.
17 1959, c. 1766, p 4249, '1.)@

18 '11460 provides:

19 **11460. Prior right to watershed water**

20 In the construction and operation by the department of any
21 project under the provisions of this part a watershed or area
22 wherein water originates, or an area immediately adjacent thereto
23 which can conveniently be supplied with water therefrom, shall not
24 be deprived by the department directly or indirectly of the prior
25 right to all of the water reasonably required to adequately supply
26 the beneficial needs of the watershed, area, or any of the
27 inhabitants or property owners therein. (Added by Stats. 1943, c.
28 370, p. 1896. Amended by Stats. 1957, c. 1932, p. 3410, '296.)@

 The December 1960 DWR Bulletin 76 (Exhibit SDWA-169) which includes a
contemporaneous interpretation by DWR of Water code Section 12200 through 12205 provides
at page 12:

 “In 1959 the State Legislature directed that water shall not be diverted from the Delta
for use elsewhere unless adequate supplies for the Delta are first provided. (Emphasis added.)

 Similarly the DWR confirmed its interpretation of law in the contract between the State
of California Department of Water Resources and the North Delta Water Agency For the

1 Assurance of a Dependable Water Supply of Suitable Quality dated January 28, 1981, which
2 provides:

3 “(d) The construction and operation of the FCVP and SWP at
4 times have changed and will further change the regimen of rivers
5 tributary to the Sacramento-San Joaquin Delta (Delta) and the
6 regimen of the Delta channels from unregulated flow to regulated
7 flow. This regulation at times improves the quality of water in the
8 Delta and at times diminishes the quality from that which would
9 exist in the absence of the FCVP and SWP. The regulation at
10 times also alters the elevation of water in some Delta channels.”

11 “(f) The general welfare, as well as the rights and requirements of
12 the water users in the Delta, require that there be maintained in the
13 Delta an adequate supply of good quality water for agricultural,
14 municipal and industrial uses.”

15 “(g) The law of the State of California requires protection of the
16 areas within which water originates and the watersheds in which
17 water is developed. The Delta is such an area and within such a
18 watershed. Part 4.5 of Division 6 of the California Water Code
19 affords a first priority to provision of salinity control and
20 maintenance of an adequate water supply in the Delta for
21 reasonable and beneficial uses of water and relegates to lesser
22 priority all exports of water from the Delta to other areas for any
23 purpose.” (Emphasis added.) (See Exhibit DWR-306.)

24 In United States vs. State Water Resources Control Board 182 Ca.App.3d82 (1986) at
25 page 139 the court concluded:

26 “In 1959, when the DWP was authorized, the Legislature enacted
27 the Delta Protection Act. (§§ 12200-12220.) The Legislature
28 recognized the unique water problems in the Delta, particularly
29 ‘salinity intrusion,’ which mandates the need for such special
30 legislation ‘for the protection, conservation, development, control
31 and use of the waters in the Delta for the public good.’ (§ 12200.)
32 The act prohibits project exports from the Delta of water necessary
33 to provide water to which Delta users are ‘entitled’ and water
34 which is needed for salinity control and an adequate supply for
35 Delta users. (§§ 12202, 12203, 12204.)” (Emphasis added)

36 In SWRCB D-1485 Exhibit SWRCB-23 at page 9 the SWRCB ruled:

37 “The Delta Protection Act accords first priority to satisfaction of
38 vested rights and public interest needs for water in the Delta and

1 relegates to lesser priority all exports of water from the Delta to
2 other areas for any purpose.”

3 As related to the Peripheral Canal or Tunnels or any other isolated conveyance facility,
4 the requirements of WC 12205 are particularly relevant.

5 “‘It is the policy of the State that the operation and management of
6 releases from storage into the Sacramento- Joaquin Delta of water
7 for use outside the area in which such water originates shall be
8 integrated to the maximum extent possible to permit fulfillment of
9 the objectives of this part.’”

10 The objectives include salinity control and an adequate water supply. Conveyance
11 facilities which transport stored water to the export pumps with no outlets or releases to
12 provide salinity control and an adequate water supply in the Delta would not comply.

13 **The responsibility for mitigation for the CVP and SWP adverse impacts and the
14 affirmative obligations to legal users of water and to fish and wildlife should not be
15 shifted to others. The proposed changes illegally shift such burden and violate the
16 obligations so as to harm legal users of water within and upstream of the Bay-Delta.**

17 The export projects must fully mitigate their respective impacts and meet the
18 affirmative obligations to the Delta and other areas of origin including those related to flow for
19 fish. Failure to so do results in a shift of the cost of the project to someone else. The State
20 Water Resources Development Bond Act was intended to preclude such a shift in costs or
21 burdens.

22 In Goodman v. Riverside (1993) 140 Cal.App.3d 900 at 906 the court confirmed the
23 requirement that the costs of the entire project be paid by the contractors.

24 In footnotes 3 and 4 the court included the following:

25 ³“Alan Cranston, then State Controller, notes in a press release:
26 “‘As additional security for the bonds, and to prevent a drain on
27 the General Fund in case of deficiency, the local contracting
28 agencies will have ad valorem taxing power over and above the
 cost of water which the user will pay. [¶] Local agencies will
 therefore be able to meet their commitments to the State even if
 revenues from local sales of water are not sufficient for this
 purpose. [¶] Through this procedure, the beneficiaries of the Water
 Plan become the financial keystone and support rather than the
 General Fund and the general taxpayer.’”

1 “Governor Pat Brown’s press comments at the time are also
2 informative:”

3 “Governor, what is your answer to people who say, ‘I don’t want
4 to pay for somebody else’s water.’ Like San Franciscans. “I have
5 already paid for one water project. Why should I be compelled to
6 buy another?”

7 “Governor Brown: Well, they won’t. The plan itself is completely
8 self-supporting. The law provides that the contracts have to
9 provide for the repayment of the cost of the entire Project, That’s
10 the real answer to it.” (Italics added.)

11 ⁴The League of Women Voters’ analysis observed: “The state will
12 contract with public agencies having the assessment power so they
13 can meet the required payment to the state by the use of taxes as
14 well as water rates if they so desire. In this way no area will be
15 subsidizing water for another region.”

16 Water Code Section 11912 requires that the costs necessary for the preservation of fish
17 and wildlife be charged to the contractors. The term “preservation” appears to be broader than
18 mitigation and appears to create an affirmative obligation beyond mitigation.

19 Title 34 of Public Law 102-575, SDWA-6 referred to as the Central Valley Project
20 Improvement Act in Section 3406(b)(1) authorizes and directs the Secretary of Interior to enact
21 and implement a program which makes all reasonable efforts to ensure by the year 2002
22 natural production of anadromous fish (including salmon, steelhead, striped bass, sturgeon and
23 American shad) will be sustainable on a long term basis at levels not less than twice the
24 average levels attained during the period of 1967-1991. This burden is an affirmative
25 obligation of the CVP and should not be shifted onto others.

26 The Delta Reform Act of 2009 includes provisions intended to provide additional
27 protection for the Delta. Such provisions include Water Code §85054 which provides:

28 “§85054. Coequal goals

‘Coequal goals’ means the two goals of providing a more reliable
water supply for California and protecting restoring, and enhancing
the Delta ecosystem. The coequal goals shall be achieved in a
manner that protects and enhances the unique cultural, recreational,
natural resource, and agricultural values of the Delta as an
evolving place.”

1
2 Water Code §85021 which provides:

3 “§85021. Reduction of reliance on Delta for future water supply
4 needs

5 The policy of the State of California is to reduce reliance on the
6 Delta in meeting California’s future water supply needs through a
7 statewide strategy of investing in improved regional supplies,
8 conservation, and water use efficiency. Each region that depends
9 on water from the Delta watershed shall improve its regional self-
10 reliance for water through investment in water use efficiency,
11 water recycling, advanced water technologies, local and regional
12 water supply projects, and improved regional coordination of local
13 and regional water supply efforts.”

14 The Delta and other areas of origin both upstream and downstream are part of
15 California and also need a more reliable water supply. The modified purposes of the WaterFix
16 are clearly directed only at the ability of the SWP and CVP to export water from the Delta.
17 Restoration and protection of Delta water quality and flows including flushing flows are part of
18 a more reliable water supply for California. Non-degradation of water quality and the statutory
19 obligations to provide enhancement of water quality and an adequate supply for the Delta are
20 absent from the purposes of the WaterFix and the petition for change.

21 The embedded isolated conveyance will clearly render water supply less reliable in all
22 areas of the Delta downstream of the Sacramento River intakes and those areas along the
23 current routes of Sacramento River flow to the export pumps. The common pool for the
24 interior Delta will be eliminated along with the common interest in protecting the water
25 quality. The isolated conveyance has no outlets and requirements to protect water quality in
26 dry periods are always circumvented. For areas throughout the watershed, including those
27 along the tributaries upstream of the Delta, curtailment of local water use, and water transfers
28 to increase utilization of the highly expensive tunnels combined with the need for fish flows
and high water consumption habitat to mitigate for the construction and operation of the
tunnels will greatly add to unreliability.

29 The Water Fix ignores the need to reduce reliance on exports of water from the Delta.
30 The hydrology of the Delta watershed is inadequate to support even the past level of exports.
31 Development within the watersheds of origin and the need to recapture water from SWP and
32 CVP exports will increase. There is evidence that more water will be needed to mitigate for
33 the SWP and CVP damage to fish including meeting the CVPIA anadromous fish restoration
34 requirements of 2 times the average natural production for the years 1967 through 1991.
35 Climate change is also expected to adversely affect water supply. The increasing threat of
36 terrorism, the continuing threat of natural calamities, including earthquakes and the growing
37 need for electricity all gravitate towards less reliance on exports from the Delta and instead
38 concentration on developing local self- sufficiency. The deficit due to the failure to develop
North Coast watersheds will not be overcome by efforts at self-sufficiency, however, increased

1 efforts in urban communities can increase the amount of water available for agriculture and the
2 environment.

3 The hydrology predating the construction of the CVP and SWP reflected that no surplus
4 water would be available for export from the Sacramento-San Joaquin Watershed during a
5 reoccurrence of the 1929-1934 drought.

6 Exhibit SDWA-170 is a copy of the hydrographs from page 116 of the Weber
7 Foundation Studies titled "An Approach To A California Public Works Plan" submitted to the
8 California Legislature on January 28, 1960. The highlights and margin notes are mine.

9 The 1928/29-1933/34 six year drought period reflected on Exhibit SDWA-170 shows
10 the average yearly runoff is 17.631 million acre feet with local requirements of 25.690 million
11 acre feet. There is a shortage during the drought period within the Delta Watershed of 8.049
12 million acre feet per year without any exports. It is questionable whether the groundwater
13 basins can be successfully mined to meet the shortage within the watershed let alone the export
14 demands. A comparable review of the hydrograph for the North Coast area reflects that
15 surplus water could have been developed without infringing on local requirements.

16 The limited hydrology was clearly recognized in the planning for the SWP which was
17 to develop projects on the rivers in the North Coast watersheds sufficient to import to the Delta
18 about 5,000,000 acre feet of water seasonally for transfer to areas of deficiency. (See Exhibit
19 SDWA-169 December 1960 Bulletin 76 page 13). Such areas of deficiency were expected to
20 be both north and south of the Delta pumps. The projects in the North Coast watersheds were
21 never constructed and the projects are woefully short of water.

22 The original planning for the SWP and CVP appears to have underestimated the needs
23 to protect fish both as to flow requirements and carryover storage required for temperature
24 control. Without such 5 million acre feet of water per year there is no truly surplus water for
25 export except in wet years.

26 In 2009 after only two (2) dry years, the SWP and CVP violated the February outflow
27 requirements claiming that meeting the outflow requirements would reduce storage below the
28 point necessary to meet cold water requirements for salmon later in the year. Although the
29 project operators lied and the real reason for the violation was the ongoing pumping of the
30 unregulated flow to help fill San Luis Reservoir, the incident clearly shows the inability of the
31 projects to provide surplus water for export in the 3rd, 4th, 5th and 6th years of drought.

32 In May of 2013 the SWP and CVP again claimed a need to preserve cold water in
33 storage for fish. They requested and were allowed by the SWRCB to reduce outflow by
34 changing the year classification so as to exceed the western and interior Delta agricultural
35 water quality objectives to save such cold water in storage. They did not suggest and did not
36 reduce export pumping which would have had the same effect as reducing outflow.

37 In 2014 the 2nd or 3rd year of drought, the SWRCB issued curtailment notices to post
38 1914 water right holders in the areas of origin and reduced exports due to the lack of water.

1 The events surrounding the 2009 and 2013 Water Quality Standard Violations reveal
2 disturbing collaboration among the USBR, DWR, state and federal fish agencies and the
3 SWRCB to facilitate exports rather than meet legal obligations in the Bay Delta watershed.

4 In 2009 the Fishery Agency Representatives did not object to the planned violation of
5 the standards and even though the water needed to meet the standards was being exported the
6 SWRCB did not even admonish the state and federal agencies to seek relief in advance of
7 violation. Although the need for retention of water in storage to meet cold water requirements
8 for fish was the alleged motivation for the violation of the standards exports continued at a an
9 increasing rate including water that could have been held in storage for cold water
10 requirements. See Exhibit SDWA- 172.

11 In 2013 again the reason for the violation was to retain water in storage to meet cold
12 water requirements for fish. Following the violation the USBR and DWR requested that the
13 standards for protection of agriculture in the central and western Delta be relaxed by allowing
14 operation to critical year standards rather than dry year standards. The California Department
15 of Fish and Wildlife Service, the United States Fish and Wildlife Service, and NOAA's
16 National Marine Fishery Service supported the request. Although the SWRCB staff and all
17 such agencies conferred on the matter, there was no suggestion that exports be reduced in lieu
18 of water quality standards relaxation. Most disappointing was the SWRCB Executive
19 Directors agreement not to recommend taking any enforcement action for the future operation
20 to the relaxed standard thereby effectuating a change in standards without even a public
21 hearing. See Exhibit SDWA-171.

22 In both the 2009 and 2013 cases exports continued at a relatively high rate even though
23 the need for retention of water in storage for meeting cold water fish requirements was clearly
24 recognized. See Exhibit SDWA-172.

25 It is clear that the CVP and SWP have not operated the projects in a manner so as to
26 meet water quality standards during a reoccurrence of six years or even two years of drought.

27 Six year droughts can be expected and even longer droughts are possible. The historic
28 occurrence of multi-year droughts was reported in a DWR Report, California's Most
Significant Droughts: Comparing Historical and Recent Conditions (February 2015). Exhibit
SDWA-173 is Table 2.1 from such report.

The State Water Project Final Delivery Capability Report 2015 shows for Table A, a
long-term average (1921-2003) as 2,550,000 acre feet per year; a single dry year (1977) as
454,000 acre feet and a 6-year drought (1987-1992) as 1,182,000 acre feet per year. These
figures can be contrasted to the Maximum Possible SWP Table A Delivery of 4,132,000 acre
feet per year. See Exhibit SDWA-174 excerpts from SWP Final Delivery Capability Report
2015.

The failure of the SWP and CVP to carry out the plan for development of water
projects to yield sufficient surplus water including the 5 million acre feet from the North Coast

1 to meet the needs and obligations within the Delta and other areas of origin and the
2 expectations of the export contractors is at the root of the crisis in the Delta.

3 Under CEQA the Purpose and Need cannot be artificially narrowed to limit objective
4 consideration of reasonable alternatives. The lead agencies have done just that. They rely on
5 the proposition that “a reasonable definition of underlying purpose and need” could be used to
6 avoid the objective consideration and evaluation of alternatives that cannot achieve that basic
7 goal. Their definition of purpose and need is not reasonable or compliant with law.

8 The requirements for NEPA are different. The DEIS/EIR must meet the
9 requirements of 40 CFR section 1502.14 which provides:

10 “§1502.14 Alternatives including the proposed action.

11 This Section is the heart of the environmental impact statement. Based on
12 the information and analysis presented in the sections on the Affected
13 Environment (§1502.15) and the Environmental Consequences
14 (§1502.16), it should present the environmental impacts of the proposal
15 and the alternatives in comparative form, thus sharply defining the issues
16 and providing a clear basis for choice among options by the decision
17 maker and the public. In this section agencies shall:

- 18 (a) Rigorously explore and objectively evaluate all reasonable
19 alternatives, and for alternatives which were eliminated from
20 detailed study, briefly discuss the reasons for their having been
21 eliminated.
- 22 (b) Devote substantial treatment to each alternative considered in detail
23 including the proposed action so that reviewers may evaluate their
24 comparative merits.
- 25 (c) Include reasonable alternatives not within the jurisdiction of the lead
26 agency.
- 27 (d) Include the alternative of no action.
- 28 (e) Identify the agency’s preferred alternative or alternatives, if one or more
exists, in the draft statement and identify such alternative in the final
statement unless another law prohibits the expression of such a
preference.
- (f) Include appropriate mitigation measures not already included in the
proposed action or alternatives.” (Emphasis added.)

29 An alternative which requires that the SWP and CVP be operated in accordance with
30 current law is a reasonable alternative which must be rigorously and objectively evaluated.
31 The Water Fix clearly ignores the law establishing the priorities for meeting needs within the
32 Delta and other areas of origin including the needs of fish and wildlife. The current change
33 proceeding precludes the rigorous and objective consideration of alternatives.

34 //

1 The purpose statement has changed a number of times in apparent response to the
2 demands of applicant export water contractors. These contractors, who as permittees, are
3 required to fund the objective and impartial review of the environmental impacts by the public
4 regulatory agencies should not have been allowed to leverage changes in purpose so as to
5 constrain the analysis towards their favored alternative.

6 Of particular note is the addition and continued inclusion of the following:

7 “Restore and protect the ability of the SWP and CVP to deliver up to full contract
8 amounts, when hydrologic conditions result in the availability of sufficient water,
9 consistent with the requirements of State and federal law and the terms and conditions
10 of water delivery contracts and other existing applicable agreements.” (Emphasis
11 added.)

12 The ability of the SWP and CVP to deliver “full contract amounts” never existed and
13 thus could not be restored or protected. The words “up to” conceivably should cover a range
14 from zero deliveries to a high of what can be supported with full compliance with State and
15 federal law and hydrologic conditions.

16 Although obviously not intended by those controlling the preparation of the EIS/EIR, a
17 range of reasonable alternatives must be considered including substantially reduced and at
18 times no exports from the Delta. The upper range is of course limited by law and hydrology.

19 Export of water from the Delta is counter-productive to improving the ecosystem and
20 the Water Fix has failed to present the environmental impacts and alternatives in a manner
21 providing a clear basis for choice among options by the decision maker and the public as
22 required by 40 CFR section 1502.14. The proposition that removal of natural flows into and
23 through the Bay-Delta Estuary will improve the ecosystem is unique, bold and unsupportable.

24 Reliability of water supply for exports from the Delta must be junior to the needs and
25 obligations requiring water in the Delta and other areas of origin including fish and wildlife
26 needs. The modeling and analysis should provide a clear confirmation of the types and
27 numbers of years when no water will be available for export and provide estimates of the
28 amounts that might be available in other years. Care should be taken to model carryover
storage requirements with due consideration of meeting temperature, flow and statutory
requirements to determine the firm yield available for export.

Reliability of water supply for Northern California requires that water to meet the needs
of and obligations to restore and even enhance fish not be exported.

Both State and Federal laws seek to prevent degradation of water quality. Isolated
conveyance will remove the higher quality Sacramento River water from the Delta pool
thereby reducing the dilution of the poorer quality water returning to the Delta by way of the
San Joaquin River from SWP and CVP operations which deliver water to the west side of the
San Joaquin Valley. The delivery of such water to the San Luis Unit was prohibited by the San
Luis Act of 1960 unless there was a Valley Drain with an outlet to the ocean. (See Exhibit

1 SDWA-175). The prohibition was circumvented. Even the promise that “A much needed
2 drainage system and water supply will be provided in the San Joaquin Valley” included in
3 ballot argument in favor of the California Water Resources Development Act (SWP) was not
4 kept. (See Exhibit SDWA-168). The Purposes and this proceeding unreasonably seek to
5 maintain and increase exports from the Delta to the west side of the San Joaquin Valley which
6 degrade Delta water quality. The commitment to isolated conveyance aggravates such
7 degradation.

8 The provision of salinity control and an adequate supply for the Delta was deemed to be
9 of utmost importance and is a critical feature of a reliable supply for the Delta.

10 Salinity control for the Sacramento-San Joaquin Delta is a primary purpose for Shasta
11 Dam.

12 Water Code Section 11207 provides:

13 “§11207. Primary purposes

14 Shasta Dam shall be constructed and used primarily for the following purposes:

- 15 (a) Improvement of navigation on the Sacramento River to Red Bluff.
- 16 (b) Increasing flood protection in the Sacramento River.
- 17 (c) Salinity control in the Sacramento-San Joaquin Delta.
- 18 (d) Storage and stabilization of the water supply of the Sacramento River for
19 irrigation and domestic use. (Added by Stats. 1943, c 370, p. 1896) (Emphasis
20 added.)

21 The Delta Protection Act of 1959 in WC 12200 specifically provides: “It is, therefore,
22 hereby declared that a general law cannot be made applicable to said Delta and that the
23 enactment of this law is necessary for the protection, conservation, development, control and
24 use of the waters in the Delta for the public good.”

25 The degradation of water quality in the Delta adversely impacts agricultural, industrial,
26 urban and recreational (including fish and wildlife) uses in the Delta and surrounding areas as
27 well as areas served with exports from the Delta.

28 Except as provided by agreement, salinity control and the adequacy of the quality of the
water supply for the Delta is determined by water quality objectives set by the SWRCB. Such
objectives provide the minimum level deemed necessary to protect beneficial uses. Although
the objectives are set for certain uses for certain periods, it is the composite of all objectives
which the SWRCB determined would provide the protection for all beneficial uses. Such
objectives have at times been violated and it is critical to the rigorous and objective analysis of
alternatives to incorporate with and without compliance conditions.

Federal law is specific as to the obligations for the CVP.

1 PL99-546 (HR3113) specifically provides:

2 “(b)(1) Unless the Secretary of the Interior determines that
3 operation of the Central Valley project in conformity with State
4 water quality standards for the San Francisco Bay/Sacramento-San
5 Joaquin Delta and Estuary is not consistent with the congressional
6 directives applicable to the project, the Secretary is authorized and
7 directed to operate the project, in conjunction with the State of
8 California water project, in conformity with such standards.
9 Should the Secretary of the Interior so determine, then the
10 Secretary shall promptly request the Attorney General to bring an
11 action in the court of proper jurisdiction for the purposes of
12 determining the applicability of such standards to the project.

13 (2) The Secretary is further directed to operate the Central Valley
14 project, in conjunction with the State water project, so that water
15 supplied at the intake of the Contra Costa Canal is of a quality
16 equal to the water quality standards contained in the Water Right
17 Decision 1485 of the State of California Water Resources Control
18 Board, dated August 16, 1978, except under drought emergency
19 water conditions pursuant to a declaration by the Governor of
20 California. Nothing in the previous sentence shall authorize or
21 require the relocation of the Contra Costa Canal intake.” (See
22 Exhibit SDWA-176.)

23 Section (b)(1) does not allow for the Bureau of Reclamation to operate the CVP
24 without conforming to the State water quality standards for the San Francisco Bay/Sacramento-
25 San Joaquin Delta and Estuary even if the SWRCB is willing to look the other way. A
26 determination by a court of law is required. (See Exhibit 19.)

27 There are specific processes and procedures for changes to Water Quality Control Plans
28 including review by the United States EPA, which are not being considered.

Section (b)(1) is thus applicable and requires USBR and USF&WS compliance unless
the Secretary of Interior makes a determination that compliance is inconsistent with
congressional directives applicable to the project and then the Attorney General is to be
requested to bring a legal action for a court determination of the applicability of the standards.
There is no such court determination that would allow the CVP to operate without conforming
to the standards.

Section (b)(2) provides an additional constraint with regard to the water quality at the
intake to the Contra Costa Canal. Even if the standards were determined by the court to not be
applicable to the CVP, then the D-1485 water quality standards would be applicable to the
intake of the Contra Costa Canal except under drought emergency water conditions pursuant to
a declaration by the Governor of California.

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1 In 2004 Congress passed another law to ensure that Delta water quality standards and
2 objectives would be met.

3 PL 108-361 (HR 2828) in pertinent part provides:

4 (D) "Program to Meet Standards. -

5 (I) In General. - Prior to increasing export limits from the Delta for the purposes of
6 conveying water to south-of-Delta Central Valley Project contractors or
7 increasing deliveries through an intertie, the Secretary shall, not later than 1
8 year after the date of enactment of this Act, in consultation with the Governor,
9 develop and initiate implementation of a project to meet all existing water
10 quality standards and objectives for which the Central Valley Project has
11 responsibility." (See Exhibit SDWA-177.)

12 Increasing exports from the Delta which to the extent such are for serving south-of-
13 Delta Central Valley Project contractors would be directly contrary to the direction of Congress
14 which was to assure that all existing (October 25, 2004) water quality standards and objectives
15 would first be met.

16 The WaterFix RDEIR/SDEIS Exhibit SWRCB-3 at ES.1.2.2.2 states: "It is not intended
17 to imply that increased quantities of water will be delivered under the proposed project." At
18 best this statement is misleading and at worst is a lie. Figure 4.3.1-16 (Also Exhibit SDWA-
19 184) shows Alternative 4 H3 (ELT) as increasing average annual wet year exports by 624,000
20 acre feet over existing conditions and by 898,000 acre feet over the No Action Alternative.

21 At page 4.3.1-5 it is stated: "Under Alternative 4A, average annual CVP south of Delta
22 agricultural deliveries as compared to No Action Alternative would increase by up to 12% at
23 ELT and by up to 13% at LLT."

24 At page 4.3.1-7 it is stated: as to the CVP "Therefore, average annual CVP south of
25 Delta M&I deliveries would increase or remain similar under Alternative 4A as compared to
26 the conditions without the project." as to the SWP "Therefore, average annual total SWP
27 deliveries and average annual total SWP south of Delta deliveries under Alternative 4A would
28 show a decrease or an increase as compared to conditions without the project depending upon
the range of spring outflow requirements."

At page 4.3.1-9 under CEQA Conclusion it is stated: "Alternative 4A would increase
water transfer demand compared to existing conditions. Alternative 4A would increase
conveyance capacity, enabling additional cross-Delta water transfers that could lead to
increases in Delta exports when compared to existing conditions."

Contrary to Water Code Section 85021 the project will increase rather than decrease
export reliance on the Delta. Thereby harming legal users of water.

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1 **THE BDCP/WATER FIX HAS UNREASONABLY DEFINED PURPOSES AND**
2 **NEED TO CONSTRAIN DELTA ECOSYSTEM IMPROVEMENTS TO**
3 **ALTERNATIVES WHICH CONVERT AGRICULTURAL LAND TO HABITAT**
4 **RATHER THAN REDUCE SWP AND CVP EXPORT OF WATER NEEDED TO**
5 **PROVIDE ADEQUATE WATER FLOW AND QUALITY**

6 There is strong evidence indicating that fish need water flowing into and out of
7 the Delta to the Bay. The timing and amounts are the subject of ongoing debate and
8 evaluation.

9 The SWP and CVP affect flow into and out of the Delta primarily through
10 diversions to storage and direct diversions from the tributaries and from locations in the
11 Delta to areas outside the Delta. The reliability of water supply for fish at times
12 directly conflicts with the reliability of the water supply for SWP and CVP deliveries
13 for other purposes and in particular exports from the Delta. The priorities for providing
14 such reliability are established by law.

15 Water Code Section 85086 of the Delta Reform Act of 2009 assigned to the
16 SWRCB the task of determining instream flow needs and new flow criteria for the
17 Delta ecosystem necessary to protect public trust resources. Such determinations have
18 not yet been completed, yet the RDEIR/SDEIS has been prepared and steps towards
19 design and construction are underway. Such flow criteria are important to the required
20 rigorous exploration and objective evaluation of all reasonable alternatives required by
21 40 CFR 1502.14. The rush to decision in advance of critical evaluations is further
22 evidence of predetermination and lack of a good faith effort at full disclosure and
23 analysis of impacts.

24 Driving the need for ecosystem restoration is the need to address the dramatic
25 decline in fish species and in particular those in danger of extinction. The
26 RDEIR/SDEIS continues the proposition that habitat in the Delta and factors other than
27 the amount flow into and through the Delta are the cause of the subject fish declines.
28 The impacts of the SWP and CVP diversions to storage and diversions for export of
water that is not truly surplus are discounted. The projects divert to storage and divert
from the Delta the winter and spring natural flows that would otherwise flush the Delta
and push back salinity from the bay. Export pumping reverses flows and entrains fish.
Export of water released from storage depletes the amounts needed to meet senior
requirements including fish and wildlife requirements.

The export of water from the proposed intakes on the Sacramento River where
there are far greater numbers of fish will likely increase losses of fish, eggs and larvae
due to entrainment and the impacts of screening. Unlike passage through the channels
of the Delta passage through the tunnels does not allow for escape. Predators will surely
occupy the proposed Sacramento River intakes forebays and tunnels. The related
impacts to fish and wildlife have not been adequately examined.

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1 The correlation between SWP and CVP exports and the decline of the fisheries
2 has been a concern for many years. In August of 1978 the State Water Resources
3 Control Board rendered its Water Right Decision 1485. The Decision was the
4 culmination of 32 days of evidentiary hearing initiated on November 15, 1976 and
5 concluded on October 7, 1977. At that time the striped bass index was considered to be
6 the indicator of ecosystem health for the Delta and Suisun Marsh. Striped bass were in
7 effect the "canary in the coal mine". As the years passed and striped bass populations
8 plummeted, the water exporters claimed striped bass to be invasive species, predators
9 on endangered species and major cause of fish declines wrongfully attributed to the
10 export of water. The canary died and the death was ignored to facilitate greater
11 exports. As Exhibits SDWA-178 show, striped bass, steelhead, Delta smelt, fall-run
12 Chinook salmon and winter-run Chinook salmon all co-existed at relatively high
13 populations at lower export levels.

14 In 1978 the SWRCB concluded in D-1485 at page 13 that:

15 "To provide full mitigation of project impacts on all
16 fishery species now would require the virtual shutting
17 down of the project export pumps." (See Exhibit
18 SWRCB-23.)

19 The SWRCB also concluded in D-1485 at page 14 that:

20 "Full protection of Suisun Marsh now could be
21 accomplished only by requiring up to 2 million acre feet
22 of fresh water outflow in dry and critical years in addition
23 to that required to meet other standards." (See Exhibit
24 SWRCB-23.)

25 Exports from the Delta were not curtailed and the additional 2 million acre feet
26 of outflow was not provided for the marsh.

27 Exhibits SDWA-178 show that significant declines in fish populations
28 commenced when annual exports reached 2 million acre feet. Increased development
in the watersheds and the effects of climate change would indicate that additional water
yield would have to be developed within the Delta watershed to provide a comparable
level of fish protection for the future and maintain the 2 million acre feet of exports.
Little or no export water in dry years and more in wet years would likely be necessary
in any event.

An examination of the fish population graphs indicates that restoration of the
ecosystem for fish is not correlated with Delta wetland habitat conditions in the 1850's
or at all. The likely relationship is to water conditions, particularly flow.

The Delta was fully leveed and reclaimed by about 1930.

1 "By 1930 all but minor areas of the swampland had been leveed and were in
2 production." (See page 8 of December 1960 Bulletin 76 - Exhibit SDWA-169.) The
3 USACE completed project levee construction on the San Joaquin River in the early
4 1960's. There are no significant changes in leveed areas or even riverine habitat which
5 appear to be the cause of the decline of the fisheries. In fact, there have been increases
6 in Delta wetland habitat during the periods of apparent decline. Mildred Island flooded
7 in 1983 and has not been reclaimed. Little Mandeville and Little Frank's Tract flooded
8 in the 1980's and have not been reclaimed. Lower Liberty Island levees were not
9 restored and the area has been in a tidal wetland condition since at least 2002.

7 The focus on conversion of Delta land to habitat as a substitute for water for fish
8 is misplaced and the result of the manipulated BDCP purposes. Adequate analysis has
9 not been done to determine if development of shallow wetland habitat is actually
10 detrimental to salmon and other anadromous fish. In particular, stranding and predation
11 from otters, egrets, herons, cormorants, gulls, white pelicans and the like needs further
12 analysis. The limited study (Exhibit SDWA-179) showing a picture of larger salmon
13 smolts raised for a time in a wetland versus smaller smolts raised in the channel is cited
14 by BDCP proponents as the evidence that shallow seasonal wetland in the Delta would
15 be a substitute for flow and justification for a 50 year take permit. The study monitored
16 caged smolts in the channel where the fish must constantly swim against the current
17 and compared those smolts to smolts in cages in shallow wetlands where there was
18 little or no current. The experiment did not attempt to evaluate stranding or predation
19 and it is doubtful that the smolts in the channel cages if uncaged would spend as much
20 time swimming against the stronger currents rather than seeking areas of the channel
21 where the velocity is lower. The presentation of results by BDCP including the fat
22 fish/skinny fish photo neglected to show the sizes of the fish from the cages in the
23 channel upstream of the shallow habitat which reportedly were comparable to those in
24 the wetlands. "During periods of low, clear water, fish growth rates in the river site
25 above the floodplain were comparable to those in the floodplain". (Exhibit SDWA-
26 179, pg. 1.)

20 Creation of Floodplain Habitat Is Not a Substitute for Flow

21 The available evidence and studies do not support such a substitution. The
22 floodplain habitat which is suggested as potentially beneficial is that which is inundated
23 by high flows for a limited period; involves a large area of water of a proper depth to
24 help avoid predation; assumes avian predator populations are limited; is properly
25 drained to avoid stranding and avoids increased water temperatures detrimental to
26 salmonids.

25 The Jeff Opperman Final Report for Fellowship R/SF-4 referenced above
26 containing the picture of the fat fish and skinny fish is often shown as support for the
27 proposition that floodplain habitat can be substituted for flow (Exhibit SDWA-179.)
28 The study does not put forth that conclusion but suggests "that juvenile Chinook benefit
from access to floodplain habitats". (Page 2) It is important to recognize that the test
fish were caged and thus predation from birds, fish and other animals was not an issue.

1 Stranding was down-played but admittedly not tested. The test was conducted in and
2 along the Cosumnes River. The skinny fish were in the river swimming against the
3 current and because they were in cages and couldn't move with the current or move to
4 quiet and more productive water. The fat fish obviously saved their energy for growth
5 and apparently benefitted from improved food availability. The report states "During
6 high flows the river offers poor habitat and fish living in this type of habitat will tend to
7 be displaced downstream." High flows and displacement downstream are likely not
8 detrimental. It is generally accepted that the salmon do well in high flow years. The
9 return of adults (escapement) is usually higher two and one-half years after a high flow
10 year. It is recognized that ocean conditions also play a part and may in some cases
11 reduce escapement nullifying the benefit of high flow. The difference in food
12 availability in the high flow channel versus in the quiet water may not be significant in
13 the test given the consumption of energy and lack of opportunity for the skinny fish to
14 move to more favorable parts of the river. Displacement downstream into the cooler
15 and more productive parts of the estuary is likely not bad for displaced salmon smolts.

16 Floodplain Habitat Not Accompanied by High Flow Does Not Appear to Result
17 in Increased Chinook Salmon Ocean Survival and May Not Improve Survival of
18 Sacramento River Juvenile Chinook Salmon Migrating to the Ocean

19 In the study titled "Floodplain Rearing of Juvenile Chinook Salmon: Evidence
20 of enhanced growth and survival" by Sommer, et al. (2001), a copy of which is Exhibit
21 SDWA-180, tests were conducted in the Yolo Bypass in 1998 and 1999. The study
22 concluded that during such years salmon increased in size substantially faster in the
23 seasonally inundated agricultural floodplain than in the river, suggesting better growth
24 rates. The study, however, provides: "Survival indices for coded-wire-tagged groups
25 were somewhat higher for those released in the floodplain than for those released in the
26 river, but the differences were not statistically significant. Growth, survival, feeding
27 success, and prey availability were higher in 1998 than in 1999, a year in which flow
28 was more moderate indicating that hydrology affects the quality of floodplain rearing
habitat". (Exhibit SDWA-180, pg. 1.)

In the discussion the authors provide:

"Mean length increased faster in the Yolo Bypass during each study year, and CWT fish released in the Yolo Bypass were larger and had higher apparent growth rates than those released in the Sacramento River. It is possible that these observations are due to higher mortality rates of smaller individuals in the Yolo Bypass or of larger individuals in the Sacramento River; however we have no data or reasonable mechanism to support this argument."

"Elevated Yolo Bypass survival rates are also consistent with significantly faster migration rates in 1998, the likely result of

1 which would be reduced exposure time to mortality risks in the
2 delta, including predation and water diversions.”

3 In the study “Habitat Use and Stranding Risk of Juvenile Chinook Salmon on a
4 Seasonal Floodplain” by Sommer, et al. (2004), a copy of which is Exhibit SDWA-181, the
5 authors build upon the above study with further testing in 2000 and present their analysis of
6 ocean survival.

7 The author’s abstract provides:

8 “Although juvenile Chinook salmon *Oncorhynchus tshawytscha*
9 are known to use a variety of habitats, their use of seasonal
10 floodplains, a highly variable and potentially risky habitat, has
11 not been studied extensively. Particularly unclear is whether a
12 seasonal floodplain is a net “source” or net “sink” for salmonid
13 production. . . Adult ocean recoveries of tagged hatchery fish
14 indicate that seasonal floodplains support survival at least
15 comparable with that of adjacent perennial river channels. These
16 results indicate that floodplains appear to be a viable rearing
17 habitat for Chinook salmon, making floodplain restoration an
18 important tool for enhancing salmon production. (Emphasis
19 added.)

20 The data provided for ocean survival is as follows:

21 Table 1. – Number of coded wire tags recovered in the ocean and
22 commercial fisheries for Chinook salmon released in the Yolo
23 Bypass and Sacramento River. The total number of tagged fish
24 released in each location for each year is shown in parentheses.
25 The survival ration is calculated as the number of Yolo Bypass
26 recoveries divided by the number of Sacramento River
27 recoveries.

Release Group	1998 (53,000)	1999 (105,000)	2000 (55,000)
Yolo Bypass	75	136	27
Sacramento River	35	138	47
Survival Ration	2.14	0.99	0.57

28 In 1998 Yolo Bypass looked like a benefit, in 1999 it was a push and in 2000
29 Yolo Bypass looked like a detriment.

30 It is assumed that shaded river aquatic habitat is desirable for special status fish.
31 Attention is called to the BDCP Draft Chapter 8 which puts forth the need to control
32 predators by removing structures which affect flow fields and provide shade. The focus
33 appears to be on abandoned docks, pilings and the like, however, shaded river aquatic

1 habitat can provide the same effect on flow and provide shade. The impact of shaded
2 river aquatic habitat on special status fish is unclear.

3 There are a number of significant adverse impacts associated with so-called
4 restoration of tidal floodplain habitat within the Delta which have not been objectively
5 considered or mitigated.

6 In the Delta where the waters are tidal the proposed habitat restoration is not
7 necessarily floodplain but rather is tidal wetlands which is inundated most if not all the
8 time.

9 Increased salinity intrusion could result from the increased tidal prism and/or
10 creation of shortened pathways to the interior Delta and particularly to the large DWP
11 and CVP intakes whether in the north Delta or south Delta.

12 Setting back, breaching, degrading and/or not restoring levees in the Delta has
13 significant adverse impacts.

14 Increases in the tidal prism at locations similar to and including the area in and
15 around the lower Yolo bypass not only induces greater salinity intrusion, but also
16 results in advection adversely affecting the out migration of salmon smolts some of
17 which are endangered.

18 The regularly or permanently inundated areas constitute increased habitat for
19 predator species and increase ambush locations affecting the fish species of concern.
20 The increase in water surface and wetland vegetation will greatly increase the
21 evaporation and evapotranspiration of fresh water. In many cases there is an increased
22 threat of flooding to surrounding areas due to increased fetch and wave action across
23 the habitat area and increased seepage into adjoining levees and lands.

24 There is also the harm to and loss of agricultural land and production.

25 Exhibit SDWA-182 contains excerpts from the April 2011 report by Dave
26 Vogel titled "Insights into the Problems, Progress, and Potential Solutions for
27 Sacramento River Basin Anadromous Fish Restoration" prepared for the Northern
28 California Water Association and Sacramento Valley Water Users contains the results
of studies which include the Liberty Island Ecological Reserve area. (The entire study
can be viewed on the Northern California Water Association website by clicking on
"Fisheries")

At pages 112 and 113 the report provides:

Subsequent, additional juvenile salmon telemetry studies were
conducted by Natural Resource Scientists Inc. on behalf of the USFWS
and CALFED in the north Delta (Vogel 2001, Vogel 2004). Triangulating
radio-tagged fish locations in real time (Figure 61) clearly demonstrated
how juvenile salmon move long distances with the tides and were

1 adverted into regions with very large tidal prisms, such as upstream into
2 Cache Slough and into the flooded Prospect and Liberty Islands (Figure
3 62). During the studies, it was determined that some radio-tagged salmon
4 were eaten by predatory fish in northern Cache Slough, near the levee
5 breaches into flooded islands (discussed below).

6 At page 120 the report provides:

7 During recent years, there has been an emphasis to reclaim or
8 create shallow, tidal wetlands to assist in re-creating the form and
9 function of ecosystem processes in the Delta with the intent of benefitting
10 native fish species (Simenstad et al. 1999). Among a variety of measures
11 to create such wetlands, Delta island levees either have been breached
12 purposefully or have remained unrepaired so the islands became flooded.
13 A recent example is the flooding of Prospect Island which was
14 implemented under the auspices of creating shallow water habitat to
15 benefit native fish species such as anadromous fish (Christophel *et al.*
16 1999). Initial fish sampling of the habitat created in Prospect Island
17 suggested the expected benefits may not have been realized due to an
18 apparent dominance of non-native fish (Christophel *et al.* 1999).
19 Importantly, a marked reduction of sediment load to the Delta in the past
20 century (Shvidchenko *et al.* 2004) has implications in the long-term
21 viability of natural conversion of deep water habitats on flooded Delta
22 islands into shallow, tidal wetlands. The very low rates of sediment
23 accretion on flooded Delta islands indicate it would take many years to
24 convert the present-day habitats to intertidal elevations which has
25 potentially serious implications for fish restoration (Nobriga and
26 Chotkowski (2000) due to likely favorable conditions for non-salmonid
27 fish species that can prey on juvenile salmon. Studies of the shallow water
28 habitats at flooded Delta islands showed that striped bass and largemouth
bass represented 88 percent of the individuals among 20 fish species
sampled (Nobriga *et al.* 2003).

21 There have likely been significant adverse, unintended
22 consequences of breaching levees in the Delta. There is a high probability
23 that site-specific conditions at the breaches have resulted in hazards for
24 juvenile anadromous fish through the creation of favorable predator
25 habitats. The breaches have changed the tidal prisms in the Delta and can
26 change the degree in which juvenile fish are advected back and forth with
27 the tides. (Figure 61; previously discussed). Additionally, many of the
28 breaches were narrow which have created deep scour holes favoring
predatory fish. Sport anglers are often seen fishing at these sites during
flood or ebb tides. Breaching the levees at Liberty Island is an example
(Figure 72 and 73). Recent acoustic-tagging of striped bass in this vicinity
confirmed a high presence of striped bass (Figure 74, D. Vogel, unpub.
data.)

1 The increased loss of fresh water due to creation of tidal and wetland habitat is clear.
2 Exhibit SDWA-183 is Table A-5 from DWR Bulletin 168, October 1978 shows the annual Et
3 values for various crops and for Riparian Vegetation and Water Surface. The Riparian
4 Vegetation and Water Surface 67.5 inches can be compared to tomatoes 33.8 inches and alfalfa
5 46.0 inches. The increased fresh water loss is from 33.7 inches when compared tomatoes and
6 21.5 when compared to alfalfa. The increased loss of fresh water is particularly significant in
7 drier years.

8 The Division of Water Resources (predecessor to The Department of Water Resources)
9 in the Sacramento – San Joaquin Water Supervisor’s report for the year 1931 dated August
10 1932 and designated Bulletin 23 includes the results of studies of water consumption of tules
11 and cat-tails Exhibit DWR-22 includes Tables 69, 74, 75 and 77 from such report.
12 Consumptive use for open water surface is shown as 4.91 acre feet per acre, tules at 9.63 acre
13 feet per acre, and alfalfa at 3.51 acre feet per acre. To examine the relatively high consumptive
14 use for tules the U.S. Department of Agriculture undertook a continuation of the study of
15 consumptive use for asparagus, tules and cat-tails. The tables show an average of 14.63 acre
16 feet per acre for cat-tails and 13.48 acre feet per acre for tules. Results from cat-tails and tules
17 grown in tanks at Camp 3, King Island for 1931 are shown in Table 77. The results for normal
18 sized tules was 8.0 acre feet per acre.

19 **INJURY TO LEGAL USERS FROM THE PROPOSED CHANGES INCLUDE**
20 **INJURY TO MUNICIPAL, INDUSTRIAL, AND AGRICULTURAL USERS FROM**
21 **ALTERATION OF WATER FLOWS AND ALTERATION OF WATER QUALITY.**

22 Legal users of water are entitled to protection of the priority of their traditional water
23 rights, contract rights and statutory protections and failure to provide such protection
24 constitutes injury. Additionally, such users are injured when the mitigation and affirmative
25 obligations of the CVP and SWP are not met by the projects and/or the burdens are shifted onto
26 them.

27 The CVP and SWP must provide salinity control for the Delta and assure an adequate
28 Delta supply including maintenance of the Delta common pool, provision of overland facilities
and maximize use of the stored water released for export to provide incidental benefit. Most
important is the prohibition of project exports from the Delta of water necessary to provide
water to which Delta users are ‘entitled’ and water which is needed for salinity control and an
adequate supply for Delta users. Such burdens are not to be shifted to others.

The CVP has the burden of meeting the anadromous fish doubling and other
requirements of the CVPIA which can be considered to be mitigation and/or enhancement.
The SWP has the burden of preserving fish and wildlife which should be directed at
populations existing at the 1960 inception of the project. Such burdens should be met by the
projects and not be shifted to others. Additionally, the SWP and CVP must mitigate the
damages caused by their respective projects including and without limitation the inducement of
upstream water use, diversion of the San Joaquin River at Friant, water delivery to the San Luis
Unit without a drainage outlet to the ocean, construction of flood control projects, ship
channels and the like, depletion of surface flow and groundwater through water transfers and

1 water right settlement mechanisms, destruction of and isolation of fish spawning habitat,
2 creation of habitat which induces salinity intrusion and increases the concentrations of methyl
3 mercury, microcystis and other harmful elements, damage to fish from operation of large
4 pumping and other diversion facilities. Such burdens should be met by the projects and not be
5 shifted to others.

6 The resulting degradation in quality from the proposed changes and related mitigation
7 injures legal users in the Delta by increasing salinity in the water supply thereby limiting reuse,
8 increasing treatment costs and adding salinity to the soil thereby inhibiting plant growth. The
9 increase in methyl mercury, microcystis, boron and other harmful constituents creates a danger
10 to human and animal health both in the channels, on the farm and in the urban areas, and
11 contaminates the land and potentially the safety of crops for human consumption.

12 **The Adverse Impacts To Legal Users Cannot Be Adequately Evaluated At This**
13 **Time Due To The Lack Of Description And Analysis Of The Project and Its Operations**

14 Figures 4.3.1-15, 16 and 17 Exhibit SWRCB-3 show for different year types the
15 portions of the north and south Delta exports passing through the channels of the Delta and
16 through the proposed new intakes and tunnels. Much of the justification for the changes is the
17 forecasted failure of Delta levees due to sea level rise and earthquakes. The project does not
18 include funds or plans for improvement of the Delta levees to avoid such failures or to
19 promptly restore the same to mitigate the consequences. There is no adequate analysis of the
20 impacts associated with the diversion of all water for export through the new intakes and
21 tunnels or the intended intentional flooding of Delta islands under the pretense of mitigation
22 for project related impacts.

23 Petitioners contend that the proposed changes would allow the projects to export water
24 in the event of levee failures due to earthquakes and/or sea level rise and avoid the necessity of
25 releasing reservoir water to flush saltwater from the Delta. The legal obligation of the projects
26 to provide salinity control even if it requires overland supply and even if on occasion it
27 requires water from reservoirs is not eliminated by reason of the desire to export water. The
28 export of water is junior to the obligation to provide salinity control. To construct and operate
facilities for the purpose of evading the legal obligation to protect legal users of water in the
Delta is obviously injurious to such users.

It is obvious that avoidance of the threat of earthquake damage to levees in the Delta
does not eliminate the earthquake threat to the hundreds of miles of canals, pipelines, pumping
plants and electrical facilities used to divert and transport water from the Delta to areas south
of the Delta. Exhibit SDWA-188 shows the active faults paralleling and in proximity to the
project facilities delivering water to the south. Exhibit SDWA-189 shows an example of the
California Aqueduct and the pumps and pipelines delivering water to the South Coastal region.
Exhibit SDWA-190 shows the earthquake faults beneath the pipelines from the Edmonston
Pumping Plant to the Tehachapi Afterbay Control Structure. Exhibit SDWA-191 is a drawing
of the 20-Island failure scenario circulated by DWR. Exhibit SDWA-192 contains Extracts of
USACE May 23, 2007 comments on the 20-Island failure analysis. A more careful analysis of

1 the threat of levee failure must be undertaken as a prerequisite to consideration of the proposed
2 changes including interim measures during construction if such is ultimately approved.

3 Petitioners contend a sea-level rise of as much as 5 1/2 feet can be expected within 90
4 years implying that such a rise is applicable to the Delta and is compelling their pursuit of this
5 project. Complete analysis has not been presented as to the likely extent of sea level rise
6 impacting the Delta and the relevance to the Petitioners duty to avoid injury to legal users.
7 Exhibit SDWA-193 is a copy showing the earth from Google Maps. The earth is not shown as
8 flat. From personal experience I have verified that the earth is not flat. Of equal importance is
9 the recognition that sea level rise varies with location and is impacted differently by the time
10 duration of surges and likely winds, ocean currents and changes in the earth surface. Exhibit
11 SDWA-194 shows the mean sea level trend for the Golden Gate, Alameda, Juneau Alaska and
12 Pietarsaari, Finland. Exhibit SDWA-195 contains plots from the NOAA website of sea level
13 rise and fall arrows reflecting degree for various parts of the earth. Delta agricultural levees
14 incorporate 18 inches of freeboard and many are being built with wider crowns to
15 accommodate greater freeboard in the future. A more careful analysis of sea level impact in
16 the Delta is merited. The July 26, 2016 CVFPP climate change briefing plot of actual sea level
17 rise, San Francisco includes a 33 year Gaussian average which appears to be flattening out.
18 See Exhibit SDWA-196.

19 It is also important to recognize that abandonment of Delta levees could result in a large
20 loss of infrastructure. Exhibit SDWA-197 shows the potential loss of Delta infrastructure
21 within the 100-year flood limits as \$56.3 billion in 2005 dollars and \$67.1 billion in 2050
22 dollars. Such impacts will adversely impact legal users and must be considered as possible
23 impacts of the proposed changes.

24 A comparison of Exhibit SDWA-185 and 186 shows that historic salinity intrusion into
25 the Delta occurred infrequently and late in the growing season, that after the commencement of
26 the CVP salinity control was provided and that after commencement of the SWP salinity peaks
27 were controlled but longer duration of salinity intrusion at lower levels was the result. Further
28 increases in salinity will increase the already troublesome concentrations of salinity
29 encountered by legal users.

30 This portion of my testimony is presented to verify some of the documents presented by
31 SDWA et.al. during cross-examination of the Petitioners' witnesses. As was argued by SDWA
32 et.al. and finally agreed to by the hearing officers, SDWA et.al. introduced certain documents
33 to show that Petitioners were not in compliance with various federal and state statutes and
34 other regulatory provisions which mandate how the Petitioners must operate the SWP and the
35 CVP. Until the Petitioners plan for and do operate in accordance with these requirements there
36 cannot be an accurate base case or no action alternative for their project. Without such
37 accurate base case or no action alternative, the modeling supporting the WaterFix is
38 meaningless as it does not indicate what the effects of the project would be.

39 SDWA 5 includes California Water Code sections 12200-12205 (page 336), commonly
40 referred to as the Sacramento-San Joaquin Delta Act or Delta Protection Act of 1959. The
41 language of the Act speaks for itself, but it is clear that the Act requires the SWP and CVP to

1 provide both water quality and supply for all in-Delta needs. It also mandates that upstream
2 reservoir releases be coordinated to the maximum extent possible to help meet the various
3 goals of the Act; water quality and supply.

4 //

5 SDWA 6 includes excerpts of Title 34 Public Law 102-576 (page 1 and 12) which is
6 the Central Valley Project Improvement Act. The complete Public Law is offered as SDWA-
7 200.

8 SDWA 7 includes excerpts from the Final Restoration Plan for the Anadromous Fish
9 Restoration Program (pages 35-38, 67-68, 81-84, 86-88, 92-101). SWRCB-99 is the complete
10 Plan.

11 SDWA 8 includes excerpts from the Public Law 108-361 (Section 103 Bay Delta
12 Program, Program to Meet Standards (i) through (vii)), the Water Supply, Reliability and
13 Environmental Improvement Act (federal CalFed Reauthorization) of 2004. The full Act is
14 included as SDWA-201

15 SDWA 9 includes excerpts from the USBR Program to Meet Standards (pages ES -
16 through ES-6), which was mandated in PPL 108-361 referenced above. The Complete
17 Program is SDWA-202

18 SDWA 10 (pages 149 - 156) and 21 (page 184 and 185) are excerpts from D-1641.
19 That water right order is SWRCB-21

20 SDWA 11 is the Response Plan for Water Level Concerns produced by DWR and
21 USBR as mandated by D-1641.

22 SDWA 13 includes excerpts of the Water Quality Response Plan (pages 1 and 6)
23 produced by DWR and USBR as mandated by D-1641. The complete Plan is SDWA-203 As
24 noted during cross examination, a provision of this Plan (on page 6) requires that transfers of
25 water through the CVP or SWP must conform to the requirements of Joint Point of Diversion
26 (as defined and authorized by D-1641) including this Plan.

27 SDWA 14 is the letter dated 7-1-2005 from the SWRCB to DWR and USBR approving
28 the Water Quality Response Plan referenced above with certain changes which add compliance
with a pending cease and desist order.

SDWA 15 includes excerpts from SWRCB WR Order 2006-0006 (pages 1, 28, 32, and
33), a Cease and Desist Order issued against DWR and USBR. The complete Order is SDWA-
204

SDWA 16 includes excerpts from SWRCB WR Order 2010-0002 (pages 1, 2, 19 - 26),
which amended WR 2006-0006. The complete Order is SDWA-205

1 SDWA 24 includes excerpts from Public Law 99-546 (page 10), the federal law
2 approving the Coordinated Operations Agreement between California and the US government.
3 This Act requires that the USBR operate in compliance with all regulatory mandates imposed
4 on it by the SWRCB unless certain findings are made and pursued.

4 SDWA 2 is a printout from the DWR California Data Exchange Center (CDEC)
5 showing the hydrologic classification indices for the Sacramento and San Joaquin Rivers. The
6 printout goes from 1901 to 2015. This exhibit is submitted to show how often a dry or critical
7 year follows a dry or critical year, which was the criteria for considering seeking a TUCP
8 under the terms of the January 2016 draft Biological Assessment.

8 SDWA 3 includes excerpts from the draft Biological Assessment for the California
9 WaterFix (pages 3-214 to 3-215), dated January 2016. The complete BA is SWRCB-104. The
10 excerpts describe the conditions under which DWR and USBR would seek a temporary
11 urgency change to their permits. Such a change would mean that they would not be operating
12 under their current terms and conditions and thus would be adversely affecting the beneficial
13 uses protected by those terms and conditions. This also indicates that the modeling done in
14 support of the Petition does not accurately reflect how the projects would in fact be operating
15 under these certain hydrologic conditions.

13 SDWA 12 are emails (dated November 2, 2016, July 5, 2016, July 6, 2016, July 12,
14 2016, July 13, 2016, and August 5, 2016) between DWR Delta personnel and John Herrick,
15 Esq., counsel and general manager of SDWA regarding water level problems in the south Delta
16 and the impacts therefrom. These emails indicate that even when the levels are in accordance
17 with the Water Level Response Plan they may not be sufficiently protective of local diversions.
18 In those emails Mr. Herrick asks that the minimum levels set forth in the Plan be re-evaluated,
19 as is provided in the Plans.

18 SDWA 18 are printouts from the DWR Operations and Maintenance website showing
19 measured and 30-day averaged EC at the four southern Delta water quality compliance
20 locations from January 1, 2014 to August 2, 2016. These data show that whereas the modeling
21 results of averages presented by the Petitioners' modeling panel never rise above the current
22 standards of 0.7/1.0 EC, in fact these standards were regularly violated over the term shown.

22 SDWA 27 is an email and attachments sent from DWR personnel to a service list of
23 interested recipients date July 15, 2016. The email describes an ongoing transfer of water and
24 the projected impacts to water quality and water levels. One of the attachments is a graph
25 showing projected EC at Old River near Middle River with and without the transfer. In both
26 cases, the projected water quality is below the 0.7 EC of the standard. These forecasts also
27 indicate that small changes in exports (the 350 cfs transfer) can affect southern Delta water
28 quality by as much as (approximately) 120 EC.

27 SDWA 35 is a printout of the actual and 30-day averages for EC at the four southern
28 Delta compliance locations. This actual data shows that at the same Old River near Middle
River location the daily EC's were significantly higher than the DWR forecasts in SDWA 27.

1 Whereas the forecasted EC was never above 0.7 EC, the actual EC reached 1120 EC indicating
2 that the modeling forecasts do not reflect actual conditions.

3 SDWA 28 are CDEC printouts (graphs) for EC at Old River near Tracy and the San
4 Joaquin River at Brandt Bridge from June 22, 2006 through August 8, 2016. These graphs
5 show that although the modeling results of average EC presented by Petitioners show no
6 exceedances above the 0.7/1.0 EC standard, the actual EC's over this time frame exceed the
standards regularly. This actual data covers much of the time during which D-1641 was in
effect whereas the Petitioners' modeling covers a time frame when D-1641 was not in effect.

7 SDWA 31 includes excerpts (page 30) from the Central Valley Regional Water Quality
8 Control Board's report entitled Salinity in the Central Valley, dated May 2006. The excerpts
9 show that the salts coming down the San Joaquin River each year amount to 742 thousands of
10 tons a year (mean from 2001 to 2004) with the annual salt load minimums, maximums and
11 mean for the period of 1985 to 2004 of 263,000, 2,557,000 and 922,000 tons respectively. The
complete Report is SDWA-206.

12 Dated: August 31, 2016



13
14 DANTE JOHN NOMELLINI, SR.