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The Monterey Amendments to State Water Project Contracts: A History

Policy statement: C-WIN works to overturn the Monterey Plus amendments to the State Water Project contracts. To return the state mandated "Urban Preference"; to require the contracts to reflect water that is really there; to stop the abusive pumping of water that is not surplus; and to return the Kern Water Bank to the public to firm up the urban preference for the 22 million urban water users south of the Delta in times of drought.

Drought from 1987 to 1992, and again in 1994, financial crisis among state water contractors, and the prospect of tighter regulation of Delta exports by the State Water Project (SWP) by the state and federal government provoked the project's most serious crisis. In 1994 four of the SWP contractors, including the Metropolitan Water District of Southern California (MWD) and the Kern County Water Agency which together control about 75 percent of State Water Project allocations, and representatives from Paramount Farming (a private company), met secretly in Monterey to attempt to resolve their water shortage dilemma. The result was the Monterey Amendments to the State Water Project water service contracts.

These contracts lay out the contractors' and state's obligations concerning delivery of water under both surplus and drought conditions. In each contract, there is a "Table A" schedule that details how much water the contractor is "entitled" to each year. It was originally intended to be a ceiling on the amount for which the California Department of Water Resources (DWR, which owns and operates the State Water Project) would be responsible.

But the drought conditions of 1987 to 1992 were so severe, and the reductions of deliveries to zero for SWP agricultural contractors meant they had to pay the "mortgage" costs of the project while receiving no water that year. The system was working; urban water users got the small amount of water available during the severest period of the drought; but the agricultural users were not happy.

It was an ultimate cost-squeeze: "Entitlements" in the SWP contracts meant little when drought prevented deliveries from occurring to contractors' constituents. (C-WIN believes "entitlement" is a misnomer, and that these amounts should merely be seen as "allocations" since the state cannot guarantee water deliveries each year.)

Most of the water delivered in 1991 by the State Water Project was delivered to MWD, whose customers are largely urban water districts south of the Tehachapi Mountains. The SWP contracts originally stipulated in Article 18(a), that a long-standing "urban preference" in state water law, giving domestic and industrial water rights holders (such as cities and counties holding water rights) priority in receiving

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water during droughts, prior to the claims of agricultural water users. The theory in state law is that water for people is a higher social priority than water for farming.

Finally, in the 1980s, DWR acquired agricultural lands once owned by Tenneco Corporation, a former oil company, in Kern County. These lands became known as the Kern Water Bank, and DWR sought to develop an underground reservoir to provide additional south-of-Delta storage capacity for the State Water Project for greater reliability of water supplies for southern California urban water customers and southern San Joaquin Valley agricultural customers.

Under the secret Monterey deal in 1994, the State agreed to eliminate drought protections for urban areas (throwing out Article 18(a), encourage “paper water” by throwing out Article 18(b) and to give away the Kern Water Bank to local interests. In addition, in part to appease the urban water interests that participated in this negotiation, DWR agreed to change rules that control how, when, and under what circumstances water can be moved through the SWP (Article 21 “Surplus” Water). These water management changes, promoted by the negotiating parties as mechanisms to enhance water management “flexibility,” have contributed to the decline of the Delta by encouraging increased pumping during certain times of the year when Delta fisheries and ecosystems are most vulnerable.

Four aspects of these amendments that changed the course of California water history:

Eliminating Article 18(a): The “Urban Preference”

Eliminating Article 18(a) removed the “Urban Preference,” the safeguard put in the contract in 1960 to make sure that in times of prolonged dry weather, which occur in over one-third of years in California, agricultural allocations would be cut first.

The original SWP contracts provided protections for California’s cities and industrial facilities by ensuring that these interests would receive priority for SWP water in times of drought. The proposed SWP Amendments eliminate these safeguards.

DWR admits that in dry years (like 2001), the proposed SWP Amendments would reduce water supplies for urban areas by more than 400,000 acre-feet (greater than 25 percent). In practice, this means that urban areas will have to go out onto the open market to purchase water from agricultural interests at inflated prices, potentially causing ratepayer increases .

Eliminating Article 18(b): The “paper water” safeguard

Article 18(b) was put in the original contracts to make sure that the total amount of water that was promised could actually be delivered on a “firm yield” basis. This clause in the contracts required the total amount of the Table A Entitlement allocations to conform to the “firm yield” of the SWP.

“Paper water” is water that exists in the contracts but cannot be reliably delivered because of hydrology, infrastructure, environmental constraints, or climate change. The original SWP contracts required DWR to reassess the actual capacity of the SWP to deliver water and to readjust contract allocations

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accordingly.

The original contracts also prohibited the use of intermittently available water (e.g., water available to the projects in particularly wet years) to support permanent economies, such as housing developments or permanent crops. The proposed SWP contract amendments would eliminate these important provisions. If DWR fails to reassess the delivery capacity of the SWP and allows permanent economies to become dependent upon unreliable water supplies, DWR is encouraging environmental destruction and putting our economy at risk.

The true “firm yield” of the SWP is not the current Table A Entitlement allocation total of 4.23 million acre-feet per year (MAFY) because the contracts were premised on full build-out of State Water Project facilities. This has not occurred. In the 1970's, Ronald Regan signed the Wild and Scenic Rivers Act taking all of the North-Coast rivers off the table. The result is that the SWP could never deliver as expected; in fact, the average amount of water actually delivered between 1990 and 2000 was 1.86 MAFY. (By 1990 all of the SWP contractors were requesting their full contract entitlements.) The difference between the 4.23 MAFY and the actual delivered average of 1.86 MAFY is “paper water” in the State Water Project; water that does not exist in reality. The Third District Court of Appeal in its 2000 decision invalidating the Department’s environmental report on the Monterey Agreement called this difference “a wish and a prayer.”

Developers in Southern California did not want the State Water Project to reduce its overall capacity from 4.23 MAFY to a

smaller amount because then they could not prove there was enough water for their developments. This is still one of the most dangerous problems with “paper water” in California today.

Article 18(b) was eliminated by the Monterey Amendments to the SWP contracts with virtually no environmental review of consequences.

Giving Away the Kern Water Bank

As part of the Monterey Agreement, DWR turned over a state asset, the Kern Water Bank (20,000 acres of prime alluvial fan land ideal for storing water underground), to the Kern County Water Agency in exchange for retiring 45,000 acre-feet of “paper water” (water that Kern would never receive). As a state asset, the Kern Water Bank could have been used by DWR to help firm up all of the contractors SWP Table A Allocations, especially in times of drought.

Instead, the day after DWR turned over the Kern Water Bank to the Kern County Water Agency, the Agency turned over somewhere between 58 to 68 percent of the Kern Water Bank to Paramount Farms, a private company owned by Stewart and Lynda Resnick as part of a newly constituted public-private partnership called the Kern Water Bank Authority (a joint powers authority that could include a private company as a controlling partner.) This privatization of the Kern Water Bank allowed the water bank owners to buy cheap so-called “surplus” water (Article 12 water, see below), store it underground in their “bank”, and then sell it to the highest bidder for large profits. The various subsidiaries of the Resnick empire have been doing this ever since taking over the water bank and have made many millions

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of dollars in profits off the tax payers of California.

Expanding Article 21 so-called "surplus" water

The original State Water Project contracts contained provisions that discouraged contractors from requesting large volumes of water during the winter and spring months; instead, they would usually request water when it was most needed, in the summer and fall. The proposed SWP Amendments encourage contractors to request the maximum amount of water, from a variety of sources, at all times of the year. This is a likely cause of over-pumping from the Delta in the winter and spring months, which has arguably contributed to the massive decline of the Delta smelt and other Bay-Delta fish populations.

The Monterey Amendments enable state water contractors—particularly those in the southern San Joaquin Valley and those under MWD's umbrella—to make much greater use of "surplus water" in the State Water Project—that is, when "surplus water" is available. C-WIN strongly believes there is no "surplus water" in the SWP system; if there was, it would have to be available only when all of the Table A Entitlements are met. Full Table A Entitlements have never been met since the completion of the SWP in the 1970's to the present.

During the 1990s, SWP deliveries were well below projected "entitlements" for SWP contractors, and very little "surplus water" was available. During the 2000s, more "surplus water" came available after the federal government and the state of California adopted the CalFED Record of Decision, which enabled greater export

pumping from the Delta during the months of December through May. This is not really "surplus water"; just a gimmick to allow more pumping.

State Water Project contract Article 21 provides for sale of "surplus water" available in the SWP system during periods of heavy flow and could be sold for just the cost of transporting it to the buyer. This is part of the shell game used to manipulate the price of the water for the [Kern Water Bank as journalist Mike Taugher demonstrated in his series on water sales in May 2009 for the *Contra Costa Times*](#).

Unfortunately, In this decade, heavy pumping from 2000 through 2007 of this Article 21 water helped cause the Delta's open water ecosystem decline (which was first identified in 2005), as well as closure of the commercial salmon fisheries in 2008 and 2009. This is the water that federal judge Oliver Wanger and the new biological opinions covering Delta smelt and the salmon fisheries restricted sharply.

With low precipitation and runoff since 2006, hydrologic restrictions have reduced Delta exports, but the dry conditions have also not helped recovery of either the open water ecological conditions or the salmon fisheries of the Delta.

Overturn the Monterey Amendments

C-WIN believes that the Monterey Amendments to the SWP contracts must be overturned. It is certainly in the best interest of the MWD to overturn the Monterey Amendments as this would give MWD a more reliable water supply; especially during droughts. This would mean reinstating the Kern Water Bank as a

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DWR asset that would be used in dry times to fulfill the Urban Preference. This would increase the real wet water that MWD could count on during droughts from their Table A Allocation.

Reinstating Article 18(b) would mean that the Department of Water Resources could reduce the overall “entitlements” of “Table A” in each of the project contracts to what water the Department can actually deliver thus removing the “paper water” from the system. This would ultimately lead to more reliable water service by the State Water Project to its contractors.

The Monterey Amendments must be overturned to stop the privatization of the State Water Project. This is the best way to ensure that the Kern Water Bank benefits all Californians. The Monterey Amendments must be overturned to stop the gaming of the system by manipulating Article 21 'Surplus' Water by people like Stewart Resnick.