

**Hearing in the Matter of California Department of Water Resources and United States
Bureau of Reclamation Request for a Change in Point of Diversion for California
WaterFix, Part II**

Testimony¹ of Don L. Hankins, Ph.D.

On Behalf of AquAlliance

I, Don Hankins, Miwko? traditional cultural practitioner and president of the California Indian Water Commission, do hereby declare:

Introduction

The Sacramento-San Joaquin Delta (Delta) is recognized as the largest estuary on the west coast of North America. The Delta falls within the *Miwko? Waali?* (Plains Miwok ancestral homelands). Since time immemorial we (Miwko?) have lived in association with our world centered upon *Wolwonja?* - ?Ujumpile? (Mt. Diablo and associated region). From this place our story begins; stretching to the horizon, the landscape is marked by story places serving to remind us of the events that transpired in the time before human creation, and ultimately providing the framework for our lawful understanding of this world and our rights and responsibilities therein. This region has undergone tremendous change in geologic time, and in the process has provided a means for maintaining resilient and sustainable ecosystems and livelihoods for countless generations who mindfully considered their obligations to generations unborn. In the spirit of these obligations it is understood that Miwko? bear a responsibility to ensure future generations receive a world left in as good, if not better condition than it has been received.

Since time immemorial Miwko? have asserted the ancestral responsibility to ensure the balance and stewardship of land and water is maintained. Within this context, water is a sacred element of life, and this view is shared by many other Indigenous people around the world; it is a life-giving force which all creation is connected to. Since colonization Miwko? have systematically been denied our ancestral rights, which were never surrendered by treaty (i.e., 18 unratified treaties) or other means for transitory resources (i.e., water, air, fish and wildlife). In the context of self-determination, our rights are to be upheld, we maintain pre-emptive rights above all others. Prior legal precedence demonstrates that our preeminent rights to surface and ground water (see *Winters v. United States* and *Agua Caliente v. Coachella Valley Water District & Desert Water Agency*). However, local, state, and federal projects past and present have failed to acknowledge this fact, and have failed to achieve implementation of actions to make the systems sustainable and resilient to social and environmental change as Miwko? tradition would have. Moreover, current planning vis a vis the Water Fix maintains the status quo of old ideas to ensure operations for a water delivery system that is inefficient and

¹ This testimony draws upon my personal work *Ecocultural Equality in the Miwko? Waali?* recently submitted for publication in the journal *San Francisco Estuary and Watershed Science*

unsustainable. Clearly, at this point in time the Delta is not resilient; the flora and fauna of the region are suffering, the landscape is threatened by poor land-use decisions, the water that is crucial to it all is being commodified by interests that lack the foresight to see beyond financial gains for themselves and the near future, and the foundation of Miwko? culture is compromised.

Currently, efforts are underway to complete a map-based ethnography and paleoecology for the Miwko? Waali?, which will guide future planning and dialog with others in regards to this landscape. I will draw upon those efforts to frame the context for ecocultural equality for the Miwko? Waali?. By looking at ecocultural equality, the discussion focus becomes more inclusive of multi- and inter-species relationships (Heise 2016, 199), which provides a framework for understanding the interrelated and interdependent nature people, species, and resources within the Indigenous landscape.

Ecocultural Context: Story, Law, and Landscape

Miwko? culture is derived from the ancestral landscape; the language and worldview are interconnected with the ecology of the lands and waters which flow through it. To understand the breadth and depth of Miwko? worldview, it is imperative to understand what defines the waali? through various facets of geographic knowledge. In its elemental form, Miwko? Waali? is centered on Wolwonja? - ?Ujumpile? and roughly bounded by the Pacific Ocean beyond the Farallon Islands to the west, Talawit (Sutter Buttes) to the north, the peaks surrounding Tahoe to the east, and Yosemite Valley to the southeast. Within this geographic context there are many sacred sites and traditional cultural properties that are known, but have not been recorded from the region. Our story and law is derived from this landscape, and has been conveyed traditionally through song. Story is the foundation of law, and water is central to the law. The law has been sung through the generations, and it is on the only law that enables us to live harmoniously within this landscape in regards to human-environmental interactions. It is important to note that this law predates European-based legal system and knowledge, and is the law of this land. For instance, it has guided Miwko? through past environmental change of rising seas along the tidal plains of the paleo Delta as it moved between the Farallons to points east. It has also guided us through other climatic variations. We are estuarine/river people, and recognize the dynamic and resilient nature of a functional landscape. The fabric of Miwko? traditional society is framed within the context of one's affiliation with their moiety (land or water) through lineage, and associated responsibilities of reciprocity thereto. Furthermore, it is through language that the perspective of place is acquired. Embedded within language are basic terms for water-related things and phenomena occurring within this region.

Through law one learns to be responsible and protect what is not only vital to humans, but every living thing (our relations). Within the understanding of place and stories of place is law. Specific laws addressed various issues including those pertaining to access to country, rights to material goods from that country, and exclusion zones (e.g., places where no fishing could occur for conservation purposes). Indigenous legal scholars Austin (2009) and Black (2011) summarize common threads of indigenous jurisprudence. Indigenous philosophy and pedagogy is steeped in knowledge of language, laws, ecology, philosophy, ceremony, story places of their

own and their neighbors. Indigenous law is rooted in the cosmology, which demonstrates the interrelated and interdependent nature of everything from the individual to the universe. It is understood that every natural element of the landscape serves a purpose, and there is order to that purpose. Furthermore, the interrelated and interdependent relationship exists across spatial, temporal, and environmental scales. Thus, the removal of attributes disrupts the balance at multiple scales. For traditional cultural practitioners, this understanding is fundamental to existence; yet ironic when posited with the actions of the dominant society. For instance, placing Clifton Court Forebay, Los Vaqueros Reservoir and other infrastructure within the heart of Miwko? story places is in conflict with the law those places represent. Specifically, these federal, state and local water projects have violated our preemptive rights and disrupted the integrity of several key sources of ground and surface water noted in one of our creation stories as water emerges from a series of springs associated, flows down a creek through vernal pools and into the Delta. This demonstrates the interconnected nature of water and ecosystems within the landscape. In light of water development in this area, Black (2011) offers a solution that for others to live in a foreign land (i.e., settlers to live on indigenous land) one must understand the culture and restricted knowledge of the story/laws, which is gained through respectful engagement with local indigenous people and proper initiation to place. She notes, that if one understands the relationships of all things within the land they will 'feel the law flowing through them.' California lacks treaties ceding the lands, waters, and resources to the local, state, and federal governments. It lacks a legitimate Native Title; established by its traditional Indigenous inhabitants for their own lands. From a Miwko? perspective, these lands, waters, and resources are all within Tribal jurisdiction.

A great diversity of species are known from the region, all of which share an integral piece to the functioning of the ecocultural system. Each species bears a link within the larger web of relationships. Miwko? have traditionally understood the interactions of species within this web (e.g., where they are found, and what their associations are, etc.). Today, that relationship is compromised by land- and water-use policies, which have changed many of these traditional relationships. Miwko? village and place names reflect upon this regional diversity, and more specifically note where some of these species are known from; either through knowledge of story places, or as an indication of localized abundance. Of 56 species addressed in the Bay Delta Conservation Plan/California Water Fix (California Natural Resources Agency 2015), at least 24 are noted as being culturally significant (see powerpoint slides). However, this list is not as comprehensive as should be given traditional knowledge. Miwko? would expand this list to include marine and upland species beyond the legal Delta. Some of these additional species would include gray whale, humpback whale, bald eagle, peregrine falcon, and other organisms, which are known from story and traditional knowledge to occur within this region. Traditional knowledge also recognizes the connection of these species to the region and impacts analysis for such species should be considered when evaluating environmental impacts. Miwko? recognize these species as part of a system that is interrelated and interdependent within a landscape inclusive of the surrounding mountains and the sea. Thus, the fate of the Delta smelt and Chinook salmon for instance is ultimately linked to upland species like the fisher and marine species like the orca. It is a matter of Trust responsibility by local, state, and federal

entities to Tribes to ensure impacts to these species are addressed, as impacts to them are likely to occur.

While the Delta smelt, Sacramento splittail, Chinook salmon, and green sturgeon are examples of species in peril because of poor water management, they are also culturally significant as food, featured within Miwkoꞑ traditional stories and law, and recognized within the kinship system. Many of these species are the basis of a traditional subsistence economy, which underpins the functioning of traditional activities (e.g., catching salmon to provide for the community). Aside from the traditional economic aspects of hunting, fishing, and collecting are the interactions of interspecies relationships. From a Miwkoꞑ perspective, taking an individual of a species is a reciprocal action of the relationship with that species. Thus, by not taking those individuals, Miwkoꞑ will cease to have a relationship with those species, and the species will go extinct. This end result has been conveyed by community elders, and has been validated by extinction of two clam species from Bodega Bay. Miwkoꞑ philosophy recognizes that for a species to thrive it needs to be respectfully harvested (in some cases with ceremony involved). This notion of harvesting for conservation purposes has been supported by several key research projects among global indigenous communities. Unfortunately, concerns for environmental pollutants has led to decreased harvest activity related to many aquatic species within the Delta.

It is imperative to address habitat needs within the estuary as a means of closing the loop for species recovery and stewardship. Little natural habitat remains in the Miwkoꞑ Waaliꞑ due to habitat conversion and land use modifications which have destroyed wetlands for agriculture, grasslands and oak woodlands for urbanization, and a network of water, power, transportation, and other infrastructure projects which fragment the remaining habitats. Currently, much of the Delta lacks floodplain connectivity; there is little suitable floodplain emergent vegetation to provide the functional needs of the Delta and its inhabitants. Floodplain connectivity creates a naturally resilient landscape that performs functions including flood storage and groundwater recharge, water filtration, carbon sequestration, and habitat. It is no surprise that fish like Chinook salmon fare better with access to floodplain habitat (see Henery et al. 2010). Similarly, the seasonal fluctuations of salinity within the Delta is an ecological processes that Delta species have evolved with (e.g., Delta smelt), and their place within the Delta is noted by place names (e.g., Cukumneꞑ the place of the minnow [sic. Delta smelt]) and among the archaeological middens of the region. While water is currently managed to keep Delta smelt near the Sacramento-San Joaquin confluence, historic seasonal fluctuations of salinity were a vital process for nutrient exchange and other functions to maintain the Delta. Furthermore, there is not enough connected floodplain habitat for fisheries to be sustained nor the ecocultural interactions connected to these species.

The fate of the Delta has been on a downward spiral since the arrival of European colonists beginning with the Spanish in 1772 (although a wave of impacts may have arrived in advance of their physical presence in the region). Some of the early impacts at this period came with the onslaught of disease and acts of depopulation, which initiated the breakdown of ecological interaction of the Delta ecosystems. Despite the common assumption that the Delta was a vast

tule marsh, there is much complexity to this system that lends to the richness this region is known for. To temper this, it is important to recognize the Delta supported one of the highest human population densities in pre-Columbian North America (north of the Aztec Empire). These populations were supported by their relationship to grasslands, oak woodlands, vernal pools, riparian woodlands, scrub, and other ecosystems that were the matrix of the Delta. Keystone processes inclusive of indigenous set fires which maintained productivity and heterogeneity within these ecosystems (Hankins 2009, 2013, 2015). Anderson (2005) and others have stated these relationships are a form of agriculture. However, this form of agriculture was not appreciated by early European settlers, and still fails to be valued within the context of co-equal goals stipulated by California Legislation for the Delta Conservancy and ultimately within the Water Fix. Colonial notions of agriculture and landscape relationships lead to the reclamation of the productive floodplains of the region via the Swamp Lands Act of 1850, and parallels the historic acts carried out by Californians against Miwko? via the 18 Unratified Treaties, Scalp Act, and California Act for the Government and Protection of Indians.

Issues pertaining to the region draw much contention with environmental health often losing to political and economic considerations of water purveyors who fail to recognize the significance of a healthy ecosystem that is capable of adapting to the uncertainty of environmental change which will occur. By understanding traditional knowledge and science, it is evident that the Delta is a place that continues to evolve. It has experienced sea level rise since the last glacial maximum, and will continue to evolve if natural processes are allowed to occur. This is what our storyscape encompasses; the reality that sea level rise will eventually place us at the foothills of the Sierra Nevada or Sutter Buttes, and we will experience the fluctuating tides at those locations. This is something the short-sighted nature of the Water Fix fails to recognize. The whole project is already in a zone that is tidal, and experiences a natural range of salt water intrusion. Engineering will not make this system resilient, but natural processes such as natural hydrology can maintain rich ecosystems.

Regulatory Context

From a Miwko? perspective environmental stewardship by local, state, and federal agencies has failed to address the needs of the Delta in a meaningful way. Specifically, there is a disconnect in recognizing the interrelatedness of the Delta within a landscape context that extends from source to sink. While there is often discussion of hydrologic inputs from regions beyond the Delta, there is little effort to holistically consider the landscape feedbacks from the crest of the mountains to the sea. The Delta is part of a system that is not linear with one direction of inputs and outputs, but is circular and multidirectional with inputs and outputs; simplistically water, salmon, and nutrients are cycled throughout the Delta to connect the uplands to the marine environment (see Merz and Moyle 2005). The connectivity of the system as a whole underscores the importance of landscape-scale contributions. Miwko? have understood this relationship, but recognition of this within the scientific literature has lagged to recognize such relationships (e.g., the role of forest land cover and fire on water yields feeding into the state's water supply [see Goulden and Bales 2014]). While some entities might seek to capitalize on this sort of knowledge, it is important not to lose sight of the finite benefits of incorporating such concepts into land and water management. In a similar vein, it is also important to

recognize the value of natural landscape features including meadows, basins, and sinks that exist throughout the Central Valley from the Colusa Basin to Tulare Lake versus man-made reservoirs that provide water storage and other functions to meet water needs.

In the context of water planning and stewardship, local, state, and federal entities have largely failed to include regional Tribal experts as stakeholders in the development and implementation of stewardship plans. Many projects, including the State water project and Central Valley Project were developed with little to no consultation with Tribes, because they were done in an era before consultation was required. As a result, devastating impacts of these projects have had long-lasting impacts on Tribes, their landscapes, and traditional responsibilities. Typically, consultation with tribes revolves around cultural resources in regards to National Environmental Policy Act or California Environmental Quality Act requirements, but here too there is a failure to recognize the environment as a whole as a cultural resource (see BDCP/Water Fix Master Response 21). As alluded to above, impacts analysis for projects in the region often focus on a narrow view of the Delta; the direct, indirect and cumulative effects of a given project may be much farther-reaching than is typically analyzed. To understand the Delta the environmental setting begins at the top of the contributing watersheds and extends through the ocean. Furthermore, there are some aspects of the environment such as spiritual or metaphysical parameters, which Miwko? would assess impacts to, that are not currently assessed in any environmental impact review. As it turns out there are some tools to assess environmental impact analysis for such parameters (see Mauri-o-meter <http://mauriometer.com>), but have not been utilized by local, state, or federal entities to date. The Mauri-o-meter assesses impacts to the environment, cultural wellbeing (inclusive of metaphysical aspects), social wellbeing, and economic wellbeing using a series of questions that are filtered through a heuristic model. Lastly, coordination with Tribes and Tribal organizations must go beyond the minimalist attempt that is typically afforded by such agencies to solicit input from tribes. Moreover, there should be allocations in the budgets of these entities to fund Tribes and Tribal organizations to be engaged, as much of this work occurs without financial support or dedicated staffing. In some cases, the Tribes most engaged in Delta issues are not from the region, but have a stake in water or other resources linked to the region, and/or have staff and funding to devote to engaging in these issues (e.g., Hupa Valley Tribe).

Beyond impact assessment, it is also important to address the shortcomings of agencies upholding Tribal Trust responsibilities, which are often not upheld in a satisfactory way. For instance, regulatory agencies like National Marine Fisheries Service and US Fish and Wildlife have issued biological opinions for culturally important species that they have Trust responsibilities to Tribes for, yet have not consulted with Tribe to ensure their cultural obligations are upheld. Overall, there is neglect for Tribal law, which is critical for federal and to a lesser extent, state entities to uphold. PL 93-638 Tribal Self Determination policies were established by Congress to ensure that the Sovereign interests of Tribes and Tribal organizations are upheld. Likewise, CDFG Code 16000 supports Tribal interests in Trust resources. Therefore, entities permitting, funding and authorizing activities in the Delta must act in the interest of Tribes and Tribal organizations. When it comes to mitigation and stewardship, there are missed opportunities to further engage with Tribes. Given that

California lacks tribal treaties, local, state, and federal entities should utilize their authority to deed title or conservation easements to Tribe(s) and Tribal organizations with ancestral territorial ties or agreements for those places.

A change in the point of diversion should bring analysis of all of these considerations to light through government to government consultation with Tribes as preeminent water rights holders and beneficiaries should be a primary objective of the proposed project. In fact, it should be directed by Tribes. The direct, indirect, and cumulative effects of the Water Fix and related projects does not resolve the ecocultural atrocities placed upon the Miwko? Waali?, and will further adversely impact Miwko? relationship and uses of this landscape while also undermining trust responsibilities.

Water Fix Tribal Engagement

In reviewing the comment index for the BDCP/Water Fix RDEIR/SDEIS I located at least ten Tribes or Tribal individuals who submitted a total of 16 comment letters (including those written by myself) for the water fix. Largely, the response to comments has failed to adequately address Tribal concerns, frequently dismissing those concerns in reference to Master Response 21. Allegedly, outreach to Tribes regarding the BDCP began in 2012. Despite being listed on the Native American Heritage Commission list of contacts for sacred sites within the project area, and being involved in Tribal engagement for the California Water Plan updates, I did not receive any notice of such outreach. In 2014, the Lone Band of Miwok and California Indian Water Commission (including me), were asked for dates to meet in June, but the dates DWR selected were dates Lone Band of Miwok and California Indian Water Commission were at a water conference in Tahoe. To my knowledge that was the only attempt to consult with any Miwko? individuals.

Despite the lack of outreach and consultation, I provided two comment letters outlining various concerns including those of cultural significance in hopes DWR and BOR would engage in a deeper discussion of my concerns. Specifically, I pointed out that the proposed facilities near Clifton Court Forebay are located in a traditional cultural property, and analysis of impacts thereto were not analyzed. In fact, I have gathered plant materials for baskets, food, and medicine at this specific site, as well as other sites that will be impacted directly, indirectly, or cumulatively by the Water Fix from the intakes on the Sacramento River and other locations. Some of the first baskets I made were made with materials collected at location of the proposed facility near Clifton Court Forebay. I mentioned that the analysis did not consider impacts to traditional cultural properties or traditional cultural landscapes. I suggested using the Mauriometer as a tool to analyze the impacts of the project to the ecocultural landscape. For all of these points, the response to these comments was to see Master Response 21, which does not address the lack of analysis for impacts associated with these concerns. I mentioned concerns for power demand for the project, and the piecemeal nature of the proposed project; and recently have been involved in a piecemeal consultation with Sacramento Municipal Utilities District to provide power to the intake along the Sacramento River, which was not part of the project analysis. Here the response references Master Response 8, which discusses piecemeal in regards to *Laural Heights Improvement Association v. Regents of University of*

California. Clearly if the project requires other components to exist, then those impacts should be included in the NEPA/CEQA review. In regards to species considered for impacts, the analysis should have been broader based on trust responsibility and self-determination obligations at the local, state, and federal levels.

Discussion

The one thing that sets Indigenous people apart from water purveyors, regulators, and managers is that Indigenous people maintain a relationship with the lands, waters, and organisms that is a lifetime responsibility passed down through generations. By contrast the water purveyors, regulators, and managers only reflect their obligations through career responsibilities. We need to see a shift towards shared responsibility inclusive of all members of society, and with greater recognition of traditional tribal relationships and authority.

While the population of California continues to grow, so too are the demands on water. It is a finite 'resource'. We cannot create more water by diverting it, storing it, etc. We can work to be better stewards of water by managing the uplands to enhance water quality and yields. Gains for water can be achieved by restoring natural features in the landscape (e.g., restore the Tulare Basin, managing conifer encroachment in meadows, etc.). We must not sell short the opportunities for a real solution to balancing environmental and cultural heritage in the Delta, and not rob future generations of the right to inherit a world in as good or better condition than we have inherited. Short term profit should not come at the long term cost to the ecosystem, sustainable economics, or the resiliency of the land/seascape. The Delta is part of a landscape from summit to sea, and the problems within the Delta are not exclusive to its legal boundary.

Biography

I am a Miwko? (Plains Miwok) traditional cultural practitioner and speaker of the Mokelumne? dialect. My connection to my ancestral homelands has always been strong. I spent most summers and weekends in the Delta where my family had a place on King's Island adjacent to Clifton Court Forebay, and within view of some prominent features of our sacred storyscape. The intimate relationship I have with the Delta and my homelands has shaped my professional career in various aspects of land management, regulation, and conservation for a variety of organizations and agencies including federal and tribal governments. Currently, I am president of the California Indian Water Commission and professionally employed as a professor in the Department of Geography and Planning at California State University, Chico. My academic areas of expertise are pyrogeography, water resources, natural resources and conservation. Combining my academic and cultural interests I am particularly interested in the application of indigenous land management practices as a keystone process to aid in conservation and management of resources. I am currently engaged in fire and water research involving Indigenous California and Aboriginal Australian communities.

About the California Indian Water Commission

The California Indian Water Commission is authorized by tribal resolution through the Indian Self Determination and Education Act, PL638. The California Indian Water Commission works to

protect, promote, and enhance the traditional ecological cultural knowledge and stewardship practices of the Indigenous people of California for the future generations of our Tribes and all Californians.