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9  
10 **Before the California State Water Resources Control Board**

11 HEARING IN THE MATTER OF  
12 CALIFORNIA DEPARTMENT OF  
WATER RESOURCES AND UNITED  
13 STATES BUREAU OF RECLAMATION  
14 REQUEST FOR A CHANGE IN POINT  
OF DIVERSION FOR CALIFORNIA  
15 WATER FIX

TESTIMONY OF  
RONALD M. STORK

16 I, Ronald M. Stork, do hereby declare:

17 **Introduction**

18 I am policy director of Friends of the River staff and have been on staff since 1987.  
19 Friends of the River is a statewide environmental group focused on river protection,  
20 restoration, and inspiring citizen action. During my time at Friends of the River, I have had  
21 various responsibilities for organizing Friends of the River’s dam-proposal response  
22 activities before the Federal Energy Commission, state legislature, congress, and state and  
23 federal resources and land-management agencies.

24 I am a founding member of the (Sacramento) Water Forum, a group of community  
25 leaders in Sacramento, Placer, and El Dorado Counties working to fashion water develop-  
26 ment and water-conservation approaches that protect the area’s riverine environments  
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28

1 (including the American River Parkway) while helping to accommodate identified  
2 community water-supply-infrastructure needs.

3 I have also been involved in state and federal wild & scenic river designation and  
4 management plan advocacy before federal agencies, the legislature, and the congress. I  
5 began this work in the late 1970s, even before my time at Friends of the River.

6 I provided witness testimony put on a case in chief before this Board on the  
7 revocation of the U.S. Bureau of Reclamation's Auburn Dam permits and have filed a  
8 number of protests of permit applications as well.

### 9 **Summary of Testimony**

10 The construction and operation of the petitioners proposed facilities are intended by  
11 the petitioners to ease pumping constraints at the Delta pumps. The petitioner's proposed  
12 operational standards (compliance with D-1641)<sup>1</sup> permits substantial operational discretion,  
13 discretion that petitioners and the SWP and CVP export contractors hope and expect will  
14 result in increased deliveries to south-of-delta storage and uses. The petitioners' projects are  
15 not complete and both may attempt to serve more demand and usually have the water rights  
16 to do so.

17 This operational discretion and demand pressures could be expected to result in  
18 lower north-state reservoir levels in some or many years, with consequent adverse  
19 temperature and flow impacts to downstream fisheries and reservoir amenities. In one case,  
20 this operational discretion could affect a state wild and scenic river. Moreover, south-of-  
21 Delta interests are likely to find more advantages in proposing expanded storage in the north  
22 state, either by reservoir expansions or new dams and diversions that would otherwise be  
23 poor or risky investments. These projects even include dams and diversions now prohibited  
24 by state and federal law to protect their extraordinary values and free-flowing character.

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26 <sup>1</sup> "This Petition is limited in scope. It proposes only to add points of diversion and  
27 rediversion with the Sacramento/San Joaquin Delta Estuary (Delta) of the permits listed  
28 above. This Petition does not propose to change any other aspect of the existing SWP/CVP  
permits." (Petitioner's "Supplemental Information for Petition for Change in Point of  
Diversion," Exhibit SWRCB-1 p. 10 of 39)

1           Recent financing uncertainties suggest that the change petition may be for a right that  
2 will necessarily be put into “cold storage,” a right that may be perennially infeasible to  
3 achieve and a distraction to tackling the difficult public trust problems of the Delta and the  
4 rivers that flow into it.

5 **Discretion**

6           Part 1 of this hearing allowed north-state water interests potentially harmed by the  
7 petitioner’s project proposal to introduce evidence that north state reservoirs could be tapped  
8 more heavily in the future if the change petitions are granted.<sup>2</sup> These same operational  
9 injuries to north-state water supplies have adverse impacts to reservoir cold-water pools,  
10 flows, the fisheries that depend on them, and river and reservoir recreation associated with  
11 fisheries, flows, and reservoir levels. I expect that these same north-state water interests and  
12 other witnesses will in Part 2 introduce analyses that demonstrate these modeled injuries to  
13 fish and wildlife and public trust assets. In at least one case, this operational discretion  
14 affects flows in a state wild and scenic river. I, thus, discuss and corroborate circumstances  
15 further that could cause these and additional injuries that are the subject of the Board’s  
16 inquiry in Part 2.

17 State Watershed Protection Statutes Provide No Clear Protection for Public Trust Resources

18           Since some degree of shortage to the U.S. Bureau of Reclamation’s (Reclamation)  
19 contractors are routine, Reclamation’s shortage policies govern to a considerable extent the  
20 allocation of waters under the control of the federal Central Valley Project (CVP). In recent  
21 years, the Tehama-Colusa Canal Authority argued in federal court that state the area-of-  
22 origin statutes<sup>3</sup> should have provided a preferential shortage policy to areas of origin against  
23

24           <sup>2</sup> See, for example, “Part 1 Closing Brief of City of Folsom, Sacramento Suburban  
25 Water District and San Juan Water District.” SWRCB California Water Fix Hearing,  
November 8, 2017.

26           <sup>3</sup> The “Area of Origin statutes” apply to the federal Central Valley Project and the  
27 State Water Project. See “Laws Protecting Areas of Origin,” Porter A. Towner, Chief  
28 Counsel, Department of Water Resources, The Resources Agency, State of California,  
pp. 4–5. (FOR-9) The significant part reads: “In the construction and operation by the  
department of any project under the provisions of this part a watershed or area wherein

1 export uses.<sup>4</sup> (*Tehama-Colusa Canal Authority v. U.S. Department of Interior* (9<sup>th</sup> Cir. 2013) 721  
2 F.3d 1088,1090) The trial court and the Ninth Circuit made it clear that no such preference  
3 within the CVP was required. If Reclamation wished to provide equal shortage-provision  
4 contracts, north and south, to users within its various classes, it was not constrained by the  
5 area-of-origin statutes. (*Tehma v. U.S.* 1095–1097) That is and has been Reclamation’s  
6 position and is reflected in contracts. (*Tehma v. U.S.* 1092–1093)

7 Of significance in this proceeding, the court did note that export water-service  
8 contractors usually bear the greater burden of shortages. (*Tehama v. U.S.* 1089) This is by no  
9 means untypical as can be seen in Reclamation’s operations forecasts, reports, and com-  
10 plaints by Reclamation’s south-of-delta contractors.<sup>5</sup> To some degree this is because of  
11 different types of contracts, but the *Tehama* court here is referring to differences in deliveries  
12 among the same or similar classes of contract priorities because of facility and geographic  
13 realities described as “operational constraints” by the court. (*Tehama v. U.S.*, 1089) It is these  
14 facility and geographic realities or operational constraints that the petitioners in the present  
15 proceeding seek to reduce. Although the *Tehama* case did not involve the State Water  
16 Project (SWP), the principles would be similar, although a much greater portion of SWP  
17 contracts are south of Delta than in the CVP.

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19 water originates, or an area immediately adjacent thereto which can conveniently be  
20 supplied with water therefrom, shall not be deprived by the department directly or indirectly  
21 of the prior right to all of the water reasonably required to adequately supply the beneficial  
22 needs of the watershed, area, or any of the inhabitants or property owners therein.”

23 <sup>4</sup> Others have argued that these statutes should be interpreted to provide area of  
24 origin for public trust resources, see “Area of Origin Protection: Our Fisheries and Other  
25 Public Trust Interests” by Felix E. Smith. The *Tehama* appeals court, which took a narrow  
26 view of the applicability of the statutes, did not discuss a broad area-of-origin doctrine for  
27 fish and wildlife/public trust resources advanced in 2010 by this retired Field Supervisor of  
28 the California office of the U.S. Fish & Wildlife Service. (FOR-10)

29 <sup>5</sup> For some background on recent operations, see “Central Valley Project  
30 Operations: Background and Legislation” Charles V. Stern, Specialist in Natural Resources  
31 Policy, and Pervaze A. Sheikh, Specialist in Natural Resources Policy, Congressional  
32 Research Service, April 26, 2017, especially pp. 7–9.  
33 <https://fas.org/sgp/crs/misc/R44456.pdf> (FOR-11)

1 Operational experience demonstrates that this north-versus-south court-affirmed  
2 storage and delivery discretion can have direct implications on public trust resources since  
3 increased north-state delivery reliability can mean higher reservoir levels and consequent  
4 better temperatures and flows during critical months for priority fish stocks, at least in some,  
5 although important, years.

6 To state this again, the facility and geographic realities of cross-delta operations do  
7 tend to bottle up water in north-state reservoirs in some years. It is these facility and geo-  
8 graphic realities that the petitioners and their export contractors hope to diminish by this  
9 change petition that provides for no new constraints on the petitioners' operational  
10 discretion.

11 History shows the petitioners can change operations to meet differing objectives

12 Petitioners' projects have changed operating criteria from time to time in response to  
13 different weighting of the risks and benefits to various operational styles.<sup>6</sup> They have done  
14 this while usually meeting regulatory requirements, although sometimes requiring  
15 temporary change petitions or other forms of relaxed regulatory requirements.

16 I mention all this because of Part 1 discussions that the CALSIM modeling is based  
17 on assumptions on how the petitioners would operate the system. There were also discus-  
18 sions that the new change-petition facilities might result in changes in petitioners' reservoirs  
19 to more successfully move water across the Delta into south-state reservoirs, groundwater  
20 projects, and direct use. Such operational changes would in some years and year-type  
21 sequences impact water temperatures downstream of and in project reservoirs, reservoir  
22 levels, and downstream flows. Such changes would affect fish and wildlife and recreation  
23 based on these physical factors.

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27 <sup>6</sup> "Comments on BDCP/WaterFix Final EIR/EIS regarding failure to disclose or  
28 analyze reservoir operations criteria," Deirdre des Jardins, California Water Research, July  
13, 2017. (FOR-12)

1 This operational discretion regarding differing project environmental or delivery  
2 objectives also applies to flood operations since the Corps prescribes minimum flood  
3 operations, not actual flood operations.<sup>7</sup>

#### 4 **Do We Know What the Project Is?**

##### 5 Project Deliveries are Routinely Smaller than Contracts and Water Rights

6 Project physical and water-right delivery capabilities routinely exceed actual project  
7 deliveries.<sup>8</sup> Petitioners hope that the change in point of diversion will reduce regulatory  
8 constraints on project operations within their existing water rights permits. Their contractors  
9 have made it clear that they hope that this will increase diversions from SWP and CVP  
10 reservoirs. Since these diversions are often releases from storage, petitioners will have more  
11 facility discretion to decrease north-state reservoir storage, again with adverse implications  
12 to north-state reservoir cold-water pools, downstream fishery conditions, and recreation in  
13 rivers and reservoirs.

##### 14 Project Deliveries and Operations Are Uncertain Because the Project is Uncertain

15 Both petitioners have unmet demand in their project areas. The SWP has contracts  
16 for somewhat north of four million acre-feet in its service areas with a significant shortfall in  
17 project deliveries due to lack of water availability in comparison to its contracts and  
18 contractual requests for deliveries.<sup>9</sup> Contractors desire to increase project deliveries in order  
19 to get a return on their investment in the point-of-diversion change.

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22 <sup>7</sup> An example of that discretion is the 2017/18 Lake Oroville Flood Control Season  
23 Operations Plan. [http://www.water.ca.gov/oroville-spillway/winter\\_operations\\_plan.cfm](http://www.water.ca.gov/oroville-spillway/winter_operations_plan.cfm).  
24 It provides for more flood space and a more aggressive evacuation of flood-pool encroach-  
25 ments than required by the Army Corps of Engineers Oroville Reservoir Regulation Manual  
26 in force. This operation increases risks to SWP water releases for delivery and summer/fall  
27 fishery purposes, but balances that by increases in the likelihood that main spillway releases  
28 can stay below the interim safe capacity of this spillway in reconstruction. "Lake Oroville  
2017/2018 Flood Control Season Operations Plan," DWR, October 15, 2017. (FOR-13)

<sup>8</sup> CWIN CVP permit extension protest (FOR-14)

<sup>9</sup> "State Water Project Supply," Deirdre Des Jardins, California Water Research.  
(FOR-15)

1 Along with this desire to meet unmet contract demands, the SWP itself is incom-  
2 plete, with a significant additional south-of-Delta storage project, Los Banos Grandes,  
3 authorized<sup>10</sup> but unconstructed. The SWP is also listed as a customer or project beneficiary  
4 in the draft Sites Reservoir project environmental/feasibility reviews. It is also listed as a  
5 customer or beneficiary in the final environmental/feasibility document for the Shasta Dam  
6 raise.<sup>11</sup> These unmet demands and potential projects in their advanced planning stages  
7 suggest that the SWP intends to be a bigger operation than current point-of-diversion  
8 modeling suggests. Again, greater demand in the largely south-of-the-Delta SWP service  
9 areas, along with new facilities (with at least one not requiring a water-rights expansion, see  
10 later discussion) coupled with the operational discretion of the project of the current project  
11 and one with the point-of-diversion change facilities suggest that the petitioners' proposal  
12 result is likely to be loss of public trust resources dependent on north-state reservoirs.

13 Although Reclamation's CVP would appear to be a complete project, Reclamation is  
14 a petitioner in this proceeding to construct two tunnels to aid in delivery of project waters to  
15 the pumps in the Delta operating according to the Coordinated Operating Agreement. It  
16 also cautioned the Board in 2009 when applying for a permit extension of time to complete  
17 its project and fully develop project demand that it was not yet ready for such a step  
18 preparatory to licensing its water rights:

19 Reclamation has further determined that it is not possible at this time  
20 to accurately predict future operations and diversion levels at specific times  
21 during the extension period. Major uncertainties that include possible future  
22 State Water Board actions involving additional conditions to CVP permits,  
23 outcome of the Bay Delta Conservation Program (BDCP) process, as well as  
24 any other future actions necessary for compliance with the Federal  
25 Endangered Species Act, frustrate any attempt to make such predictions at  
26 this time. As a result, Reclamation is unable to determine what the ultimate  
27 diversions under its CVP permits will be.

28 Reclamation will continue to put water diverted under its CVP permits  
to beneficial use, including consumptive uses, as well as for environmental  
and fisheries purposes. Reclamation will also continue to divert to storage in

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26 <sup>10</sup> 2013 California Code Water Code - Division 6. Conservation, Development, and  
27 Utilization of State Water Resources Part 3. Central Valley Project, Chapter 2. Description  
of the Project, Article 9.2. Los Banos Grandes Reservoir.

28 <sup>11</sup> SLWRI Feasibility Report, pp. 4-30 table 4-4. (FOR-16)

1 CVP reservoirs in accordance with its permits. However, Reclamation is  
2 unable at this time to provide any recommendations on permits that are ready  
3 for licensing, but may do so in the future.<sup>12</sup>

3 In response Reclamation noted the following:

4 Reclamation envisions that prior to 2030, it may be necessary to  
5 request the State Water Board for adjustments in order to conform the  
6 authorized CVP places of use to match water use demands anticipated to exist  
7 at time of build-out, but that would be met with no changes in permitted  
8 diversion quantities, permitted diversion rates, or contract totals. Reclamation  
9 would prefer having any necessary place-of-use adjustments completed prior  
10 to licensing, and to have been serving water accordingly, rather than going to  
11 license sooner and for authorized places of use that may not reflect demands  
12 existing under the CVP contractors' future built-out conditions.<sup>13</sup>

9 However, the CVP is fully constructed in order to divert and  
10 beneficially use water under the subject permitted applications.<sup>14</sup>

11 Reclamation also has completed a draft feasibility and draft environmental impact  
12 statement for the Temperance Flat dam on the San Joaquin River, a dam that if constructed  
13 would be the second tallest dam in California. Although the success of this dam is  
14 speculative, it would be built on a fully appropriated stream,<sup>15</sup> it has powerful backers in the  
15 majority party of the House of Representatives.<sup>16</sup> And as will be more fully discussed in a

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17 <sup>12</sup> "Protest of the California Sportfishing Protection Alliance, Extension of Time of  
18 Bureau of Reclamation's CVP permits," October 31, 2009, p. 2. (FOR-17)

19 <sup>13</sup> "Reclamation's Response to Protest," USBR Mid Pacific Region, May 10, 2010,  
20 p. 2-3 (FOR-18)

21 <sup>14</sup> "Reclamation's Response to Protest," USBR Mid Pacific Region, May 10, 2010,  
22 p. 2 (FOR-18)

23 <sup>15</sup> See the referenced Friends of the River Temperance Flat fact sheet (FOR-19) and  
24 letter from Katherine Mrowka, SWRCB, to Robert Colella, USBR, August 7, 2014.  
25 (FOR-20)

26 <sup>16</sup> Congressman [and Majority Leader] Kevin McCarthy released the following  
27 statement regarding the San Joaquin Valley Water Infrastructure Authority's (SJVWIA)  
28 grant application for the Upper San Joaquin Valley Water Storage Project, also known as  
Temperance Flat.

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



1 subsequent section, Reclamation also has a final feasibility study, EIS, and a preferred (but  
2 not recommended) alternative configuration for a raise of Shasta Dam. It also has a draft  
3 EIR/EIS out partnering with the Sites Project Authority for the Sites Reservoir,<sup>17</sup> both  
4 projects with uncertain beneficiaries and therefore operational plans. It is thus a bit difficult  
5 to reconcile Reclamation's characterization to the Board in 2010 that it is fully constructed  
6 with these rather large potential changes to the project.

7 In summary, both the SWP and CVP may not have reached their final physical  
8 configuration, nor meeting their existing and future contract demands. Contracts and Water  
9 Rights do not appear to be limiting the expansion of project demand. This makes it difficult  
10 to assess actual operational behavior of the petitioners' projects. The fate of some of the  
11 public trust resources potentially affected by the point-of-diversion change are thus difficult  
12 to assess. What does seem clear from Part 1 testimony is that Petitioners' propose a project  
13 that would increase their operational discretion, discretion that may put north state public  
14 trust resources at greater risk.

### 15 **This Project Affects More than Just the Delta**

#### 16 CVP Operations Affect a State Wild & Scenic River

17 The American River below Reclamation's Nimbus and Folsom Dams (LAR) is a  
18 state-designated wild and scenic river. Releases from these dams affect flows, temperature,  
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20 efforts to expand our state's water capacity, and I congratulate the Authority  
21 on successfully submitting a grant application for California Proposition 1A  
22 water infrastructure funding. This is a critical first step to build the  
23 Temperance Flat Reservoir that will store an additional 1.26 million acre-feet  
24 of water for use from Stockton to Bakersfield. I am proud to support this  
25 project and I look forward to working with the SJVWIA, the Friant Water  
26 Authority, Central Valley stakeholders and the Bureau of Reclamation for  
27 continued success in the near future. (Mojave Desert News, April 18, 2017)  
28 [http://www.desertnews.com/news/article\\_5f9e7f22-842f-11e7-af4b-27dbcf24dcec.html](http://www.desertnews.com/news/article_5f9e7f22-842f-11e7-af4b-27dbcf24dcec.html)

<sup>17</sup> See joint press release: "Offstream Storage Project in Northern California Takes  
Critical Step Forward Submittal of Application to the California Water Commission for Prop 1  
Funds and Release of Draft Environmental Review Documents," Sites Project Authority and  
USBR, August 14, 2017. (FOR-21)

1 habitat, and recreation in the LAR. There will be Part 2 testimony regarding operational  
2 changes that petitioners and American River water purveyors have modeled that show an  
3 adverse effect from the point of diversion change. There has been Part 1 testimony that  
4 petitioner modeling may underestimate the impact of the point-of-diversion change on  
5 operations that track closely with adverse fish and wildlife and associated recreation impacts  
6 such as angling success. (Part 1 Closing Brief of City of Folsom, SSWD, and SJWD,  
7 pp. 11–17)

8 Public Resources Code Section 5093.61 requires that “[a]ll departments and agencies  
9 of the state shall exercise their powers granted under any other provision of law in a manner  
10 that protects the free-flowing state of each component of the system and the extraordinary  
11 values for which each component was included in the system.” The Lower American River  
12 Parkway Plan, adopted by the California Legislature, is the state wild & scenic river  
13 management plan for the LAR. It identified the wild and scenic river corridor (the LAR  
14 Parkway) and identified the extraordinary values as anadromous fishery and recreation.<sup>18</sup>  
15 The plan also discusses goals and means to achieve river flows consistent with plan  
16 objectives.<sup>19</sup>

17 Thus the Board’s inquiry into issues associated with the point of diversion change  
18 properly is necessarily conducted not just under the Board’s water code and public-trust  
19 jurisprudence but also under its state Wild & Scenic Rivers Act responsibilities. Protecting  
20 state wild and scenic rivers is clearly in the public interest and an affirmative responsibility  
21 of state agencies and political subdivisions of the state.  
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26 <sup>18</sup> See wild and scenic river provisions of “County of Sacramento, Lower American  
27 River Parkway Plan 2008” County of Sacramento Municipal Services Agency Planning and  
Community Development Department. (FOR-22)

28 <sup>19</sup> See water and flood elements of the LAR Parkway Plan. (FOR-23)

1 North-State Rivers Will Be Subject to Increased Pressure for Projects that Dam and Divert  
2 Them

3 Some of the consequences of a change in point of diversions will be actions by  
4 petitioners and their export contractors that come from the perception of more Delta  
5 transport capacity, more reliable capacity, and reduced regulatory constraints on Delta  
6 diversions. In other words, north-state increased reservoir capacity and diversions become  
7 more attractive to export customers and the petitioners that may contract with them. This is  
8 also true regarding non CVP/SWP north-state reservoirs.

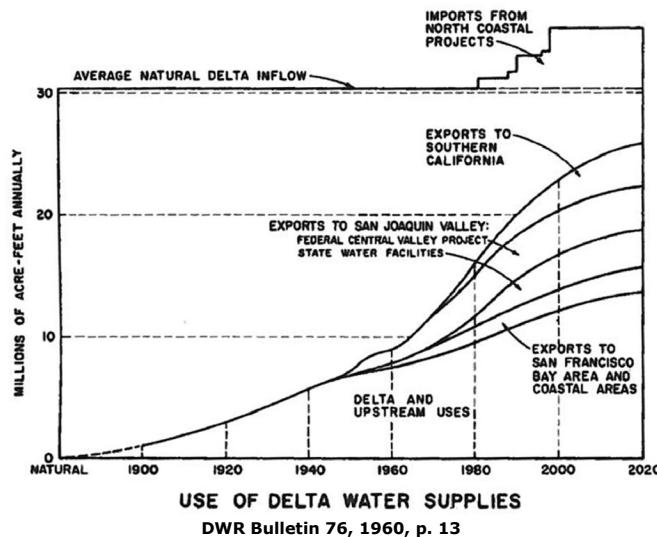
9 Of course, lands dedicated to reservoirs become landscapes denuded of natural  
10 vegetation and become biological deserts with reference to their previous inhabitants. Dams  
11 block passage and can have major impacts on nearby riverine environments. Diversions into  
12 and out of dam reservoirs alter flows in natural channels and can cause temperature impacts  
13 that may adversely affect fisheries, affect riparian vegetation, and stream-based recreation.  
14 As I noted earlier, potential actions that may advance dams, reservoirs, and diversions on  
15 state wild and scenic rivers also bring a special responsibility of state agencies to consider  
16 whether their actions are consistent with the policies and provisions of the state Wild and  
17 Scenic Rivers Act.

18 Interest in an isolated facility should come as no major surprise. The bypass-the-  
19 Delta facility of half a century ago, the peripheral canal, envisioned as part of the 1960-era  
20 SWP, was considered an essential part of the plan to achieve SWP yield planned to meet the  
21 original contract demands. To meet the demands that could not be met by the initially  
22 constructed supply facilities, for some time DWR and the Eel River Council focused its  
23 efforts on a complex staged plan to put most of the Eel River into a series of reservoirs<sup>20</sup> with  
24 an average of two-million acre-feet per year of diversions going into the Sacramento River  
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27 <sup>20</sup> See Plate 13, Eel River Council, Water Resources Development Maps, North-  
28 western California, Gerald Butchert, Executive Director. (FOR-24)

1 and north Bay.<sup>21</sup> This would involve very large river-to-reservoir conversions of other north-  
 2 coast rivers as generally depicted in maps and discussions in DWR Bulletin 3, The  
 3 California Water Plan, May 1957.<sup>22</sup> Indeed, the 1960 DWR Bulletin 76 confidently  
 4 predicted that by the year 2000 five million acre-feet would be diverted from the north-coast  
 5 rivers to “the areas of deficiency.” (FOR-50)



15 The Department recognized that the peripheral canal was a key element to making  
 16 the Eel River dams worthwhile. Here’s an example:

17 You also asked about the cost of getting Eel River water “to and  
 18 through the Delta without the Peripheral Canal”. Physical works required  
 19 would include conveyance systems on lower Stony and Cache Creeks,  
 20 Sacramento River seepage and erosion mitigation measures, channel  
 21 improvements in the southern Delta, and the additional pumping units at the  
 22 Delta Pumping Plant. Costs of these measures are not readily available, but  
 23 they would not be great in comparison to the \$3.6 billion cost of the entire  
 [Eel River development] plan. The major “cost” of getting the added water  
 through the Delta would be the additional Delta outflows required to allow it  
 to be conveyed to the pumps. In effect, part of the new water would have to  
 be devoted to Delta outflow so that the remainder could be pumped. The  
 percentage of the Eel Project water that could be pumped is a function of how

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24 <sup>21</sup> Memo of Albert Dolcini, Chief DWR Northern District, to Gerald Meral, Deputy  
 25 Director, DWR, January 26, 1978. (FOR-25) For a detailed read on the Eel River planning  
 26 effort and the political reaction to it, see *The River Stops Here, Saving Round Valley, A Pivotal*  
 27 *Chapter in California’s Water Wars*, by Ted Simon, University of California Press, 1994, 2000,  
 and 2001.

28 <sup>22</sup> Klamath and Trinity River dam and reservoir Maps, DWR Bulletin 3, The  
 California Water Plan, May 1957. (FOR-26)

1 the project would operate and the Delta quality standards to be met. We  
2 consulted with John McClurg and Ed Huntley and concluded that, for now,  
3 all we can say is that a “substantial” amount of the Eel Project yield would be  
4 lost in crossing the Delta via existing channels.<sup>23</sup>

5 This link between an isolated Delta conveyance and damming and diverting the Eel  
6 into the SWP was regarded as critical enough that Tulare Basin interests funded<sup>24</sup> the 1982  
7 Proposition 9 referendum campaign on SB 200 that linked authorization of the peripheral  
8 canal and imposing a two-thirds vote requirement on the legislature (or passage of a ballot  
9 measure) to remove the Eel from the state wild and scenic river system.<sup>25</sup> They were  
10 successful. Although thirty-three years had passed since the referendum, Tulare County has  
11 still not forgotten the importance (in their view) of the state Wild & Scenic Rivers’ Act  
12 constraint on actions to increase state water project yield when the County Board of  
13 Supervisors wrote to the legislature in 2013:

14 “The legislature should revisit Wild and Scenic Rivers status of the  
15 North Coast waters, where nearly one-third of California’s water supply flows  
16 to the ocean, when there is such a demonstrated need to put available  
17 resources to their highest and best use.”<sup>26</sup>

18 Apparently the Supervisors do not share DWR’s late 1970s’ view that the “biggest  
19 concern about the proposed Eel River Project is its environmental impact.”<sup>27</sup>

20 It is noteworthy that the petitioners’ proposed beneath-the-Delta facility does not  
21 include any enhanced guarantees that these rivers will not be taken out of the state system.  
22 After all, California voters passed such enhanced protections in Proposition 8 in 1980, and

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23 <sup>23</sup> 1978 Dolcini memo, pp. 2–3 (FOR-25)

24 <sup>24</sup> “Bitterness Runs Deep in California Battle over Bringing More Water South,”  
25 Philip Shabecoff, Special to the New York Times, Published: February 27, 1982.  
26 <http://www.nytimes.com/1982/02/27/us/bitterness-runs-deep-in-california-battle-over-bringing-more-water-south.html>. (FOR-27)

27 <sup>25</sup> “The California Wild and Scenic Rivers Act, Steven L. Evans and Ronald Stork,  
28 Friends of the River, January 20, 2005 to October 10, 2017, pp. 12, 14. (FOR-28)

<sup>26</sup> “Sups: Without storage, no on bond, Board says more water storage needed to  
protect agriculture,” Porterville Recorder, July 24, 2014. (FOR-29)

<sup>27</sup> 1978 Dolcini memo, p. 3. (FOR-25)

1 in 1982 making them contingent on voters rejected the referendum on the peripheral canal.  
2 With this new point-of-diversion change facility before the Board, some consideration and  
3 deliberations of the Board about additional protection to California's north-coast wild and  
4 scenic river jewels would seem warranted once again.

5 However, the Eel River dams and delivery tunnels would not likely be the first  
6 storage target consequence of this point-of-diversion-change facility. In DWR Director  
7 David Kennedy's report to the legislature on the Eel in 1985 required by then-existing  
8 language in the state Wild and Scenic Rivers Act, he noted the following:

9 Engineering studies over the last few years have disclosed alternative  
10 developments that may be more cost effective than the Eel River develop-  
11 ment. State and Federal studies have indicated that reservoir developments in  
12 the Central Valley, including offstream storage south of the Delta, may be  
13 more practical than development of the Eel River. It is also recognized that  
14 ground water storage will play a larger role in meeting dry period needs than  
15 previously assumed. Also, based upon what is known today, enlarging Shasta  
16 Dam appears more cost effective than Eel River development.

17 He did wish to keep DWR's options open:

18 It is important to note that, while potential cost-effective alternatives to  
19 the Eel River have been identified, no program of alternatives has been  
20 accepted which would preclude the possibility of the eventual need for the Eel  
21 River as a feature of the SWP.<sup>28</sup>

22 At the time, Cottonwood Creek and Glenn Reservoirs or an enlarged Shasta Dam  
23 were the focus of DWR's north-state river-damming plans.<sup>29</sup> Until the Sites Project  
24 Authority recently largely muscled DWR's ownership interest aside, during the CALFED/  
25 BDCP era, the Sites Reservoir, instead of the Cottonwood Creek and Glenn Reservoirs, has  
26 occupied much of DWR's attention, the Department going as far as producing an admin-  
27 istrative draft EIR<sup>30</sup> that languished waiting for local sponsor buy-in to completing its

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28 <sup>28</sup> Letter to legislative committee chairs from Dave Kennedy, DWR Director,  
29 August 30, 1985, pp. 5-6. (FOR-30)

30 <sup>29</sup> A Look at the Recent History and Future of the Eel and Russian Rivers, Jerry  
31 Meral, Deputy Director, DWR, a speech before the Eel-Russian River Commission, August  
32 8, 1980, p. 8. (FOR-31)

33 <sup>30</sup> DWR North Delta Storage Investigation,  
34 <http://www.water.ca.gov/storage/northdelta/#NODOSDocs> (accessed Nov 25, 2017).

1 preparation. The Sites Project Authority now is the active sponsor of the project with a draft  
2 EIR/EIS from the Authority and Reclamation in the comment phase.<sup>31</sup> But as much as  
3 things change, they remain the same: Sites is not interesting to the key export interests  
4 without a Delta isolated facility according to Metropolitan Water District of Southern  
5 California (MWD) General Manager Jeffrey Kightlinger:

6 Sites Reservoir from the MWD perspective looks like a good sound  
7 project. The problem is, for us, it's north of the Delta. And right now we can't  
8 move water through the Delta because we were so restricted in our ability to  
9 move water, that it wouldn't provide any real benefits to anyone south of the  
10 Delta. ... I say well, the problem is I don't know why I would fund it unless I  
11 could get some of that water and I can't actually get the water unless we build  
12 a conveyance system."<sup>32</sup>

13 However, apparently MWD is willing to fund part of the costs of environmental  
14 reviews to preserve a spot in the line of beneficiaries in the hope that Sites storage would  
15 ultimately prove valuable to the MWD.<sup>33</sup>

16 There are public trust resources on the Sacramento River that will or may be affected  
17 by the construction and operation of the Sites dam complex, reservoir, and diversion  
18 facilities,<sup>34</sup> but, to the extent that it may be proposed to operate in coordination with a raised

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19 See DWR NODOS Highlights for the 2014 view of this phase of the project. (FOR-32)

<sup>31</sup> See the Sites Project Authority website:

20 [http://cms.capitoltechsolutions.com/ClientData/SitesProject/uploads/Sites\\_FinalCmtPeri  
21 odExtension\\_PressRelease\\_Draft\\_9.18.17\\_Joint.pdf](http://cms.capitoltechsolutions.com/ClientData/SitesProject/uploads/Sites_FinalCmtPeriodExtension_PressRelease_Draft_9.18.17_Joint.pdf). (FOR-33)

22 <https://www.sitesproject.org/environmental-review/> (accessed November 25, 2017).

<sup>32</sup>

23 [https://mavensnotebook.com/2016/07/31/a-conversation-about-water-with-jeffrey-kightli  
24 nger/](https://mavensnotebook.com/2016/07/31/a-conversation-about-water-with-jeffrey-kightlinger/) (FOR-34)

25 <sup>33</sup> "Big L.A. water agency antes up for a share of Valley's Sites Reservoir,"  
26 Sacramento Bee, April 11, 2017. (FOR-35)

27 <http://www.sacbee.com/news/state/california/water-and-drought/article143994694.html>

28 <sup>34</sup> "For a quick summary of the Sites Reservoir Project and public trust resources  
that may be affected, see the pre-Sites Project Authority draft EIR/EIS fact sheet prepared  
by Friends of the River and the Sacramento River Preservation Trust. (FOR-36) An  
additional post-draft EIR/EIS fact sheet is under preparation, but not available at the time  
of this written submission.



1 Shasta Dam, the Board’s consideration of this matter as part of its state Wild and Scenic  
2 Rivers Act responsibilities is appropriate in this proceeding.

3 The potential for an isolated Delta facility to open up northern California rivers has  
4 wetted the appetites of export interests, even to the extent of desire to repeal protections  
5 embedded in the state’s Wild and Scenic River’s Act or actions to preempt it by federal  
6 law.<sup>35</sup> Before we begin here, it is good to remind ourselves of the purpose of this body of  
7 California Law.

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

16 I’ve already mentioned Dave Kennedy’s warning that California’s protected north-  
17 coast rivers may be the object of desire by DWR in the future and Tulare County’s interest  
18 during the SB 200 controversy and their contemporary desire to unprotect California’s  
19 north-coast rivers. However, there are even more immediate potential threats to protected  
20 rivers.

21 Raising Shasta Dam is illegal because it would imperishably drown more of the  
22 McCloud River protected in California’s Wild and Scenic River’s Act.<sup>36</sup> As a consequence,  
23 on December 11, 2012, the MWD Board of Directors voted to support “administrative/  
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25 <sup>35</sup> Federal wild & scenic river protections, once described as permanent protections  
26 and overlap state protections on the north-coast rivers and the lower American River, have  
27 twice been the subject of successful de-designations by the House of Representatives on the  
28 Merced River in California. Merced River Wild & Scenic River Fact Sheet #4, Threatening  
a Wild & Scenic River, Friends of the River, May 26, 2016. (FOR- 37) Cal W&S Rivers  
Act, Evans & Stork, pp. 12–14. (FOR-28)

<sup>36</sup> See Friends of the River et al. “Supplemental Comments on Revised Proposed  
Regulations for the California Water Commission’s Water Storage Investment Program  
Quantification Regulations” pp. 5–10. (FOR-38)



1 legislative actions to remove existing prohibition for state funding to raise Shasta Dam.”<sup>37</sup>  
2 Presumably, this means MWD supports an effort to remove the McCloud River provisions  
3 from code so that it could participate as a project beneficiary of Reclamation’s CVP Shasta  
4 Dam raise. As has been noted before, the MWD is a major water contractor of petitioner  
5 DWR, and SWP urban customers have been identified as potential buyers of Shasta Dam  
6 raise water deliveries by Reclamation even though the SWP is outside of the CVP service  
7 area.<sup>38</sup>

8 Westlands Water District, a major export contractor of Reclamation, is now a  
9 landowner of part of the shores along the McCloud River that would become part of the  
10 expanded reservoir. The District has also supported the expansion of the reservoir.<sup>39</sup>  
11 However, according to a press account, then Westlands Deputy General Manager Jason  
12 Peltier told the reporter that raising Shasta Dam won’t be a high priority for Westlands until  
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16 <sup>37</sup> <http://www.fishsniffer.com/reports/details/mwd-votes-to-support-shasta-dam-raise/>  
17 (FOR-39)

18 <sup>38</sup> “Summary of Chapter Nine Shasta Lake Water Resources Investigation (SLWRI)  
19 Final Feasibility Report and Environmental Impact Statement (EIS),” Friends of the River,  
20 Planning and Conservation League, Winnemem Wintu Tribe, May 10, 2016, pp. 3–4.  
(FOR-40)

21 <sup>39</sup> According to a June 19, 2013, *Reading Record* Searchlight article, pp. 3–4,  
(FOR-41)

22 Westlands officials also want the dam raised. In 2007  
23 the district paid about \$33 million to buy about 3,000 acres  
24 bordering the river, including the Bollibokka Fly Fishing Club.  
Its property extends south to just downstream of the McCloud  
River bridge.

25 Westlands General Manager Tom Birmingham said in  
26 2007 the district, which supplies water to some 600 farms in the  
San Joaquin Valley, bought the land to protect its interests  
along the river and around Lake Shasta.

27 “We did not want to see the use of this land to be  
28 changed to impede the potential of raising the dam,” he told the  
Record Searchlight in 2007.

1 another roadblock to sending more freshwater south is removed: the Delta.<sup>40</sup> It would seem  
2 that the change petition has implications to the fate of this protected state resource.

3 There are public trust resources that would be adversely affected by this potential  
4 dam,<sup>41</sup> a raise that is not likely to require a water-rights change proceeding.<sup>42</sup> The potential  
5 for a dam raise that is illegal under the state Wild and Scenic Rivers Act makes Board  
6 consideration of the consequences of the petitioners' change petition more important under  
7 its broad state Wild and Scenic Rivers Act responsibilities.<sup>43</sup>

8 Nevertheless, Reclamation has an ongoing planning effort on raising this dam. It has  
9 completed its final EIS and feasibility report. It has a preferred alternative but no recom-  
10 mended alternative because of unresolved concerns. Reclamation considers the project to be  
11 feasible, although it does not have any cost-sharing partners and the project is illegal under  
12 California law.<sup>44</sup>

13 Apparently unaware of Reclamation's unresolved concerns, Section 8 of HR 875, a  
14 bill "to facilitate and streamline the Bureau of Reclamation and Bureau of Indian Affairs  
15 processes for creating or expanding certain water projects, and for other purposes," by Rep.  
16 Newhouse, authorizes the Shasta Dam Raise Project, "to be carried out by the Secretary  
17 substantially in accordance with the plans, and subject to the conditions, described in the  
18 respective reports and correspondence designated in this section." The bill will be heard on  
19 November 30, 2017, in the House Natural Resources Committee.<sup>45</sup>

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21 <sup>40</sup> "Tunnel Vision Part Two: Rivers in Peril," Robert Gammon and Joaquin  
22 Palomino, East Bay Express, p. 6. (FOR-42)

23 <sup>41</sup> "The Facts about Raising Shasta Dam," Friends of the River, May 26, 2016.  
(FOR-43)

24 <sup>42</sup> "Comments on Draft Environmental Impact Statement (DEIS) for Shasta  
25 Lake Water Resources Investigation," SWRCB, September 17, 2017, p. 2. (FOR-44)

26 <sup>43</sup> Friends of the River's analysis of the Water Commission's state Wild and Scenic  
27 Act responsibility closely tracks the Board's responsibility with regard to consideration of  
28 actions in this proceeding affecting directly or indirectly the McCloud River that might be  
contrary to policies and provisions of the Act. (FOR-38) See pp. 9–10.

<sup>44</sup> "Summary of Chapter Nine SLWRI Feasibility Report and EIS. (FOR-40)

<sup>45</sup> <https://www.congress.gov/bill/115th-congress/house-bill/875>

1 And there's more on the Federal side. The Auburn Dam lost its state water rights in  
2 2009. The Bureau of Land Management has found the Project lands to be eligible for a  
3 National Recreation Area designation,<sup>46</sup> and Reclamation has determined that most Project  
4 lands are eligible for wild and scenic river designation.<sup>47</sup> And there's no sign that the Corps  
5 of Engineers or the local flood control agencies have any plans to invest in flood-control  
6 space there.<sup>48</sup>

7 Nevertheless, Congressional boosters remain active, and the Congressman who  
8 represents the Auburn dam area and champions the proposed dam formerly represented  
9 districts in southern California in the legislature.<sup>49</sup> If constructed, Auburn dam would be  
10 upstream of the lower American River, a state wild and scenic river. At the time of the 1965  
11 federal authorization of Auburn dam (an authorization still on the books), it was associated  
12 with a large canal running south and joining with a Sacramento River diversion at Hood to  
13 become the east-side canal to parallel the state and federal canals going down the west side  
14 of the San Joaquin Valley. This canal leading from the Lake Natoma Reservoir was  
15 constructed to the Rancho Seco Nuclear Power Plant. It was the subject of federal litigation  
16 challenging the diversion on grounds of harm to the lower American River, and there are no  
17 active plans by Reclamation to continue it, but it does represent another isolated facility that  
18 would have allowed a bypass around the Delta. Actually, in small part, it does now for it is  
19 used by the East Bay Municipal Utility District as part of its Freeport Diversion Project for  
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21 <sup>46</sup> Final NRA Study, American River Feasibility Study, USDOJ, BLM, September  
22 1990. (FOR-45)

23 <sup>47</sup> Determination of Wild and Scenic Eligibility of Segments of the American River  
(General Investigation Program), USBR, March 23, 1993. (FOR-46)

24 <sup>48</sup> Water Right Hearing Regarding Proposed Revocation of Auburn Dam Project  
25 Permits Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and  
26 21637) Opening Statement and Witness Testimony for Friends of the River, Save the  
American River Association, Defenders of Wildlife by Ronald Stork and Jonas Minton July  
21 & 22, 2008, Before the State Water Resources Control Board. (FOR-47)

27 <sup>49</sup> "Could dam plan be back? McClintock poised to lead in Congress for Auburn  
28 dam revival," Auburn Journal, December 12, 2010 and "Auburn dam back in play as  
McClintock takes over House panel," Sacramento Bee, January 15, 2011. (FOR-48)

1 Sacramento River deliveries to its Mokelumne River Aqueducts leading toward the East San  
2 Francisco Bay Area.<sup>50</sup>

3 **Diligence**

4 Whither goest the petitioners' project and are we getting close to a cold storage application?

5 The petitioners' have put a lot of work into bringing this application to this stage.  
6 However, since at least the CALFED days where a beneficiaries-pay principle was adopted,  
7 the beneficiaries seem to have worked just as hard to put off the hard questions of who will  
8 pay what, and will it be enough.

9 The events of recent months have rocked this project: Westlands pulled away from  
10 the table, claiming that the Water Fix costs were too much for the benefits to its growers  
11 (Exhibit FOR-79); Reclamation announced various things but appeared that it finally settled  
12 on not being willing to contribute federal funds to the project<sup>51</sup>; and non-benefitting CVP  
13 project contractors continued their understandable unwillingness to pitch in to ease the  
14 financial burdens on the San Luis Unit. Santa Clara appears unwilling to participate in the  
15 project as petitioners' describe it (Exhibit FOR-81, p. 4). California government officials  
16 expressed perhaps willingness to consider a downsized version of the project.<sup>52</sup>

17 At the same time, the Board maintains it intends to process the application it has in  
18 front of it until that application is withdrawn or modified. But part of the Board's delibera-  
19 tions need to question whether the petitioners' are asking for a change petition that they  
20 plan to put into cold storage while they wait to sort out what project they can afford and  
21 when and under what circumstances can they afford it. This could be decades.

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25 <sup>50</sup> See chronology section in the Friends of the River state wild and scenic river  
memo. (FOR-28)

26 <sup>51</sup> USBR "Participating Central Valley Project Contractors in the State of  
27 California's WaterFix - Central Valley Project, California, September 15, 2017. (FOR-49)

28 <sup>52</sup> See "Santa Clara Valley Water District rejects Jerry Brown's twin Delta tunnels  
plan," San Jose Mercury News, October 17, 2017. (FOR-50)

1 To some extent we are fortunate, the WaterFix draft EIR documents that DWR and  
2 the Bureau planned to apply for a “cold storage” permit in the case that the contractors  
3 couldn’t afford the project, something that appears to be increasingly relevant today’s news.

4 In 2011 the Fish Facilities Technical Team recommended consideration of phased  
5 construction, to allow 3-15 years operation to test the fish screens. DWR and Reclamation  
6 refused to analyze phased construction, and stated in Appendix 3A of the 2013 Draft EIR  
7 that it would be prohibitively expensive:

8 Although the conclusions from the workshop were not final, the results  
9 were clear that a staged approach would be extremely costly compared with  
10 an approach by which all approved conveyance facilities were constructed  
11 during a single phase. For example, construction of EIR/EIS Alternative 1  
12 (with five intakes and 15,000 cfs diversion capacity) was projected to cost  
13 approximately \$ 12.9 billion (in 2011 dollars) under a non-phased approach.  
14 Under various phasing or staging approaches, total costs were unknown due  
15 to the inability to assign costs to the studies that would be undertaken to  
16 assess the success of the initially constructed intakes; but it is clear that the  
17 additional construction costs would be enormous. For example, if one tunnel  
18 and two intakes were built initially and another tunnel and three intakes were  
19 built subsequently, the additional construction costs (on top of the initial  
20 \$12.9 billion) could range from \$9.6 to \$17.2 billion (see *Workshop Summary:  
21 Phased Construction of North Delta Intake Facilities*, p. 6). Under another scenario  
22 in which the first phase included both tunnels and the second phase still  
23 involved three intakes, the additional construction costs could range from \$2.5  
24 billion to \$4.5 billion. (*Ibid.*)

25 These additional costs could well be prohibitive. One of the greatest  
26 challenges in making the BDCP work has been to identify scenarios involving  
27 new conveyance facilities that can be financed through costs passed on to the  
28 ultimate users of water in geographic areas south of the Delta served by the  
SWP and CVP. If water supplied through new conveyance facilities is not  
prohibitively expensive, then financing should be available. If water is  
prohibitively expensive, however, new conveyance will not get built, and the  
existing environmental problems associated with exclusive reliance on south  
Delta pumps will persist. The current preferred CEQA alternative, EIR/EIS  
Alternative 4, already represents a comparatively expensive source of  
relatively limited amounts of exported water. If the costs of the same facilities  
were to increase by many billions of dollars, the result could well be  
abandonment of the BDCP by the water contractors who are proposing to  
fund the new conveyance. (Exhibit SWRCB-4, Appendix 3A, p. 3A-93-94.)

The Draft EIR also states:

And should the initial approved project be more modest than the  
current preferred CEQA Alternative, neither DWR nor the CVP and SWP  
Contractors would be prevented in the future from pursuing an expanded  
project should the economics of such an undertaking become favorable at

1 some point. The Lead Agencies have determined, however, that it would be  
2 financially imprudent to plan from the outset to knowingly embark on a  
3 two-phase or two stage process. (Exhibit SWRCB-4, Appendix 3A,  
4 p. 3A-93-94.)

5 Thus there is a real possibility that the Change Petition is an application for “cold  
6 storage.”

7 Proceedings resulting from Bella Vista Water District’s application for their own  
8 right to divert water at the Reclamation’s Cow Creek Canal intake developed this concise  
9 description of cold storage (Order WR 90-04, p. 13)<sup>53</sup>:

10 The applicants’ apparent intention to acquire a water right permit now  
11 to be utilized at some indefinite future time is contrary to the fundamental  
12 requirement of California water law that appropriative water rights be  
13 perfected with due diligence. One cannot acquire a water right permit to be  
14 placed on a shelf in “cold storage” and utilized at some future unspecified  
15 time. (California Trout, Inc. v. State Water Resources Control Board (1989)  
16 207 Cal.App.3d 585, 255 Cal.Rptr.184, 204.)

17 More explanation was developed in a case that I have more than a passing  
18 familiarity with, the order revoking Reclamation’s water rights for Auburn dam (Order WR  
19 2009-0011, p. 2)<sup>54</sup>:

20 Our order explained that the requirement that an appropriation of  
21 water be completed within a reasonable time with the exercise of due  
22 diligence is a long-standing principle of California water law designed to  
23 protect the public interest by preventing the “cold storage” of water rights. For  
24 purposes of discussion, we defined “cold storage” to mean a situation where  
25 an appropriation is initiated, so that the water subject to appropriation is not  
26 available to other parties who could potentially put it to beneficial use, but the  
27 appropriator is not diligently pursuing development of the water supply, so  
28 the water remains unused, contrary to the public interest.

29 In the present proceeding, a granted change petition that is then not used for the  
30 foreseeable future tends to focus decision makers on pursuing a perhaps perennially  
31 infeasible project. There are real problems in the Delta and its tributaries. They deserve real

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32 <sup>53</sup> Order WR 90-04 is requested to be submitted into the WaterFix hearing record by  
33 reference.

34 <sup>54</sup> Order WR 2009-0011 is requested to be submitted into the WaterFix hearing  
35 record by reference.

1 attention. The charity involved in granting the change petition is not in the public interest at  
2 all.

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6 Executed on this 29th day of November, 2017, in Sacramento, California.

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10 Ronald M. Stork  
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