



July 12, 2021

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812-2000
Via electronic filing

Re: Petition for reconsideration of the State Water Resources Control Board's June 10, 2021 Approval of the Bureau of Reclamation's Sacramento River Temperature Management Plan for Water Year 2021

Dear Ms. Townsend:

The California Sportfishing Protection Alliance (CSPA), California Water Impact Network (CWIN), Save California Salmon (SCS) and AquAlliance (collectively, CSPA et al.) respectfully submit a timely petition for reconsideration of the State Water Resources Control Board's June 10, 2021 Approval of the Bureau of Reclamation's Sacramento River Temperature Management Plan. The State Water Board made its approval via a letter from Executive Director Eileen Sobeck to Kristin White, Bureau of Reclamation.¹

From March 14 through May 23, 2021, CSPA, CWIN, AquAlliance, and SCS, in various combinations, submitted a series of comments and recommendations on Sacramento River water temperature management in 2021 and related matters. These included presentations by CSPA and comments by SCS at the State Water Board's April 17, 2021 workshop on Sacramento River temperature management. On May 23, CSPA et al. (except for AquAlliance) submitted to the State Water Board a complete Alternative Temperature Management Plan for the Shasta-Trinity Division of the CVP. In a related matter, CSPA, CWIN, and AquAlliance submitted, on June 4, 2021, an objection to the May 17, 2021 Temporary Urgency Change Petition (TUCP) of the

¹ Letter from Eileen Sobeck, Executive Director, State Water Resources Control Board, to Kristin White, Central Valley Project Operations Manager, "Order 90-5 Sacramento River Draft Temperature Management Plan" (Jun. 10, 2021). Available on the State Water Board's Sacramento River Temperature web page at this link: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/6-10-21_final_tmp_response.pdf.

Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation) relative to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions; CSPA, CWIN, and AquAlliance submitted a petition for reconsideration of the Order approving that TUCP on June 29, 2021.

On July 8, 2021, CSPA joined the petition of Natural Resources Defense Council (NRDC) for reconsideration of the State Water Board's approval Shasta Temperature Management Plan (Shasta TMP). The present CSPA et al. petition for reconsideration of the Shasta TMP is additive to NRDC et al.'s petition for reconsideration, both in terms of its substance and the addition of CWIN and SCS as petitioners.

Please contact Bill Jennings, Executive Director of CSPA, at deltakeep@me.com if you have any questions.

Respectfully submitted,



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**BEFORE THE
STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of Sacramento River Temperature Management Plan for Water Year 2021

**PETITION FOR RECONSIDERATION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
CALIFORNIA WATER IMPACT NETWORK,
SAVE CALIFORNIA SALMON, AND AQUALLIANCE
OF THE STATE WATER RESOURCES CONTROL BOARD'S
JUNE 10, 2021 APPROVAL OF THE
SACRAMENTO RIVER TEMPERATURE MANAGEMENT PLAN
FOR WATER YEAR 2021**

Pursuant to sections 1122 and 1126 of the California Water Code, section 769 of title 23 of the California Code of Regulations, the California Sportfishing Protection Alliance, the California Water Impact Network, Save California Salmon, and AquAlliance (collectively, CSPA et al.) hereby petition the California State Water Resources Control Board (“State Water Board”) for reconsideration of the State Water Resources Control Board’s June 10, 2021 Approval of the Bureau of Reclamation’s Sacramento River Temperature Management Plan. The State Water Board made its approval via a letter from Executive Director Eileen Sobeck to Kristin White, Bureau of Reclamation.²

Executive Summary

CSPA et al. is a coalition of public interest, non-governmental resource conservation organizations that seek to protect the fisheries, habitat, water quality, and water resources of California, with much of their efforts focused in the Central Valley’s Bay-Delta watershed.

² Letter from Eileen Sobeck, Executive Director, State Water Resources Control Board, to Kristin White, Central Valley Project Operations Manager, “Order 90-5 Sacramento River Draft Temperature Management Plan” (Jun. 10, 2021). Available on the State Water Board’s Sacramento River Temperature web page at this link: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/6-10-21_final_tmp_response.pdf.

In order to protect the beneficial uses and public trust resources of the Sacramento River, the Trinity and Klamath rivers, and the Bay-Delta estuary and its watershed, the State Water Board must act swiftly to rescind its Approval of the Bureau of Reclamation's Sacramento River Temperature Management Plan for Water Year 2021 (Sacramento TMP) and immediately order measures to protect affected fisheries and best manage the limited remaining water resources in Shasta Reservoir and other Central Valley Project (CVP) reservoirs, in State Water Project (SWP) reservoirs, and in California's rivers and streams.

1. Name and address of the petitioners. (Cal. Code Regs., title 23, § 769, subd. (a)(1))

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2. The specific board action of which petitioner requests reconsideration. (Cal. Code Regs., title 23, § 769, subd. (a)(2))

The State Water Board is requested to reconsider and rescind its June 10, 2021 Approval of the Bureau of Reclamation’s Final Sacramento River Temperature Management Plan for Water Year 2021. The State Water Board made its approval via a letter from Executive Director Eileen Sobeck to Kristin White, Bureau of Reclamation.³ The Bureau transmitted its Final

³ Letter from Eileen Sobeck, Executive Director, State Water Resources Control Board, to Kristin White, Central Valley Project Operations Manager, “Order 90-5 Sacramento River Draft Temperature Management Plan” (Jun. 10, 2021). Available on the State Water Board’s Sacramento River Temperature web page at this link: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/6-10-21_final_tmp_response.pdf.

Sacramento River Temperature Management for Water Year 2021 (Reclamation TMP) to the State Water Board on May 28, 2021.⁴

3. The date on which the order or decision was made by the board. (Cal. Code Regs., title 23, § 769, subd. (a)(3))

The Executive Director of the State Water Board issued the letter of Approval on June 10, 2021.

4. The reason the action was inappropriate or improper. (Cal. Code Regs., title 23, § 769, subd. (a)(4))

As explained in detail in the Memorandum of Points and Authorities attached hereto, the Order is inappropriate and improper because:

- It is contrary to law.
 - It violates Article X, Section 2 of the California Constitution (Water Code § 275), which prohibits the unreasonable use of water.
 - It violates the public trust doctrine.
 - It is not supported by substantial evidence.
 - It fails to provide a reasoned explanation of its decisions based on evidence in the record.
 - It violates Water Rights Order 90-05.
 - It violates the California Endangered Species Act by permitting and causing take without an incidental take permit.
 - It violates the July 17, 2020 Settlement Agreement between CSPA et al. and the State Water Board that resolved CSPA et al.'s lawsuit relating to drought issues in 2014 and 2015, including Water Rights Order 90-05.
- It will have unreasonable effects on fish and wildlife, including, non-exclusively, Sacramento River winter-run Chinook salmon, Sacramento River fall-run Chinook salmon, Trinity River and lower Klamath River spring-run Chinook salmon, and Trinity River and lower Klamath River fall-run Chinook salmon.
- It does not best serve the public interest.

⁴ [Transmittal of the FINAL Temperature Management Plan submitted by U.S. Bureau of Reclamation to the State Water Board](#) (May 28, 2021)

5. The specific action which petitioner requests. (Cal. Code Regs., title 23, § 769, subd. (a)(5))

CSPA requests that the State Water Board require DWR and Reclamation to manage the SWP and CVP in the remainder of 2021 to protect winter-run Chinook salmon and fall-run Chinook salmon in the Sacramento River. CSPA et al. requests that the State Water Board reconsider and rescind the Approval of the Sacramento TMP. CSPA et al. also requests that the State Water Board order DWR and Reclamation to limit irrigation deliveries in the remainder of 2021 to those levels that the underlying water rights of Sacramento River Settlement Contractors, Sacramento River Exchange Contractors, and Feather River Settlement Contractors would otherwise support. CSPA et al. requests that the State Water Board require DWR and Reclamation to manage the SWP and CVP in the remainder of 2021 to protect winter-run Chinook salmon and fall-run Chinook salmon in the Sacramento River. CSPA et al. requests that the State Water Board require Reclamation to manage the CVP in the remainder of 2021 to protect winter-run Chinook salmon and fall-run Chinook salmon in the Sacramento River. CSPA et al. requests that the State Water Board require DWR and Reclamation to manage the SWP and CVP in the remainder of 2021 to meet Decision 1641 standards in the Delta. CSPA et al. also requests that the State Water Board order DWR and Reclamation to limit irrigation deliveries in the remainder of 2021 to prioritize carryover storage in SWP and CVP reservoirs over irrigation deliveries in the remainder of 2021. In particular, the State Water Board should disallow water transfers of water stored in SWP and CVP reservoirs for the remainder of 2021, and should limit Delta exports by the SWP and CVP to amounts the State Water Board independently determines to be needed for health and safety reasons.

6. A statement that copies of the petition and any accompanying materials have been sent to all interested parties. (Cal. Code Regs., title 23, § 769, subd. (a)(5))

Electronic copies of this Petition, and all materials submitted with this Petition, have been sent to the following:

Mr. Patrick Pulupa
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patrick.pulupa@waterboards.ca.gov

Regional Solicitor's Office, c/o Amy Aufdemberge: Amy.Aufdemberge@sol.doi.gov

Bureau of Reclamation, c/o Kristin White: knwhite@usbr.gov

Department of Water Resources, c/o James Mizell: James.Mizell@water.ca.gov

7. Summary of the manner in which the petitioners participated in the process leading up to the Approval (not required).

We incorporate by reference the following documents that are in the record for the State Water Board's process leading to the adoption of the Reclamation TMP:

A. On March 12, 2021, CSPA joined in a letter sent from NRDC et al. to the State Water Board requesting immediate enforcement of Water Rights Order 90-05.⁵

B. On March 14, 2021, CSPA, CWIN and AquAlliance sent a letter to the State Water Board requesting immediate enforcement of Water Rights Order 90-05.⁶

⁵ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/wro90/2021-03-12_ngo_letter_to_swrcb_re_90-5_and_tucps.pdf

⁶ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/wro90/2021-03-14_cspa_et_al_request_swrcb.pdf

- C. On April 14, 2021, CSPA and CWIN sent a letter to the State Water Board commenting on Sacramento River water temperature management.⁷
- D. On April 17, 2021, CSPA made a presentation and Save California Salmon made oral comments to the State Water Board at a workshop on Sacramento River water temperature management in 2021.⁸
- E. On April 25, 2021, CSPA and CWIN sent a letter to the State Water Board requesting immediate enforcement of D-1641 Vernalis pulse flows.⁹
- F. On May 23, 2021, CSPA et al. submitted to the State Water Board an Alternative Temperature Management Plan for the Shasta-Trinity Division of the CVP and supporting documents.¹⁰
- G. On June 4, 2021, CSPA joined a letter submitted by the Natural Resources Defense Council (NRDC) entitled “Objection to, Protest of, and Request for Reconsideration of State Water Resources Control Board’s Approval of Shasta Temperature Management Plan under Water Rights Order 90-5.”¹¹

⁷ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/wro90/2021-04-15_cspa_et_al_comments_on_2021_sac_riv_temp_mgmt.pdf

⁸ The presentation is available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/wro90/2021-04-21_item_10_cspa_jennings_cannon_st_bd_wkshop_april2021.pdf

⁹ Available at: <https://calsport.org/news/wp-content/uploads/CSPA-et-al-ltr-to-Esquivel-re-2021-New-Melones-Ops.042521.pdf>

¹⁰ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/cspa_et_al_cvr_ltr_esquivel_re_proposed_cspa_tmp_2021_052321.pdf;

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/cspa_tmp_052321.pdf;

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/cspa_tmp_spreadsheet_052321.pdf;

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/cspa_tmp_spreadsheet_052321.xlsx

¹¹ Available at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/NRDCprotest.pdf

- H. On June 4, 2021, CSPA, CWIN, and AquAlliance submitted to the State Water Board an Objection to the Temporary Urgency Change Petition (TUCP) of DWR and Reclamation for “Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions.” This objection included additional analysis of the impacts of proposed Sacramento River temperature management. A copy of the CSPA and CWIN’s June 4, 2021 Objection to the TUCP is attached to this petition as Attachment C.
- I. On June 29, CSPA, CWIN, and AquAlliance submitted to the State Water Board a petition for reconsideration of the “Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions.”
- J. On July 8, 2021, CSPA joined in NRDC et al.’s petition for reconsideration of the State Water Board’s Approval of Reclamation’s Sacramento River TMP.¹²

Conclusion

For the reasons set forth above and in the Objection submitted hereto as Attachment A, CSPA et al. requests that the State Water Resources Control Board grant reconsideration of the Executive Director’s June 10, 2021 Approval of the Final Sacramento River Temperature Management Plan for Water Year 2021, rescind the Approval, and require Reclamation (and, as appropriate, DWR) to implement forthwith the measures requested above.

¹² NRDC et al, Notice of Petition for Reconsideration of the State Water Resources Control Board’s June 10, 2021 Approval of the Shasta Temperature Management Plan (Jul. 8, 2021), available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/nrdc_petition_for_reconsideration.pdf

Dated: July 12, 2021

Respectfully submitted,



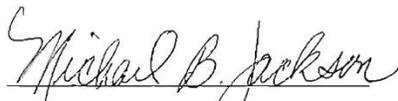
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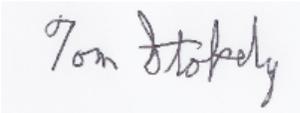
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

A petition for reconsideration must state “the reason the action was inappropriate or improper.” (Cal. Code Regs., title 23, § 769, subd. (a)(4). As described below, the State Water Board’s June 10, 2021 Approval of the Bureau of Reclamation’s Final Sacramento River Temperature Management Plan (Approval) is inappropriate and improper because:

- It is contrary to law.
 - It violates Article X, Section 2 of the California Constitution (Water Code § 275), which prohibits the unreasonable use of water.
 - It violates the public trust doctrine.
 - It is not supported by substantial evidence.
 - It fails to provide a reasoned explanation of its decisions based on evidence in the record.
 - It violates Water Rights Order 90-05.
 - It violates the California Endangered Species Act by permitting and causing take without an incidental take permit.
 - It violates the July 17, 2020 Settlement Agreement between CSPA et al. and the State Water Board that resolved CSPA et al.’s lawsuit relating to drought issues in 2014 and 2015, including Water Rights Order 90-05.¹³
- It will have unreasonable effects on fish and wildlife, including, non-exclusively, Sacramento River winter-run Chinook salmon, Sacramento River fall-run Chinook salmon, Trinity River and lower Klamath River spring-run Chinook salmon, and Trinity River and lower Klamath River fall-run Chinook salmon.
- It does not best serve the public interest.

II. The State Water Board’s Approval of the Sacramento River Temperature Management Plan for Water Year 2021 is contrary to law.

A. The Approval allows the unreasonable use of water.

Article X, Section 2 of the California Constitution (Water Code § 275) prohibits the unreasonable use of water, and requires the State Water Board to “take all appropriate

¹³ State Water Board and CSPA et al., Settlement Agreement and Release of Claims, *California Sportfishing Protection Alliance, et al. v. California State Water Resources Control Board and Thomas Howard*, (Case Number RG15780498) (Jul. 17, 2021). Available at: <https://CSPA-v.-SWRCB-Settlement-Agreement-Fully-Executed.pdf>. Attached hereto as Attachment B.

proceedings” to prevent such use. Water Rights Order 90-05 has as a stated purpose compliance with the reasonable use doctrine: “This proceeding is also an action to enforce the requirements of Cal. Const. Art. X, Section 2, Water Code Section 275”¹⁴

The Approval improperly delegates to the Bureau of Reclamation the determination of “actions within its reasonable control.” Reclamation has made it clear in repeated letters and statements before the Board that it is Reclamation’s view that it does not have discretion to reduce deliveries to Sacramento River Settlement Contractors. The State Water Board is fully aware of this position. For example, in a July 2, 2020 letter from State Water Board Executive Director Eileen Sobeck to Ernest A. Conant, Mid-Pacific Regional Director Re: Order 90-05 Sacramento River Temperature Management, Ms. Sobeck stated:

Reclamation has declined to evaluate additional operational scenarios. Reclamation’s position is that scenarios with different operational assumptions would be inconsistent with its contractual obligations, and are therefore beyond Reclamation’s reasonable control. The State Water Board disagrees. To the extent that Reclamation delivers water under its own water rights, Reclamation’s obligation to deliver water to its contractors does not take precedence over its permit obligations.¹⁵

The above-cited and linked March 14, 2021 letter from CSPA and others to Chair Esquivel (“Request Immediate Enforcement of Water Rights Order 90-05 and Bay-Delta Water Quality Standards”) quoted this same passage. It implored the State Water Board to take to evaluate different scenarios that would limit deliveries to Sacramento River Settlement Contractors in 2021 in order to allow compliance with Water Rights Order 90-05 and Bay-Delta water quality standards. An April 15, 2021 follow-up letter from CSPA and CWIN to Chair Esquivel (also cited and linked above) explicitly called out the legal precedence of reasonable

¹⁴ Water Rights Order 90-05, p. 2.

¹⁵ SWRCB Executive Director Eileen Sobeck to Ernest A. Conant, Mid-Pacific Regional Director Re: Order 90-05 Sacramento River Temperature Management, July 2, 2020. https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/7-02-20_signed_es_sac_temp_response_6-22_usbr_ltr_final.pdf

use over the rule of priority, thus disputing claims by attorneys for the Sacramento River Settlement Contractors in a March 30, 2021 letter to Chair Esquivel purporting to explain why the State Water Board could not order reduction of deliveries to those contractors. Yet despite these arguments and similar made by the objection to the Reclamation TMP of NRDC et al. (also cited and linked above), the Approval defers to Reclamation the responsibility for determining which factors are within Reclamation’s “reasonable control.” This is also in spite of the fact that the State Water Board and its Executive Director were fully aware that Reclamation has consistently taken the position that it will not reduce deliveries to Sacramento River Settlement Contractors.

The Approval is therefore unlawful because, knowingly, it inappropriately and improperly defers to Reclamation the State Water Board’s responsibility to “take all appropriate proceedings” to prevent unreasonable use of water. The Approval is also arbitrary and capricious in that it offers no explanation for why it makes this deferral or why the State Water Board has determined that Reclamation’s view of what is reasonable is appropriate and correct.

B. The Approval violates the Public Trust Doctrine and causes unreasonable effects to fish and wildlife.

1. The Approval does not conduct a Public Trust Doctrine analysis.

An adequate Public Trust Doctrine analysis must differentiate between resources protected by the Public Trust Doctrine—fisheries, navigation, waterborne commerce, recreation, and ecological preservation—and beneficial uses that are *not* protected by the common law Public Trust Doctrine, including agriculture, municipal, industrial, and general commercial supply. (*See, Audubon* at 446-447; *San Francisco Baykeeper v. State Lands Commission*, (2015) 242 Cal.App.4th 202, 237-238.). The Approval does not discuss how it found that the cited

minimum likely mortality of winter-run Chinook (50%, in the best case scenario) was an acceptable value, or how the State Water Board considered the relative value of that mortality against irrigation deliveries, primarily to Sacramento River Settlement Contractor rice farmers.

Public trust law also requires agencies “to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible,” and to “avoid or minimize any harm to those interests.” that public trust resources be protected to the extent feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446-447). The Approval makes no findings as to feasibility of improved public trust resource protection. In fact, the Approval does not mention the term “public trust” at all. Rather, it simply chooses among extremely limited choices presented to the State Water Board by Reclamation. The Board’s total absence of Public Trust Doctrine evaluation process is a procedural failing with irreparable adverse effects.

All of the choices for Sacramento River temperature management in 2021 that the State Water Board evaluated assume that Reclamation will fulfill its contracts with the Sacramento River Settlement Contractors unless those contractors voluntarily forgo some of their allocations. The Approval does not make a finding that the State Water Board lacks authority to require reduced deliveries to those contractors. Despite earlier statements from the Executive Director cited above that Reclamation must fulfill the requirements of its water rights permits notwithstanding its contract obligations, the Approval does not discuss or consider imposing such requirements.

Section 5937 of the California Fish and Game Code is a statutory of the public trust doctrine. The Approval does not mention it. Fish and Game Code section 5937 states that “[t]he owner of any dam shall allow sufficient water at all times to pass . . . around, or through the dam

to keep in good condition any fish . . . below the dam,” and the Court has interpreted 5937 to be “a legislative expression of the public trust protecting fish as trust resources when found below dams.” (*Cal. Trout v. State Water Res. Control Bd.*, (1989) 207 Cal.App.3d 585, 626 [*“Cal Trout I”*].) “The Legislature, not the Water Board, is the superior voice in the articulation of public policy concerning the reasonableness of water allocation”; where the Legislature has adopted a specific rule governing the public trust in Fish and Game Code 5937, “the Water Board has no authority to disregard it.” (*Id.* at 631.) Here, “the Legislature has already balanced the competing claims for water . . . and determined to give priority to the preservation of their fisheries.” (*NRDC v. Patterson*, (*E.D. Cal. 2004*) 333 *F.Supp.2d* 906, 918, citing *Cal Trout v. Super. Ct.*, (1990) 218 *Cal.App.3d* 187, 201 [*“Cal Trout II”*].)

Section 5937 requires that dam operators keep fish downstream of their dams in “good condition.” 50% mortality of an endangered species is not keeping fish downstream of a dam in good condition. If recent trends continue and mortality of winter-run Chinook approaches 100% in 2021, there is no plausible argument that such fish would be in good condition.¹⁶

The Approval implements none of the procedural protections mandated by the Public Trust Doctrine, and should be immediately set aside.

- 2. The Approval does not evaluate and causes unreasonable effects to fish in addition to winter-run Chinook, including Sacramento River fall-run Chinook and re-directed impacts to other runs of salmon in the Trinity River, the Feather River, the American River, and the Sacramento – San Joaquin Delta.**

The Approval does not mention the effect of Reclamation’s TMP on species other than Sacramento River winter-run Chinook salmon, other than to note that conditions for fall-run

¹⁶ See NRDC et al. petition for reconsideration, Exhibit B, in which the California Department of Fish and Wildlife predicts 2021 mortality of winter-run Chinook salmon at close to 100%. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/nrdc_p4c_exhibit_b.xlsx

Chinook salmon in the Sacramento River are “concerning.” Yet the excessive allocation of water to Sacramento River Settlement Contractors has cascading impacts on fisheries throughout the Central Valley, the Trinity River, and potentially the lower Klamath River.

Under its TMP, Reclamation plans to draw Trinity Reservoir down to approximately 600,000 acre-feet by the end of September.¹⁷ That drawdown will have negative thermal impacts to Trinity River spring-run and fall-run Chinook in 2021. The lower Klamath River is also in severe danger of widespread adult mortality due to high temperatures and low flows. The lack of storage in Trinity Reservoir will make it difficult or impossible to mitigate lower Klamath River mortality events with storage releases from Trinity Reservoir. If 2022 is also dry, the lack of storage in Trinity Reservoir is likely to be catastrophic.

Oroville Reservoir on the Feather River and Folsom Reservoir on the American River are forecast to be at historic lows in the fall of 2021. Salmon and steelhead downstream of these dams are severely threatened by high water temperatures and lack of flow. Yet water must be released from these reservoirs to meet Delta flow and salinity requirements, while the Reclamation TMP includes plans for deliveries of 1.2 million acre-feet of water released from Shasta Reservoir is delivered to by Sacramento River Settlement Contractors. The Approval, however, does not mention the effects of the redirected impacts of these excessive deliveries on the fisheries in the Feather and American rivers.

As discussed in CSPA et al.’s Objection to Reclamation and DWR’s Temporary Urgency Change Petition (the Objection is cited above and attached hereto as Attachment C), the Order granting the TUCP will have unreasonable adverse effects on Delta fisheries and the Delta ecosystem. The purported purpose of the Order granting the TUCP is to increase storage in

¹⁷ For discussion, *see* CSPA’s Alternative TMP.

Shasta Reservoir by between 60,000 and 120,000 acre-feet.¹⁸ Yet the amount of water thus “saved” is a drop in the bucket compared to the approximately 1.2 million acre-feet of water Reclamation will deliver to the Sacramento River Settlement Contractors under the Reclamation TMP. The failure of the State Water Board to force reduced deliveries to the Sacramento River Settlement Contractors under the Reclamation TMP thus has unreasonable effects on Delta fisheries and the Delta ecosystem.

C. The Approval is not supported by substantial evidence and fails to provide a reasoned explanation of its decisions based on evidence in the record.

The requirement that agency decisions be supported by substantial evidence requires both that the evidence relied on be credible and that it be weighed against other competing credible evidence. An agency cannot simply rely on part of the record while ignoring other parts of the record that offer opposing evidence.

In addition, in issuing a decision, an agency must "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community vs. County of Los Angeles* (1974) 11 Cal.3d 506, 515).

The Approval, however, makes no effort whatsoever to independently evaluate competing evidence, most notably CSPA’s Alternative Temperature Management Plan (TMP) submitted to the State Water Board on May 23, 2021. Rather, the Approval directs Reclamation, after the fact, to perform such evaluation: “Reclamation shall submit a report of those

¹⁸ Executive Director, State Water Board, In the Matter of Specified License and Permits of the Department of Water Resources and U.S. Bureau of Reclamation for the State Water Project and Central Valley Project: Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (Jun 1, 2021), p. 27. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2021/20210601_sw_b_tuco.pdf

evaluations, including evaluation of proposals that have been submitted by stakeholders, by June 21, 2021.”¹⁹ Reclamation answered: “As a general response, this proposal removes over 500 TAF from the Sacramento-San Joaquin system during the critical summer season. While the required deadline for this letter did not allow for specific modeling of this proposal, responses based on Reclamation’s experience within the system are explained below.” Predictably, Reclamation dismissed CSPA’s Alternative TMP simply by concluding: “Reclamation has taken all reasonable actions within its authority to maximize the water available for temperature management.”²⁰ Reclamation made this assertion despite the fact that a central feature of CSPA’s Alternative TMP was requiring Reclamation to reduce deliveries to Sacramento River Settlement Contractors, which Reclamation continued to refuse to do.

In its Settlement Agreement with CSPA et al. (July 2020) resolving a lawsuit stemming from the 2014-2015 drought, the State Water Board made the following commitment:

The State Water Board will employ staff, with modeling and other relevant expertise, to evaluate the U.S. Bureau of Reclamation’s compliance with Order WR 90-05 temperature management requirements, including whether different water supply delivery alternatives may achieve temperature compliance at temperature compliance points Red Bluff Diversion Dam, Bend Bridge, Jelly’s Ferry, Clear Creek, and Keswick Dam. During years when temperature management may be a concern, the State Water Board will work with Reclamation, the fisheries agencies, and others as appropriate to evaluate, with hydrologic and temperature modeling and other available tools, a range of possible operational assumptions for temperature management, including options for conserving cold water through reduced water supply deliveries to Reclamation contractors (including exchange and settlement contractors) under Reclamation’s water rights permits.²¹

Having been rebuffed by Reclamation in conducting such analysis, the State Water Board did no independent modeling or other analysis that would meet these requirements. It did no

¹⁹ Approval, p. 4.

²⁰ Letter from Kristin White, Reclamation, to Erik Ekdahl, State Water Board, re: “Evaluation of Alternatives to the Shasta Reservoir Final Temperature Management Plan” (Jun. 21, 2021), p. 2, 3. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/ltr_eval_a_lts_to_the_shasta_tmp.pdf

²¹ State Water Board and CSPA et al., Settlement Agreement, *op cit.*, p. 2

independent modeling of CSPA's Alternative TMP, an obvious practical expression of a proposed suite of operations for conserving cold water through reduced water supply deliveries. Thus, nowhere did the State Water Board or others evaluate scenarios that contemplated alternative water supply alternatives to achieve temperature compliance at Clear Creek or Keswick Dam. In this regard, the State Water Board doubly failed: it failed to support its Approval with substantial evidence, and it failed to fulfill its agreement under the settlement with CSPA et al.

Nor did the State Water Board consider, in the Approval or otherwise, the relative value of maintaining 500,000 acre-feet more in storage under CSPA's Alternative TMP as compared to Reclamation's proposed operations. The Approval in fact does not consider the effects of the Reclamation TMP on reservoirs other than Shasta at all. Rather, the approval accepts Reclamation's limited focus on Shasta operations, and is silent on the potential impacts of elevated temperatures and high drawdown of storage in the Trinity watershed and other CVP and SWP watersheds. The Approval does not state any rationale, let alone quantification, for how it weighed release of Trinity water in 2021 against preserving water in storage for 2022.

Reclamation's Final TMP describes plans for Sacramento River Settlement Contractors to transfer 170,000 acre-feet of water.²² The Approval is silent on this issue as well, regardless of the fact that water for transfer is surplus to local needs and represents an acre-foot for acre-foot reduction in carryover storage for water year 2022.

Because the Approval failed to consider or evaluate alternative operations including reduced deliveries to Sacramento River Settlement Contractors or transfers by those contractors, it fails to provide a reasoned basis for its decision and is not supported by substantial evidence.

²² Reclamation TMP, p. 3.

D. The Approval violates Water Rights Order 90-05.

The Central Valley Basin Plan, adopted by the Central Valley Regional Water Quality Control Board, includes temperature criteria to protect salmon spawning habitat. The Plan states that “[t]emperature changes *due to controllable* factors shall” not be elevated above 56°F in the reach of the Sacramento River from Keswick Dam to Hamilton City, nor above 68°F in the reach from Hamilton City to the I Street Bridge, during periods when such temperature increases will be detrimental to the fishery. (Central Valley Basin Plan at III-8.000 [emphasis added].)

In 1990, the Board adopted Water Rights Order 90-05 to enforce Sacramento River Temperature requirements for fisheries. Order 90-05 explains that “the Bureau must plan its releases so that it does not run out of cool water late in the season. It must also plan its releases so that it will meet other applicable permit or license terms and conditions.” (at 18-19.) An August 31, 2020 letter from the State Water Board’s Executive Director to Reclamation aptly summarized the requirements of Order 90-05, and provided a protocol for their attainment. However, Reclamation did not follow the stated requirements leading up to the Approval.²³ The Board’s letter explained:

Order WR 90-5 requires Reclamation to operate Keswick Dam, Shasta Dam, and the Spring Creek Power Plant to meet a daily average water temperature of 56 degrees Fahrenheit (F) on the Sacramento River at Red Bluff Diversion Dam (RBDD) during periods when higher temperatures will be detrimental to fish. If there are factors beyond Reclamation’s reasonable control that prevent Reclamation from meeting 56 degrees F at RBDD, Reclamation in consultation with staff from the State Water Board, fisheries agencies (NMFS, United States Fish and Wildlife Service, and California Department of Fish and Wildlife), and the Western Area Power Administration, may develop a plan

²³ Letter from Eileen Sobek, State Water Board, to Kristin White, Reclamation, re: Order 90-5 Sacramento River Temperature Management, pp. 3-5. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2020/8-31-20_signed_es_sac_temp_order_90-5_protocol_request.pdf

(Temperature Management Plan or TMP) and propose that the compliance point be moved upstream. ...

To inform in-season temperature management pursuant to Order 90-5 starting this year, the following elements are requested to be included in the protocol:

1. An initial report at the beginning of the water year (by October 15 each year) to facilitate planning for possible dry year conditions. This report should specifically include:
 - a. An assessment of storage conditions in Shasta and Trinity Reservoirs and how those storage conditions may affect temperature management the coming season;
 - b. An assessment of operational alternatives (including any prospective water transfers) to manage storage through the fall and early winter to provide for cold water pool protection during the following summer and fall;
 - c. Measures to avoid significant flow fluctuations and other possible impacts to fall-run Chinook salmon;
 - d. An assessment of winter precipitation forecasts.

2. Development of a TMP each year that describes actions to be undertaken that year to reasonably protect winter-run Chinook salmon, as well as spring-run and fall-run Chinook salmon and other native species, including the following:
 - a. An initial draft TMP provided two weeks prior to initial water supply allocations in February. The State Water Board understands that hydrologic conditions will continue to evolve and that planning for Sacramento River temperature management will also need to evolve. Accordingly, the initial plan should identify how Reclamation will retain adequate flexibility in its operations and water supply allocations to allow for changes that may be needed later in the season for temperature management pursuant to Order 90-5 as the hydrology changes and becomes more certain over time. ...

 - c. ... The draft and final TMPs should:
 - i. Evaluate a range of reservoir releases and associated water supply deliveries under Reclamation's water right permits to Central Valley Project (CVP) contractors for improving temperature management, including but not limited to operational scenarios that assume lower releases from Shasta Reservoir during the spring and summer and possible changes in the timing or quantity of CVP deliveries to service, settlement, and exchange contractors in order to conserve cold water resources in Shasta Reservoir and control temperature in the Sacramento River throughout the temperature control season without redistributing impacts to Folsom or Oroville reservoirs or causing water quality or flow violations in the Sacramento-San Joaquin Delta Estuary.

 - ii. Evaluate possible changes to hydropower operations to improve temperature conditions, including power bypasses and adjustments to hydropower peaking operations;

- iii. Evaluate possible changes to the timing or volume of Trinity River imports that do not adversely affect fish and wildlife on the Trinity River;
- iv. Coordinate with water supply contractors on evaluation of trade-offs related to improvements in temperature management, including possible reductions in water supplies for agricultural, municipal, and refuge uses;
- v. Evaluate the feasibility of meeting temperature compliance under Order 90-5 under the scenarios identified above at different compliance points (including RBDD, Bend Bridge, Jelly's Ferry, Ball's Ferry, Clear Creek, and Keswick Dam) for all or part of the temperature management season;

Virtually none of these measures ever happened. Reclamation's draft and final TMPs were not based on early-season planning, which is essential to safely account for the regular possibility of dry years. The draft and final TMP did not evaluate effects to any species other than winter-run Chinook salmon, contrary to Water Rights Order 90-05. The draft and final Reclamation TMP failed to evaluate a range of reservoir releases that included reduced deliveries to Reclamation's settlement and exchange contractors, and failed to evaluate the feasibility of compliance at more protective Sacramento River compliance points throughout the season. Reclamation did not evaluate alternative operation of Trinity Reservoir or of hydropower peaking operations. Yet despite the fact that Reclamation violated virtually every element of the State Water Board's stated protocols, the Executive Director approved the Reclamation TMP. The Approval of the Reclamation TMP was contrary to law, and must be set aside.

E. The Approval violates the California Endangered Species Act.

Approval of the Reclamation TMP will cause take of species listed under the California Endangered Species Act (CESA) (Fish & Game Code, § 2050 et seq.). Indeed, the Reclamation TMP anticipates a minimum of 50% mortality of winter-run Chinook salmon.

Watershed Enforcers, A Project of the California Sportfishing Protection Alliance v. San Luis & Delta-Mendota Water Authority et al., Case no. A117750 (2010), affirmed that state agencies are subject to CESA. The Court found at 10:

[S]tatutory language emphasizes CESA’s application to public agencies. Section 2053 declares it is the policy of this state that “state agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species . . . if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy. . . .” Section 2055 declares it is the policy of this state that all state agencies “shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of” CESA.

The Court also affirmed at 11 that the meaning of “take” under CESA is broad and applies to otherwise legal activities:

The court ruled the statutory definition of “take” (§ 86) was broad and included killing by any means; the definition contained no limitation to hunting- and fishing-related activities. (Anderson-Cottonwood, supra, 8 Cal.App.4th at pp. 1562–1563.) The court held such a limited interpretation would “lead to absurd results in light of the clear policy statement of legislative purpose. [Citation.]” (Id. at p. 1563.) The court relied on the legislative policy in sections 2051 and 2052. (8 Cal.App.4th at p. 1563.) “Thus, CESA makes clear that its intent is to protect fish, not punish fishermen. It is inconceivable that a statutory scheme, the purpose of which is to protect natural resources, should be construed to allow the wholesale killing of endangered species simply because the mode of death does not involve hunting or fishing.” (Id. at pp. 1563–1564.) Thus, section 2080 “prohibits the killing of endangered species in the course of lawful activity.” (8 Cal.App.4th at p. 1564.)

Finally, the Court at 13-14 found that state agencies could be held liable for take:

We thus conclude that, given the context and policies of CESA, including the policy of species preservation made expressly applicable to state agencies, as well as the statutory language expressly referring to state agencies, that a state agency is a “person” within the meaning of section 2080. Additionally, interpreting section 2080 to exclude state agencies would lead to the unreasonable result that major actors, whose operations result in the taking of endangered and threatened species, would be exempt from the general take prohibition.

Because the Approval is will cause take of CESA-listed species and is not covered by a take permit, it is unlawful and must be overturned.

III. The Approval is not in the public interest.

The State Water Board had a chance in 2020 and 2021 to set the State of California in a new direction in preparing for and managing drought. However, the Approval picks up the bloody thread of the State Water Board's failed response to drought in 2014 and 2015, reacting instead of being proactive, failing to enforce its policies and legal mandates, and failing to hold Reclamation and DWR accountable for over-delivering water in 2020 and in the first half of 2021.²⁴ None of this is in the public interest.

As CSPA told the State Water Board at its April 21 workshop on Sacramento River temperature management, droughts are predictable. They are likely to become more severe under a changing climate, and will probably be more frequent. The public interest requires that the State Water Board plan for droughts and require water users to manage water to meet competing needs in sequences of dry years. It also requires the State Water Board to require flows in the wetter water years that are adequate to allow the recovery of fisheries and other aspects of the aquatic ecosystem at a level that will sustain them through the bad years.

The overallocation of the State's water resources is inherently an unreasonable use of water. It cannot be in the public interest. The Approval on June 10 perpetuates that overallocation by treating drought as anomalous and treating it once again as a one-off, not as a symptom of the need for Reclamation and DWR to systemically change the way they do business.

It is not in the public interest to push a new species to the brink of extinction with every new drought sequence, but that is exactly what the approval does. In 2014 and 2015 it was Delta

²⁴ See Exhibit 1 to this petition, "Hydrological Figures from the Sacramento River, Storage Releases and Diversions, April-July, 2014, 2015, 2021."

smelt, with winter-run Chinook also pushed halfway into the grave. In 2021, winter-run Chinook, and perhaps spring-run Chinook in the Trinity River, are being moved to death row. A dry 2022 will place California's fisheries and its people in uncharted territory.

It is never in the public interest for a regulator to pale before its responsibilities. Not only has the State Water Board allowed Reclamation to release and deliver too much water, first in 2020 and now in 2021, but Reclamation appears on a trajectory to release even more water than its TMP stated it would.

The public interest demands a State Water Board that follows the law and enforces the law. The State Water Board must start by rescinding the Reclamation TMP and implementing the measures requested above.

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of Sacramento River Temperature Management Plan for Water Year 2021

**PETITION FOR RECONSIDERATION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
CALIFORNIA WATER IMPACT NETWORK,
SAVE CALIFORNIA SALMON, AND AQUALLIANCE
OF THE STATE WATER RESOURCES CONTROL BOARD'S
JUNE 10, 2021 APPROVAL OF THE
SACRAMENTO RIVER TEMPERATURE MANAGEMENT PLAN
FOR WATER YEAR 2021**

Attachment A

Declaration of Chris Shutes

DECLARATION OF CHRIS SHUTES

Pursuant to section 769 of title 23 of the California Code of Regulations, I declare under penalty of perjury under the laws of the State of California that the new facts and evidence cited in this petition that were not previously presented to the State Water Resources Control Board in NRDC et al.'s June 4, 2021 protest and objections (joined by CSPA) and in other emails and written communications to the State Water Board constitutes information that postdates the Executive Director's Approval of the Sacramento River Temperature Management Plan on June 10, 2021:

- Letter from Kristin White, Reclamation, to Erik Ekdahl, State Water Board, re: "Evaluation of Alternatives to the Shasta Reservoir Final Temperature Management Plan" (Jun. 21, 2021).
- NRDC et al, Notice of Petition for Reconsideration of the State Water Resources Control Board's June 10, 2021 Approval of the Shasta Temperature Management Plan, including Exhibit B (Jul. 8, 2021).
- Exhibit 1 to this petition, "Hydrological Figures from the Sacramento River, Storage Releases and Diversions, April-July, 2014, 2015, 2021," which shows graphs compiled by CSPA fisheries consultant Tom Cannon of hydrological data on the Sacramento River through July 12, 2021, with data From SasPAS: Central Valley Prediction & Assessment of Salmon, the University of Washington website that is under contract to USBR: <http://www.cbr.washington.edu/sacramento/> and from the California Data Exchange Center: <https://cdec.water.ca.gov/river/rivcond.html>

This information and data could not have been produced with reasonable diligence by Petitioners because it was not yet in existence at the time of the Executive Director's June 10, 2021 approval of the Sacramento River Temperature Management Plan.

Date: July 12, 2021



Chris Shutes

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of Sacramento River Temperature Management Plan for Water Year 2021

**PETITION FOR RECONSIDERATION OF
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JUNE 10, 2021 APPROVAL OF THE
SACRAMENTO RIVER TEMPERATURE MANAGEMENT PLAN
FOR WATER YEAR 2021**

Attachment B

**Settlement Agreement
*California Sportfishing Protection Alliance, et al. v.
California State Water Resources Control Board and Thomas Howard*
Case No. RG15780498
July 16-17, 2020**

(Submitted as separate pdf file.)

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of Sacramento River Temperature Management Plan for Water Year 2021

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JUNE 10, 2021 APPROVAL OF THE
SACRAMENTO RIVER TEMPERATURE MANAGEMENT PLAN
FOR WATER YEAR 2021**

Attachment C

**Objection of CSPA and CWIN to the
Temporary Urgency Change Petition (TUCP) of the
Department of Water Resources and the Bureau of Reclamation for
“Changes to License and Permit Terms and Conditions Requiring Compliance with Delta
Water Quality Objectives in Response to Drought Conditions.”
June 4, 2021**

(Submitted as separate pdf file.)

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of Sacramento River Temperature Management Plan for Water Year 2021

**PETITION FOR RECONSIDERATION OF
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE,
CALIFORNIA WATER IMPACT NETWORK,
SAVE CALIFORNIA SALMON, AND AQUALLIANCE
OF THE STATE WATER RESOURCES CONTROL BOARD'S
JUNE 10, 2021 APPROVAL OF THE
SACRAMENTO RIVER TEMPERATURE MANAGEMENT PLAN
FOR WATER YEAR 2021**

Exhibit 1

Hydrological Figures from the Sacramento River

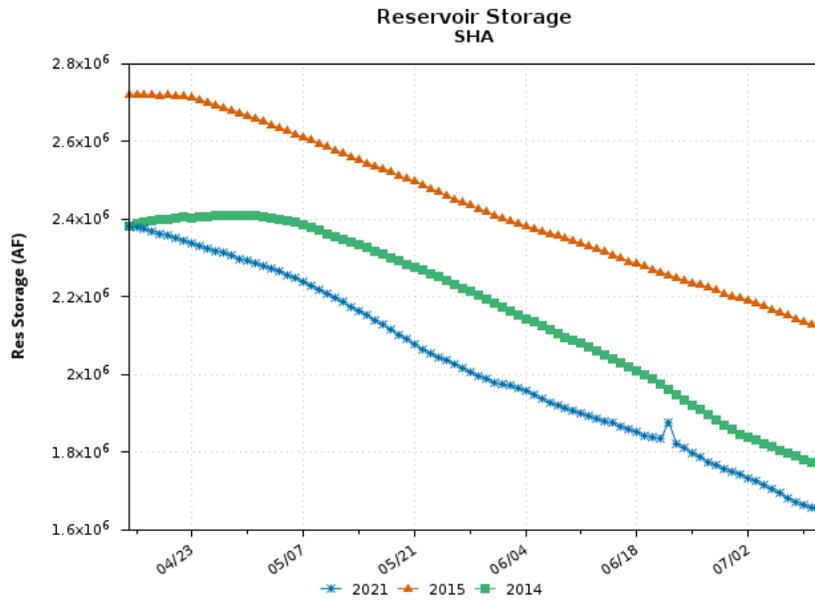
Storage Releases and Diversions

April-July

2014, 2015, 2021

Prepared by CSPA Fisheries Consultant Tom Cannon

Shasta Reservoir storage in 2021 has been consistently lower than the critically drought years of 2014 and 2015 when winter run Chinook salmon suffered almost total mortality.



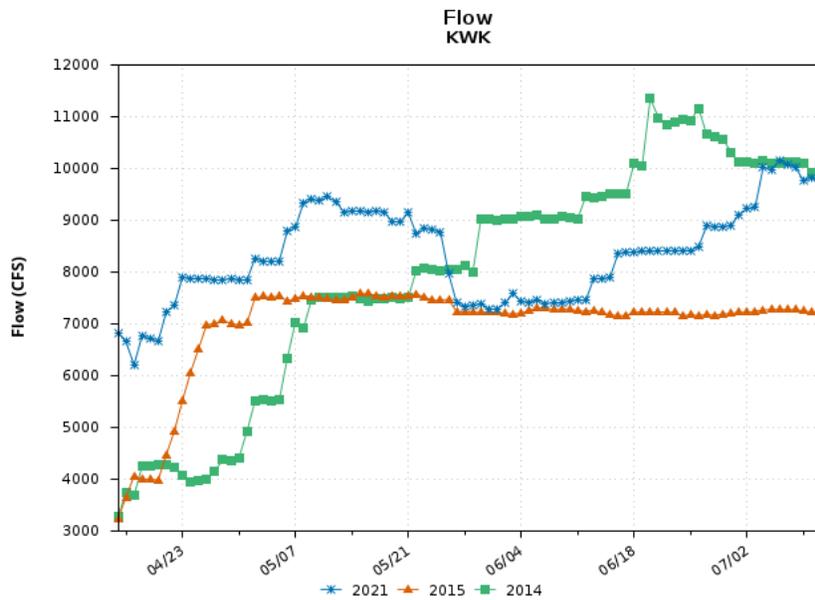
www.cbr.washington.edu/sacramento/

12 Jul 2021 01:04:51 PDT

From SasPAS: Central Valley Prediction & Assessment of Salmon, the University of Washington website that is under contract to USBR.

<http://www.cbr.washington.edu/sacramento/>

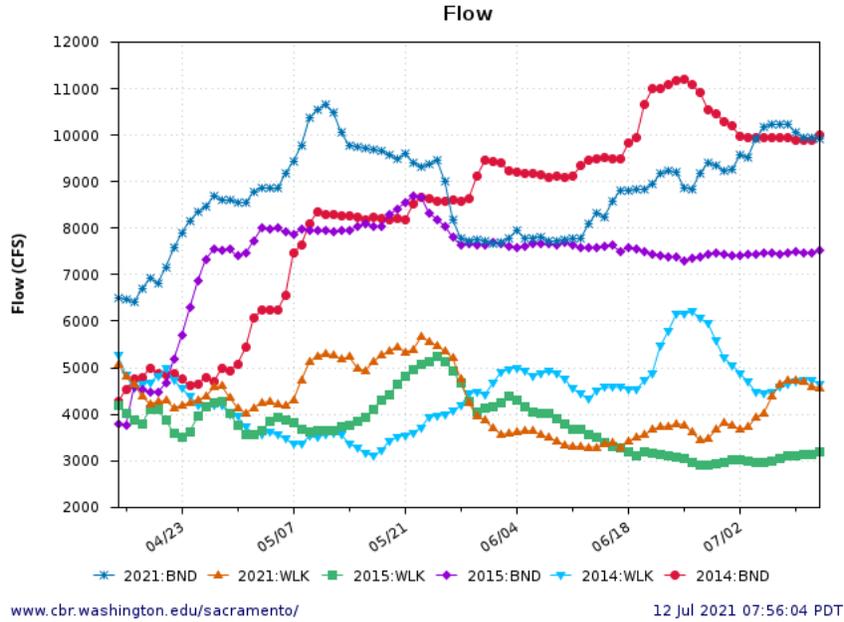
However Keswick Reservoir Releases in 2021 have been greater than water releases in 2014 and 2015.



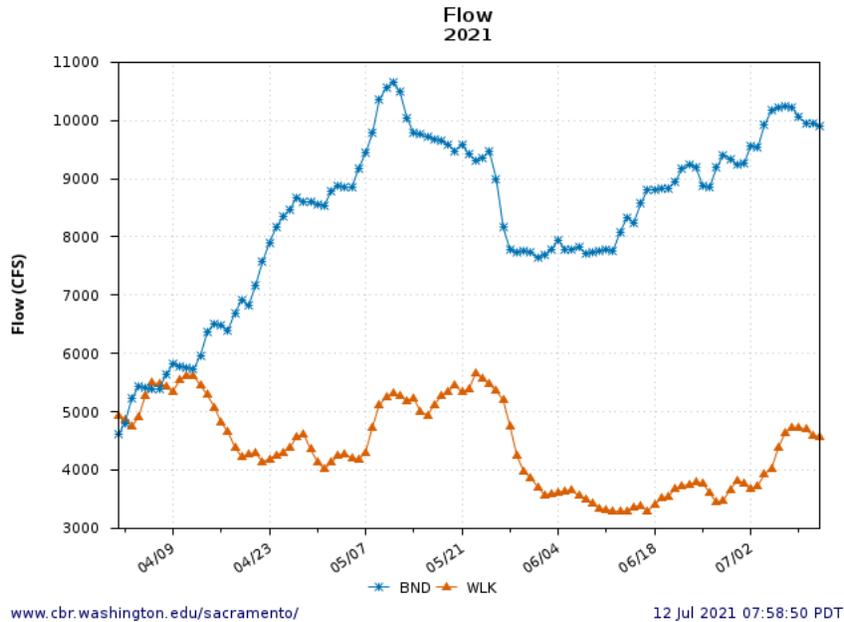
www.cbr.washington.edu/sacramento/

12 Jul 2021 01:01:41 PDT

Water diversions between Bend Bridge (River Mile 257.8) and Wilkins Slough (River Mile 125) on the Sacramento River have been substantial in the critically dry years of 2014, 2015 and 2021.



In particular, there have been significant water diversions between Bend Bridge and Wilkins in 2021.



Water diversions between Bend Bridge and Wilkins Slough between April and early July in 2021 have equaled or exceeded instream flow below Wilkins Slough.

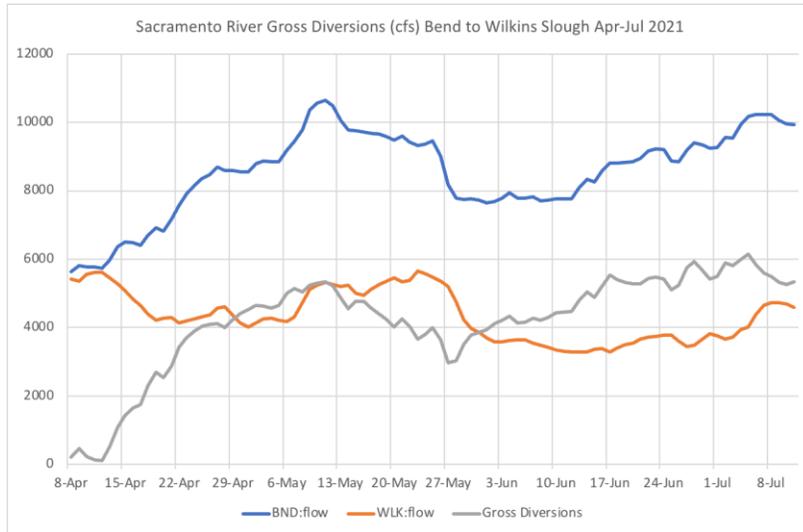


Chart prepared by CSPA fisheries consultant Tom Cannon based upon SasPAS and CDEC data.