

SOUTH DELTA WATER AGENCY

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October 15, 2008

Via e-mail

Delta Vision Blue Ribbon Task Force
650 Capitol Mall, 5th Floor
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Gentlemen/Ladies:

The Fifth Draft of the Delta Vision Strategic Plan contains many recommendations on numerous issues, some of which are good and others which are not. The main problem with the document is its gross mis-statement of the existing problem. When a problem is incorrectly identified, proper solutions cannot be presented or adopted. The South Delta Water Agency will submit additional comments as soon as possible on the bulk of the Fifth Draft; however this letter attempts to address the Delta Vision's mistaken approach.

The health of any ecosystem is affect by many factors. Things such as loss of habitat, contaminants in the water, and invasive species all can and do have an effect on fish and other aquatic populations. However, because something has an effect does not mean that is a cause of the radical decline in fisheries. The decline is directly attributable to the operation of the export projects. Once the cause is determined, it can then be addressed and mitigation or other methods can be undertaken to restore Delta fisheries. Treating the other and numerous things which also affect the fisheries as causes of the crash is both counterproductive and misleading.

The Vision then confuses California's need for water by focusing on the Delta, as if it must be the source of supply for areas of shortage. If one were to focus on California's needs as a whole, the Delta would be only one portion of the analysis, and of course one would first determine how much water is available from the Delta for use in export areas. Only that amount can or might be made reliable. The Vision puts this calculation off to the future sometime, stressing reliability while in fact endorsing the idea that a certain supply (not specified) *must* be

reliable from the Delta. Of course, until one determines the extent to which exports adversely impact the Delta one cannot begin to talk about reliability of supply from the Delta. This sort of reasoned analysis is treated like the plague in most water supply/reliability discussion because the underlying issue is that *export interests want to take a certain amount of water out of the Delta regardless of the impacts to fisheries caused by exports or the available supply*. The Delta Vision process eagerly adopts this backwards approach.

Inexplicably, the Delta Vision concludes that California must both restore the Delta ecosystem and have a reliable water supply from the Delta, making those two principles its “co-equal” goals. Of course the Vision goes to great lengths to couch the reliability goal in terms of the State’s need for water, but it is clear the Vision supports the idea that Delta supply is the main focus. To the extent that a supply of water exported from the Delta is a cause of the ecosystem crash (regardless of the means of conveyance or export), that supply cannot be made co-equal to restoring the Delta. You can’t protect a cause of the fishery crash at the same time as reviving the fishery. This non sequitur approach is best highlighted by the fact that the Vision process does not come out and address the main problem facing California; Delta supply is incapable of meeting current export demands from the Delta. The amount of water needed from the Delta is not the beginning of the analysis, the amount available from the Delta is the result of the analysis. No conclusions about protection, restoration or reliability are possible until the analysis is completed.

The existing laws protecting the environment, endangered species and water quality (in most all instances) take priority over such things as a desire to get a certain amount of water from the Delta. There is little or no balancing while enforcing ESA laws. Therefore, not only can we not have “co-equal goals” we can’t “fix” the ecosystem without first determining the degree to which exports harm it, and how much water *can/might* be exported while restoring and preserving the ecosystem.

The standard Delta Vision response to these points is to label them as “the same old fighting which got us nowhere in the past.” This superficial response ignores the facts and condemns us to larger and longer conflicts. As set forth below, this same attitude of “coming up with new ideas” and “thinking outside of the box” while ignoring the law is exactly what caused the problems.

Exports from the Delta have increased beyond the developed and surplus supplies entering the Delta while legal restraints on the exports have been intentionally ignored and laws broken. {FOOTNOTE Attached hereto are various documents previously supplied to or by the Vision process which support all then contentions made herein. Full citations or documents can be presented upon request.} First with regard to supply. Per the attached excerpts from DWR’s Bulletin 76, the SWP forecasted that it needed to develop additional supply from north coast rivers to augment the system to support exports. DWR projected that it needed and additional 5

million acre feet from that source by the year 2000 in order to support the contracts it was to (and did) execute. *None* of this supply was developed; a societal decision being made in the early 1980's to not use those sources. This estimate was based on projections of average amounts available in the watershed during various year types, and the in-basin needs which would have priority use of that supply.

Looking at these numbers we see that the in-basin needs totaled approximately 25,690,000 acre feet, while the natural runoff during a 6 year drought (based on the drought of the early 1930's) was 17,631,000 acre feet. This indicates that in a worst case drought scenario, there was *a shortage of nearly 8 million acre feet* with *no* supply available for export. A 17 dry year average showed approximately 2 million acre feet of shortage and a 30 year average showed only approximately 3 million feet of "excess" water available for export. [FOOTNOTE Coincidentally, the decreased exports resulting from the Wanger decision net out at somewhere near the 3 million acre feet amount, which brings the projects back in line with DWR's original predictions.] These original DWR projections did not of course allocate amounts of water to protect the fisheries to the degree now believed necessary.

When the State and the export contractors first developed their contracts, they included a provision which allowed the State to decrease the allotments (or the amounts each contractor could get) if the needed supply was or could not be developed. This "permanent shortage" provision was removed from the contracts in approximately 1995 pursuant to the Monterey Agreement. Hence, knowing that the supply was insufficient to fully supply their contracts, DWR and the contractors decided to do away with the permanent shortage provision and seek to increase and maximize exports. One can't imagine a worse decision for the Delta than the State agreeing to try to export more water than they believed was available. This decision put the exporters on a path which would insure a conflict with other users as the parties would have to fight over the limited supply and necessarily ruined the Delta by taking out more water than was available. It also put California on a course whereby large areas would come to expect a sufficient supply (which didn't exist) rather than embark on actions to find more supply. This point is key: rather than having spent the past twenty-some odd years trying to develop more supply, the projects simply exported more and more from the Delta. As you can see from the attached documents, exports rose steadily after the 1988-1994 drought, post Monterey Agreement and during CalFed eras, reaching historic highs well above the DWR projections of what was/is available.

It is also important to note that export supplies were always to be inferior to in-basin needs. Exports were to be only of water which was surplus to the areas of origin [FOOTNOTE the Monterey Agreement also removed a provision which recognized that exports were inferior to area of origin preferences indicating an intent by the State and the contractors to avoid if not violate the law] and in-Delta needs for supply and salinity control (see for example Water Code

Section 12203-12205), yet we now have thousands of acres of permanent crops dependant on an export supply.

With these facts, which are indisputable, we see that faulty if not illegal decisions by the State put us on a course whereby maximizing exports was given priority over water supply realities and legal restraints. The result is this fallacy of “reliable supply” for those who intentionally decided to count on water which didn’t exist or wasn’t legally available. It is certainly true that the State needs a reliable water supply, but it is demonstratively untrue that (i) export contractors can have a large and dependable supply available from the Delta, (ii) that they knew they did not have such supply, and (iii) they continued to increase exports.

As stated above, the only rational approach is to first determine how much water is available from the Delta, how often it is available, and then find the additional supply for those areas which need more water. One cannot simply make a reliable supply suddenly “appear” in the Delta because some users *want* that supply.

This brings us to the second prong of the “co-equal goals;” restoring the Delta. Entirely absent from the Delta Vision documents is any reference to the fact that DWR never applied for, and never received a “take” permit from DFG under the California ESA. Apparently DFG is/was fully aware of DWR’s and its own malfeasance. Consider that. The agencies of the State charged with protecting endangered species and operating and regulating the State Water Project *never tried to comply with CESA; never*. During the time DWR knew that it did not have sufficient supply to fulfill its contracts, and while it increased exports to fill those contracts, it didn’t comply with CESA, or more correctly never attempted to comply with the law.

At some point, species such as smelt and other listed and endangered species became “of concern” under the law. DWR did not seek, and DFG did not require its sister agency to get permission for a take. Some of us “innocent bystanders” remember early CalFed telephone conferences wherein the regulators and regulated discussed what actions could be taken after “120,000 delta smelt were killed at the pumps during a two week period.” No take permit existed, but exports were not shut down. Amazingly and tellingly, the Delta Vision documents reference a “voluntary” shut down of the State pumps to protect fish *with no mention that just a month before a Superior Court judge had found DWR to be guilty of violating the CESA by not having a take permit*. How could Delta Vision miss this salient fact while also hypothesizing about the effects of Delta agricultural diversion on fish? Years of illegal activity are ignored by Delta Vision while they join the chorus of the guilty trying to shift the blame. In-Delta exports remained the same for 80 years, fishery populations healthy; exports climb to record levels without CESA take permits, fisheries crash.

The Federal project was operating under presumed valid “take” authorization after FWS and NMFS issued Biological Opinions on the CVP operations’ effects on listed species. We

now know that those Opinions were “not based on the best available science” and have been virtually invalidated by federal District Court Judge Wanger. Just so there is no confusion, one of Judge Wanger’s reasons for his decision was that the fishery agencies continued to give the projects the authority to kill large numbers of endangered species without having done any analysis of how that many deaths affected the population. To paraphrase the Judge, there is a difference between allowing 60,000 to be killed when the population is 500,000 and allowing 60,000 to be killed if the population 100,000.

The net result of all this is a complete description of why we have both a water shortage for areas reliant on exports and why the fisheries have crashed. Areas of shortage did not abide by the rules and attempted to (and did) export amounts of water from a system which could not regularly supply the amounts needed. The State and its contractors intentionally ignored the fact that they did not develop the additional supply necessary to support exports over approximately 3 million acre feet (although this number is probably too high given what we now know about fishery and other superior needs) and pumped and pumped and pumped. At the same time, those record levels of exports were done either without legal authorization regarding their impacts on fisheries and endangered species, or under authorizations later found to be meaningless.

Its important to note that in D-1485 (in 1978) the SWRCB found that the effects of the export projects on fisheries could only be mitigated by a virtual shutdown of the export pumps. Since that time, exports increased approximately 4 million acre feet without the legally required mitigation or limitations required by ESA and CESA. What actions post D-1485 mitigated project impacts such as to allow an additional 4 million acre feet to be exported?

Any conclusions about what is to be done in the Delta or by whom are meaningless and unsupported until the above facts are fully disclosed in processes like the Delta Vision. Only with an examination of the real history of the problem can we determine that the problem is not invasive species, not contaminants, not upstream growth, not in-Delta farmers, not weak levees, not global warming, not “antiquated laws.” The problems in the Delta are the result of a lack of enforcement of the laws [FOOTNOTE I have not addressed the SWRCB’s complete failure to enforce water quality standards in the Delta, but they too must be assigned blame for their inaction and for their adoption of a “no-net loss” to exports principle which coincides with the fishery crash] which were adopted to protect the Delta and superior rights holders. They system is broken, the system was cheated.

As a final comment pending more specific comments on the Fifth Draft, I want to mention the draft Strategic Plans reference to allegations of “illegal” diversions” as one of the recent events which “fuels” conflict over the Delta (page 1-10). In this section the Delta Vision also references the “voluntary” shutdown of the State pumps discussed above without mentioning the Alameda County Superior Court case which found that DWR had no CESA take permit. Such blatantly misleading statements suggest an ingrained bias by the Delta Vision and

its staff. This notion is reinforced when they then include in their list the San Joaquin River Group Authority's allegation of illegal diversions in the Delta. There is not time to give a comprehensive response to SJRGA's unsupported allegations, but two things should be noted. The first is that SJRGA has done no investigation of how pre-1914 rights affect their broad conclusions. One area for which SJRGA alleges no/insufficient riparian or appropriative rights includes a district which has provided its hundreds of acres with water since at least 1911. This makes the allegations meaningless.

Second, all of the Delta has the right to get area of origin (or Delta Protection Act) contracts for a supply to support current and future needs. Under the law, these contracts would have a priority over the export of water, meaning that even if there were "illegal" diversions (which we strenuously deny) it takes only an administrative act to make the diversions "legal." Obviously this in-Delta diversion issue cannot be the basis of in-Delta problems. A simple conversation with Delta parties could have cleared up this issue, but the Delta Vision staff chose to simply repeat allegations which comport with their predisposition to avoid any discussion of export impacts.

Very truly yours,

JOHN HERRICK

University of the Pacific
 OLLI Fall 2008

Delta Water Issues
 October 1, 2008

 John Herrick, Esq.

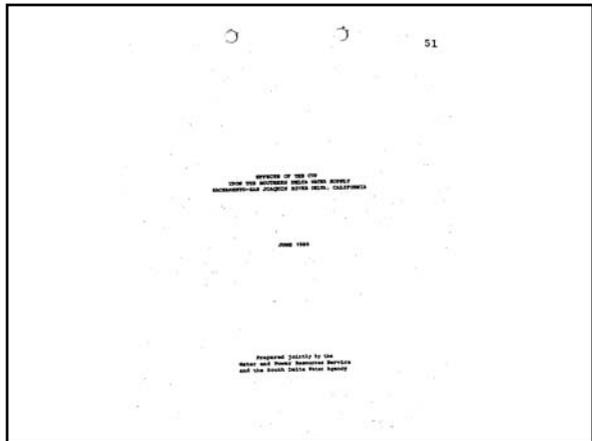
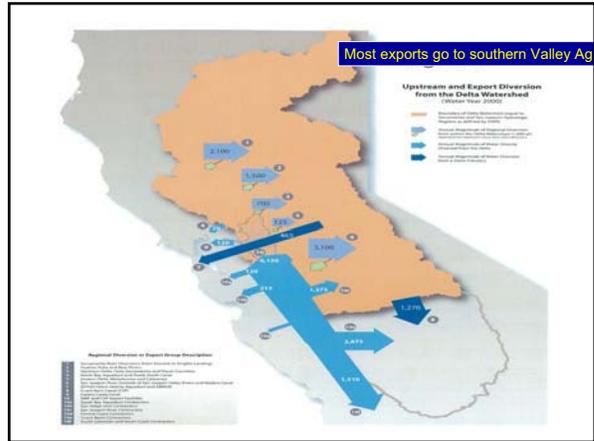
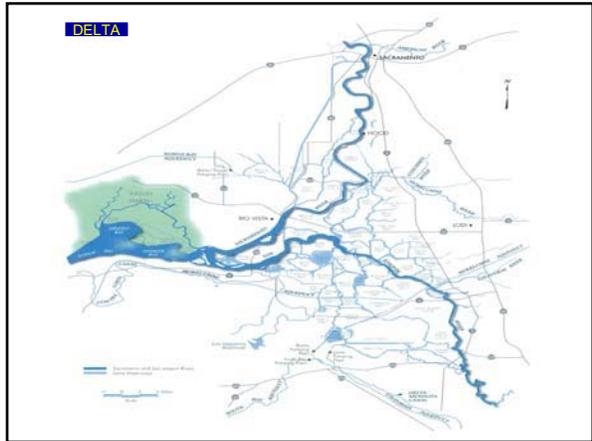


Table 9-11
SUMMARY OF REDUCTIONS IN RUNOFF OF SAN JOAQUIN RIVER AT VERNALIS FROM PRE-CVP TO POST-CVP

YEAR TYPE & PERIOD	EFFECT OF ALL POST-CVP UPSTREAM DEVELOPMENT ON RUNOFF AT VERNALIS		EFFECT OF CVP ON RUNOFF AT VERNALIS		
	Reduction in Runoff ¹ km ³	Post 1947 Reduction as Percent of Pre-1948 Actual Runoff ²	Reduction in Runoff ¹ km ³	Reduction at Vernalis as Percent of Pre-1948 Flow	Reduction at Vernalis as Percent of Post-1947 Flow
DRY					
April-Sept	206-417	49-67 ³	6-7	1.4-1.6	3.0-3.4
Full Year	258-519	25-44	93-126	8-12	10-14
BELOW NORMAL					
April-Sept	1064-1177	60-66 ³	300-428	22-24 ⁴	35-61
Full Year	1219	64 ³	543	22-25 ⁴	35
ABOVE NORMAL					
April-Sept	1406-1732	47-57	480-706	14-23	40-64
Full Year	1600-1721	28-34	768-1076	15-21	25-36
WET					
April-Sept	1002-1760	16-32	504-865	10-18	15-24
Full Year	1188-2916	13-32	771-2014	9-22	12-31
AVERAGE OF ALL YEARS⁵					
April-Sept	920-1272	44-56	347-526	12-17	28-39
Full Year	1020-1504	29-39	548-943	13-19	21-29

¹ Range of estimates by all methods of analysis. See Tables 9-2 through 9-17.
² Pre-CVP "actual" is assumed to be post-1942 actual plus pre-1944 to post-1947 loss.
³ Assumes that each year class occupies one-quarter of period.

TABLE VI-14. SUMMARY OF ESTIMATED IMPACTS ON THE QUALITY OF THE SAN JOAQUIN RIVER AT VERMILIS

Year Type & Period	Total Chloride in TDS mg/L Vermalis	Increase in TDS mg/L Due to Increased Flow		Increase in Total salt load		
		Percent	Percent	Normal Total Increase, $\times 10^3$ Tons x 10 ³ Pct-CY	Increased caused by CVF	% of
NET						
Apr-Sep	237 - 263	81 - 100	1.8 - 2.1	48	49	58
Full Year	198 - 241	56	6.3 - 7.4	143	55	100
BELOW NORMAL						
Apr-Sep	132 - 141	100	36	95	57	37
Full year	102 - 103	100	45	195	62	179
ABOVE NORMAL						
Apr-Sep	65 - 97	100	37	33	29	21
Full year	161 - 160	100	58	78	46	26
NET						
Apr-Sep	15 - 36	81 - 100	45 - 53	76	46	43
Full year	37 - 40	45 - 73	44 - 50	143	46	70
ALL YEARS						
Apr-Sep	167 - 196	80 - 100	30 - 33	73	49	34
Full year	128 - 158	70 - 73	37 - 39	187	53	91

1 - See Table VI-10.
 2 - Obtained by assuming an change in salt load and flow reduction 100-50 mg/L.
 3 - Col 2 is total San Joaquin flow reduction in total San Joaquin flow reduction.
 4 - Col 3 is rate of pump flow reduction in total San Joaquin flow reduction.
 5 - Obtained by projecting average TDS load increase between 1960's and 1970-80 period (Tables VI-31 and 32) in proportion to salt load increase to each year type (Table VI-9) and number of years of each year type in 1970-80 period.
 6 - Col 5 salt load for 1970-80 period a proportion of years in each class.
 7 - Col 5 a proportion of total chloride load contributed by upper San Joaquin basin (Table VI-33)
 8 - Col 7 a proportion of years to each year class.

channel resistance in this channel modifies the proportion of flow carried by this channel and the proportion carried by the reach of Old River between Salinas Slough and the export pump.

The control of siltation in some South Delta channels requires periodic channel maintenance. No routine channel maintenance program exists in this area of the Delta at this time.

IMPACT OF EXPORT PUMPS ON WATER LEVELS

Steady diversion of flow by the CVF reduces the water level in Clifton Creek and adjacent channels by a range of 0.67 to 1.10 feet per 1,000 cfs/w. or about 0.13 to 0.46 feet at full capacity of 4,800 cfs/w. This impact influences the water levels in Old River and Green Line Canal upstream to Salinas Slough. At about the same magnitude, thereby directly impacting the entrance to San Pablo Slough, which relies on tidal elevation differences to produce the gradient for flow into the Slough.

The establishment diversions into Clifton Creek Forebay by the SWP reduce the SWP levels by about 0.10 to 0.137 feet per 1,000 cfs/w. of water diverted. At full capacity of the SWP, operating at 4,800 cfs/w. on a steady basis, and the SWP operating only on the high tide, with a 10,000 cfs/w. diversion rate, the water level depression at SWP may be expected to be in the range of 1.34 to 1.76 feet.

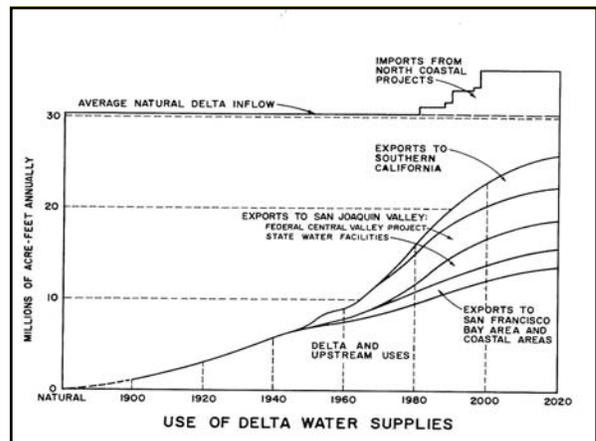
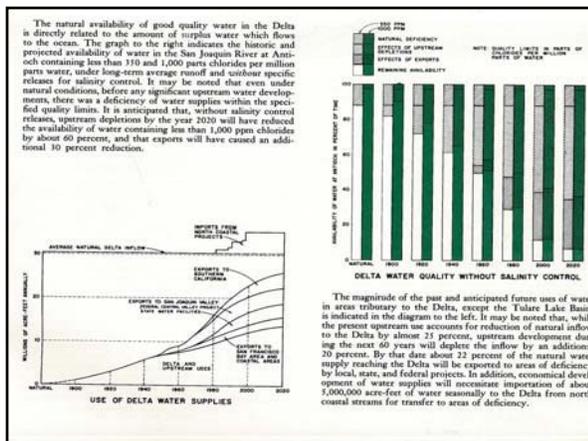
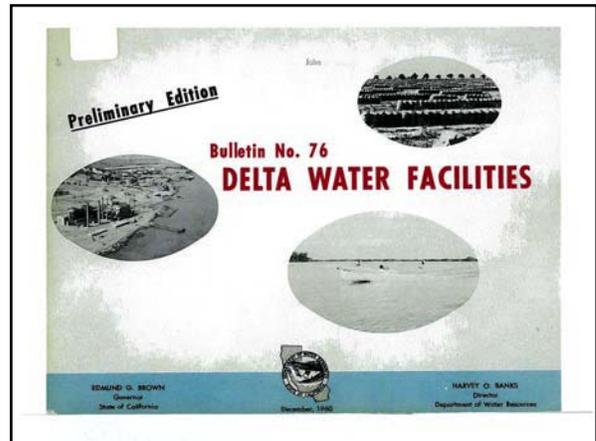
Reductions in water level also are evident at Roadside Bridge on the San Joaquin River. However, the water level depression at this point is related to the portion of the inflow from the San Joaquin River which reaches the maximum SWP pumping rate of 1,000 cfs/w. into the export canal operating at 10,000 cfs/w. from the diversion to Clifton Creek Forebay over a period of approximately 14 hours.

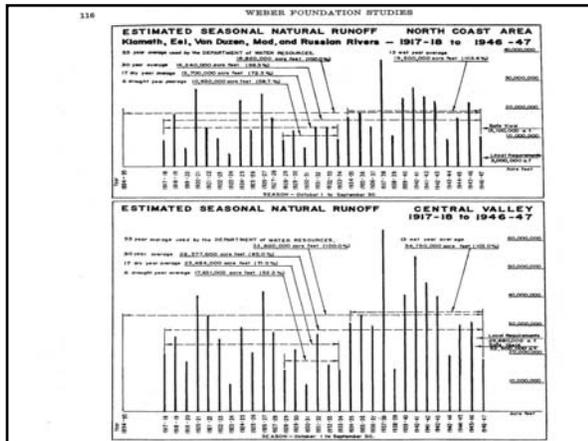
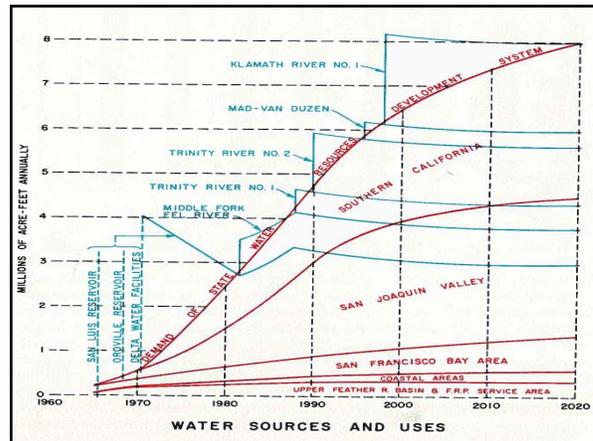
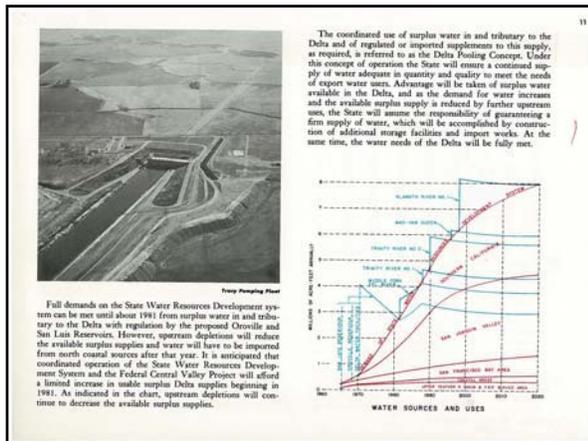
the bifurcation with Old River. When the riverflow at the bifurcation are less than 1,000 cfs/w., the upstream between the pump and the bifurcation station and the pumping effect is increased whereas at 1,000 cfs/w. the effect is relatively insignificant.

IMPACT OF REDUCED FLOW ON WATER CIRCULATION AND QUALITY

During most summer periods, the San Joaquin River flow are now less than the net rate of channel depletion within the SWP. The induced flow toward the export pump which is caused by the depression of levels, is caused mainly by Salinas Slough and Green Line and Fagan Canals. Nonseasonal discharge flows into the reach of middle river between Old River and Victoria Canal and in the reach of Old River west of San Pablo Slough are generally less than the agricultural diversions from those channels during dry seasons, thereby causing water to flow into these reaches from both ends permitting accumulation of salts from local return flows as illustrated in figure VIII-2. Much of these channels have various impediments to flow in the form of silt and depth concentrations as previously discussed. However, it is apparent that substantial portions of low summer San Joaquin River flow pass through the upstream end of Old River and Green Line and Fagan Canals and are diverted with the support of the pump.

The increase in net unidirectional flow from the San Joaquin River toward the pump reduces the accumulation of exchange salts in the upper end of Old River and in Green Line and Fagan Canals. However, the drawdown which causes this increase in flow does not necessarily induce net daily unidirectional flow through Middle River in the southern Delta, or in Old River from San Pablo Slough west toward the SWP intake channel as discussed above.





STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Applications 9025, 9026, 9263, 9364, 9365, 9366, 9467, 9368, and 10188.

UNITED STATES OF AMERICA,
BUREAU OF RECLAMATION,
Applicant,

SACRAMENTO RIVER AND DELTA WATER ASSOCIATION, et al.,
Protestants.

DECISION D-990

Adopted February 9, 1961.

On October 12, 1949, Secretary of the Interior Krug, in a public speech at Oroville, stated: "Let me state, clearly and finally, the Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it." He added: "There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later." (Staff 9, p. 799 & SRDMA 19).

On November 15, 1949, Regional Director Richard L. Bode reaffirmed these main policy statements and summarized them in a letter to Congressman Clair Engle, stating: "We believe the foregoing is a summary of the main policy statements by Government officials on the subject of importation of Sacramento Valley water to the San Joaquin Valley." (Staff 9, p. 799 & SRDMA 19).

D 990 at pages 70 and 71



051636

assessed. The criteria in the draft agreement were recommended by Fish and Game and endorsed by the Department, and were extensively analyzed by the Board staff. Based on our most current assessment, the fishery standards provide significantly higher protection than existing basin plans. The Striped Bass Index is a measure of young bass survival through their first summer. The Striped Bass Index would be 71 under without project conditions (i.e., theoretical conditions which would exist today in the Delta and Marsh in the absence of the CVP and SWP), 83 under the existing basin plans, and about 75^{3/4} under this decision.

While the standards in this decision approach without project levels of protection for striped bass, there are many other species, such as white suckfish, shad and salmon, which would not be protected to this level. To provide full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps. The level of protection provided under this decision is nonetheless a reasonable level of protection until final determinations are made concerning a cross-Delta transfer facility or other means to mitigate project impacts.

3/ There is some indication that factors other than those considered in the Board's analysis of without project levels may also affect striped bass survival. The effects of these factors are such that the without project levels would be greater than 71. However, the magnitude of this impact is unknown and cannot be quantified at this time.

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051637

SOLISM MARSH. Full protection of Suisun Marsh now could be accomplished only by requiring up to 2 million acre-feet of freshwater outflow in dry and critical years in addition to that required to meet other standards. This requirement would result in a one-third reduction in combined firm exportable yield of State and Federal projects. In theory, the existing Basin SW Plan purports to provide full protection to the Marsh. However, during the 1976-77 drought when the basin plan was in effect, the Marsh received little if any protection because the system almost ran out of water and emergency regulations had to be imposed. This decision balances the limitations of available water supplies against the mitigation responsibility of the projects. This balance is based on the constitutional mandate "...that the water resources of the State be put to beneficial use to the fullest extent of which they are capable..." and that unreasonable use and unreasonable diversion be prevented (Article 10, Section 2, California Constitution).

The Bureau, the Department, Fish and Game, and U. S. Fish and Wildlife Service are working together to develop alternative water supplies for the Marsh. Such alternative supplies appear to represent a feasible and reasonable method for protection of the Marsh and mitigation of the adverse impacts of the projects. Under this decision the Department and Bureau are required, in cooperation with other agencies, to develop a plan for Suisun Marsh by July 1, 1979. The Suisun Marsh plan should assure that the

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1995 MONTEREY AGREEMENT

- * Removed *area of origin* references
- * Removed *permanent shortage* provision

