

## KEEPING WATER PUBLIC: California's State Water Project

**C**ALIFORNIA'S RECENT DROUGHT has exposed deep problems with the state's water infrastructure and sharpened conflicts over the state's limited water supply, particularly between agriculture, ecosystems, and communities. Although the drought has pushed water systems to their limit and has caused extreme harm to fragile ecosystems and endangered species, it has also fueled a long-needed conversation about the state's water use priorities. Powerful agribusiness interests dominate this conversation and have been using the urgency of the drought to solidify their control over water in California.

At the center of this regime is the State Water Project (SWP), one of the largest public works projects ever undertaken by a state. Although ostensibly run by a state agency, the state Department of Water Resources, the SWP functions more as an extension of the water agencies and districts who make up its "contractors." These contractors are roughly evenly divided between

"urban" contractors, who supply water mostly to homes and businesses, and "ag" contractors, who supply water mostly to farm and agriculture users. Most of the contractors are in the southern part of the state, with the two biggest contractors, Metropolitan Water District of Southern California and the Kern County Water Agency, comprising three-quarters of the water delivered by the SWP. As it stands now, the SWP is operated to benefit these two contractors and their allies at the expense of the environment (particularly the Bay-Delta ecosystem). Industries dependent on a healthy Bay-Delta ecosystem also suffer, such as California's billion-dollar-plus salmon industry, a vibrant inland recreational fishing industry, and a host of smaller and less politically-connected farmers throughout the Delta region.

Center for Food Safety has been working to reform the operation of the SWP, focusing on the contracts between the Department of Water Resources and the water contractors. These con-

tracts govern how much and to whom the water is delivered each year. CFS is lead counsel in *Central Delta Water Agency, et al. v. Department of Water Resources, et al.*, also known as “Monterey Plus,” which challenges the environmental review of the Monterey Amendments (as amended and approved in 2010) and challenges the constitutionality of the amendments, including the transfer of the Kern Water Bank from the state to private control.

### THE MONTEREY AMENDMENTS AND THE KERN WATER BANK

The Monterey Amendments are a series of amendments to the contracts that govern the operation of California’s SWP. They were secretly negotiated and signed in 1995 by the California Department of Water Resources and several contractors to the State Water Project. While the stated goal was to resolve a dispute between several contractors over the allocation of SWP water, the amendments ended up being extremely broad in scope, accomplishing a wholesale rewrite of the contracts and a radical change in both the operation of the SWP and control of California’s public water resources.



*The State Water Project, running through the Central Valley, is the largest state water infrastructure project in the country.*

### ESSENTIAL CHECKS & BALANCES REMOVED

#### ***Urban Preference – Article 18(a)***

Article 18(a) of the original contracts provided that in the event of short-term shortages, such as those caused by drought, contractors serving primarily residential and commercial users would have preference for water deliveries. The rationale was that it is a greater hardship for homes and businesses to go without water than farms, which often have multiple water sources and can fallow their fields. But the Monterey Amendments deleted Article 18(a). Annual SWP deliveries are now proportionally distributed to all contractors, without regard to whether the contractor serves urban or agricultural users.

#### ***Paper Water Protection – Article 18(b)***

When the contracts were first drafted, the plan was for the SWP, at full build-out, to provide about 4.2 million acre-feet of water per year. The contractors’ annual payments were calculated based on their share of the 4.2 million acre-feet figure – what were then called “entitlements” to SWP water. These amounts were listed on Table A of the contracts, and are now called “Table A Amounts.” But full build-out of the SWP was never achieved, primarily due to several rivers being granted Wild and Scenic status in 1972 that prevented planned SWP dams from being built. The safe yield of the SWP topped out, and remains, at only 2 to 2.5 million acre-feet a year. The difference between the two figures – the 4.2 million acre-feet in Table A and the actual safe yield of the system – is known as the SWP’s “paper water.”

Article 18(b) provided that, in the event that the SWP was not fully built out, the Table A Amounts would be reduced proportionally to match the system’s safe yield. Because the amount that each contractor can request each year is limited by Table A, the numbers in Table A are not just theoretical. Thus, Article 18(b) served as a relief valve for the system, allowing the removal of paper water from the contracts and thereby reducing the inev-

itable pressure to provide more water than the system was designed to deliver.

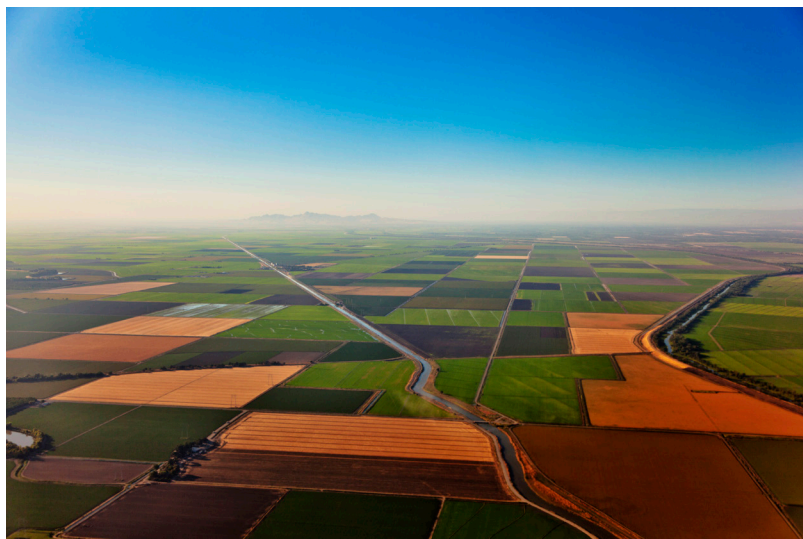
Article 18(b) was deleted in the Monterey Amendments. The Table A Amounts still total approximately 4.2 million acre-feet, and every year the contractors request deliveries of their maximum Table A amounts. Per the terms of the contracts, DWR must seek to deliver the total requests, subject only to external restrictions (like court orders re: endangered species).

### **Surplus Water Restriction – Article 21(g)(1)**

The corollary to the urban preference in Article 18(a) was a key limitation on the use of surplus water (anything above and beyond the annual amounts requested by the contractors and described in Table A of the contracts): it could only be used for temporary or seasonal purposes, not for “permanent” purposes. In other words, a contractor could deliver surplus water to a farm growing annual crops (that need to be replanted each year, and thus can be fallowed in any given year) but not to a farmer growing permanent crops like almonds or pistachios, that require water every year and cannot be easily fallowed.

But California has an extremely variable weather pattern, with some seasons or years yielding much more water than others. The original thinking was that in flush times contractors should have access to the surplus water, so long as they didn’t develop a dependency on it (because of its high volatility and unpredictability).

Unfortunately, Article 21(g)(1) was deleted by the Monterey Amendments. Any contractor may now obtain delivery of surplus water and there are no restrictions on its use. This change in the contracts led directly to the unsustainable growth of almond, pistachio, and other orchard crops in the southern San Joaquin Valley. The region’s conversion to permanent crops has, in turn, placed incredible pressure on the SWP to continue to deliver excessive amounts of water,



*The State Water Project and Central Valley Project both transport water from northern to southern California. Together they are one of the largest aqueduct systems in the world.*

leading to the collapse of the Delta ecosystem and the near-extinction of many Delta species.

## **PRIVATIZATION OF PUBLIC RESOURCES**

### **Kern Water Bank Transfer – Article 53**

The Kern Water Bank is an underground reservoir located in Kern County. It was originally a functioning aquifer sustained by water from the Kern River, but by the 1980’s it had been essentially drained by excessive groundwater pumping. In 1988 the Department of Water Resources purchased about 20,000 acres of land above the empty aquifer for 74 million dollars. The department set up recharge basins on the land to infiltrate water back into the aquifer, turning the aquifer into a water bank: surface water can be delivered to the recharge basins, infiltrated into the bank, stored indefinitely, and then withdrawn (pumped out) when needed. The Kern Water Bank was conceived of as an essential component of the SWP, providing much-needed storage capacity for project water for use by all southern California contractors.

The Monterey Amendments transferred the Kern Water Bank from the state to the Kern Water Bank Authority, a privately-controlled joint pow-

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*The Monterey Amendments radically changed both the operation of the State Water Project and control of California's public water resources.*

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ers authority made up one private company and several local water districts. The water bank is now used primarily for the benefit of its several agribusiness owners (including the Wonderful Company, owned by billionaires Stewart and Lynda Resnick). The bank also enables its owners to stockpile and sell banked water.

In exchange for the transfer of the Kern Water Bank, several local water districts collectively “retired” 45,000 acre-feet of their Table A Amounts. But because Table A Amounts reflect much greater quantities of water than are ever reliably delivered by the SWP, the 45,000 acre-feet was mere “paper water” – water that does not actually exist. Worse, because water contractors’ annual payments for participation in the SWP are based on their Table A Amounts, not on actual water deliveries, the most significant effect of the retirement of 45,000 acre-feet was to reduce the annual payment of those contractors.

The Kern Water Bank transfer was certainly illusory, in that the state only obtained paper water in exchange for the Kern Water Bank. But worse, the state continues to lose money every year due to the reduction in the annual payments by the contractors that “retired” that paper water.

***Facilitating a Private Water Marketplace – Articles 53 and 56***

The original long-term contracts restricted the ability of contractors to transfer and sell their SWP water or to use the SWP system for the transport of non-SWP water. First, any transfers between contractors required case-by-case prior approval by DWR, as did the transport of non-

SWP water using SWP facilities. Second, contractors’ use of SWP water was generally limited to the water they could physically take delivery of; if a contractor could not immediately use or store SWP deliveries, the contractor lost its claim to that delivery. In such circumstances DWR might have made the water available to other contractors for immediate delivery, stored it in state-run reservoirs, or left it in the Delta ecosystem.

The Monterey Amendments made the transfer and storage of both SWP and non-SWP water easier. Transfers no longer require pre-approval and are not reviewed on a case-by-case basis. Out-of-district storage has been explicitly approved and facilitated. And a “turn-back pool” has been set up, allowing contractors to store, sell and/or trade SWP water that they do not take immediate delivery of. The result is that the SWP system has changed from its original design as a water delivery infrastructure system to become the backbone of a trading floor for water; the aqueducts and reservoirs of the system now more resemble rail lines or highways (or the Chicago Board of Trade) than they do water pipelines.

**CONCLUSION**

The Monterey Amendments eliminated critical checks and balances that had been built into the SWP system when it was first proposed and presented to the citizens of California for their approval, by ballot initiative, in the early 1960s. The result is the development of a water delivery regime that increasingly focuses on satisfying the needs and desires of a select group of agribusiness interests, investors, and real estate speculators at the expense of smaller farms, communities, the environment, and the public trust. State regulatory agencies and political bodies, buying into the arguments propounded by these politically-connected interests, have not only failed to address the problem but are exasperating it.