

I. INTRODUCTION

A. The California Department of Water Resources' Approval Of The Bay Development And Conservation Plan Alternative 4A Violates The Delta Reform Act, The Public Trust Doctrine, The California Environmental Quality Act, and Article X, Section 2 Of The California Constitution.

This action challenges the California Department of Water Resource's ("DWR") approval of the Bay Development And Conservation Plan ("BDCP") Alternative 4A, also known as California WaterFix ("the Project") because the Project violates the Sacramento-San Joaquin Delta Reform Act of 2009, Cal. Water Code §§ 85000–85350 ("Delta Reform Act").

The Delta Reform Act requires that the Project, *inter alia*, restore Sacramento-San Joaquin River Delta ("Delta") through-Delta flows, provide increased reliability for California's water distribution system, enhance the quality of water supply from the Delta, protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.

Instead of meeting its legislatively defined requirements, the Project drastically decreases through-Delta flows, decreases water system reliability, degrades the quality of water supply from the Delta, and destroys Delta recreation and communities. The Project violates the requirements of the Delta Reform Act and therefore the Project approvals must be set aside.

The vast amount of water exported through this water conveyance system from the Delta's critical aquatic habitat causes an "ever spiraling tension over water exports and ecosystem decline." (Delta Stewardship Council, The Delta Plan, p.4.)

The CVP and SWP have degraded, and continue to degrade water quality in the Delta to the detriment of recreational users, family

farms located on Delta islands that draw their irrigation water directly from Delta channels, and municipalities that draw drinking water for their residents directly from Delta channels, including the City of Antioch, City of Stockton, and San Joaquin County.

The Burns Porter Act, authorizing construction of the SWP, was narrowly approved by voters in November of 1960 after a contentious election pitting Southern California developers and Central Valley agriculture against Northern Californians. Only one county in Northern California (Butte County, home of the Oroville Dam) voted in favor of exporting Delta water to the south.

The net effect of operating the CVP and SWP has been to supply exported water to Central Valley farmers and Southern California municipalities to the detriment of the environment, Delta farmers, and Delta municipalities.

In the first decade of the twenty-first century, the toll of fifty years of environmental abuse reached crisis proportions as already declining Delta fish populations crashed precipitously.

In the landmark 2009 Delta Reform Act, the legislature recognized the mounting existential peril to the Delta and the unsustainable nature of California's water system and found that the "Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crises and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." (Cal. Water Code § 85001(a).)

The Delta Reform Act's imperative to reduce reliance on water exported from the Delta is the culmination of legislative recognition in the twenty-first century that massive mid-twentieth century water export projects are the problem, not the solution. The legislative solution is to develop water supplies within each region of the state using modern technology in order to reduce exports

from the Delta.

The State Water Project's dream of making the Central California desert bloom and fueling unlimited population growth in arid Southern California metropolises with exported Delta water, zealously promoted over a half century ago by recently retired Governor Jerry Brown's father, Edmund G. "Pat" Brown, is an unsustainable artifact of the environmentally ignorant 1950's. The mega-engineering dream has proven an environmental nightmare. It has been legislatively replaced by the goal of reducing exports, taking pressure off of the Delta, and developing technologically up- to-date regional water supply infrastructure to replace Delta exports.

With the legislative decision to reduce the demand for Delta exports, restoration of through- Delta flows and the Delta ecosystem dependent on those flows can now, after decades of neglect, finally commence.

The damage that exports do to the Delta ecosystem also reflects back, causing the state's water system to be unreliable. Exports have driven several Delta fish species to the brink of extinction and degraded in-Delta water quality to the point that during dry periods Delta water may become too salty or polluted for beneficial use. When climatic conditions dictate, pumping of Delta water for export must be reduced or suspended because continued pumping would draw water too polluted to use and/or extinguish the few remaining Delta Smelt. The export-degraded Delta ecosystem and California's export-dependent unreliable water system are two sides of the same coin. With investment in new local and regional supplies, water users dependent on exported Delta water for agricultural and urban use can wean themselves off of unreliable supplies from the Delta and become reliably self-sufficient.

The BDCP started life as an extraordinarily ambitious and novel effort. The plan included restoration of 150,000 acres of Delta

habitat, by far the largest habitat restoration effort ever contemplated in the United States. Some areas considered for restoration to historical wetland condition have been fertilized, irrigated, and farmed for over 100 years and have subsided twenty feet or more. No such effort at restoring such a radically altered landscape to wetland condition has ever been attempted before.

The BDCP also promised a “Big Gulp–Little Sip” strategy, meaning that water would be harvested from the Delta for export in large quantities only at times of plenty, during peak storm flows (Big Gulp), and at times of scarcity, during drought and low summer flows, only minimal amounts of water would be diverted (Little Sip).

Because of the history of failure and disappointment associated with water export infrastructure projects, the Delta ecosystem crisis, and the policy of reducing exports, the legislature was wary of the BDCP. The BDCP bore a strong resemblance to the infamous failed “peripheral canal” advanced to the ballot by Governor Jerry Brown on behalf of the Water Contractors in his first stint as governor and rejected overwhelmingly by voters in 1982.¹

One of the “conservation measures” included in the BDCP was, in fact, a peripheral canal, or possibly tunnels, to convey Sacramento River water under or around the Delta and directly to the mighty export pumps that push Delta water southward through the network of SWP and CVP canals. This BDCP conveyance feature, Conservation Measure 1 or “CM-1,” was highly controversial from the beginning because of its ability to divert large amounts of water away from Delta sloughs and channels.

In the end, the legislature responded to the BDCP with a carrot and stick approach. If the proponents kept true to their promise of transforming an entire vast landscape from farmland to wetland through billions of dollars’ worth of habitat restoration, the BDCP

would be recognized as a favored project. However, if proponents went back on their word and did not follow through with the habitat restoration, the BDCP would be permanently barred from receiving any state funding, branding it as a legislatively disfavored project.

The legislature defined the carrot and stick approach through Water Code section 85320. Section 85320 provides that if the BDCP follows through with its promise of vast habitat restoration it will be automatically incorporated into the State's master plan for the Delta (the Delta Plan), easing the BDCP's approval process. However, section 85320 also specifies that if BDCP proponents fail to follow through on their habitat promises, then the BDCP may not be incorporated into the state's master plan, making approval more difficult *and* the BDCP will be ineligible for state funding.

It is undisputed that BDCP Alternative 4A, also known as California WaterFix, now before the Court, failed to qualify as an NCCP.

In 2015, after nine years of touting the "gold standard" environmental benefits of the BDCP, the proponents abruptly reneged on all of the habitat promises. Five billion dollars' worth of habitat restoration was jettisoned from the Project. Hundreds of millions of dollars' worth of habitat restoration research and planning conducted over nine years was abandoned. Thousands of pages of BDCP habitat maps and analysis were unceremoniously stamped "SUPERSEDED"

The 2013 CEQA statement of objectives for the Project included the objective "[t]o ensure that the BDCP meets the standards for an NCCP by, among other things, protecting, restoring, and enhancing aquatic and terrestrial natural communities and ecosystems that support covered species within the Plan Area." (Draft Environmental Impact Report / Environmental Impact Statement

for the Bay Delta Conservation Plan: Chapter 2, Purpose and Need, p. 2-3: 27–29 (“DEIR/S”).)

However, the 2015 Re-circulated Draft Environmental Impact Report / Environmental Impact Statement for the Bay Delta Conservation Plan (“RDEIR/S”) CEQA statement of objectives deleted the goal of qualifying as an NCCP with the comment that “the Lead Agencies revised the proposed project to ... address more immediate water supply reliability needs” (RDEIR/S, p. 1- 3: 1–4.)

The final July 21, 2017, CEQA Notice of Determination (“NOD”) explains that the project is now proceeding “without the large-scale conservation efforts that were [originally] included in the BDCP.” (CEQA NOD, Attachment 2, Project Description.)

Upon retracting his long-held promise to the people of California, Governor Brown re- branded the Project for public marketing purposes as “California WaterFix” to indicate that the dozens of habitat restoration conservation measures of the BDCP have been deleted and only Conservation Measure One, the water conveyance tunnels, remains as the Project’s “multi-species conservation plan.”

Upon canceling the habitat restoration conservation measures of the BDCP, the Governor offered the public a consolation prize, a brand new “Eco Restore” program, with a new set of promises of habitat restoration, albeit on a much reduced scale. Eco Restore is not a part of the Project now before the Court. Eco Restore is a political promise and there is no legal obligation for the state to follow through with Eco Restore.

The “WaterFix” branding is only a marketing name for BDCP Alternative 4A. The Project was initiated with the CEQA Notice of Preparation for the “Bay Development and Conservation Plan EIR/S” (“NOP”) filed with the State Clearinghouse on February 13, 2009, and culminated with the NOD and Project Description in

the CEQA Findings of Fact and Statement of Overriding Considerations, filed with the State Clearinghouse on July 21, 2017, selecting BDCP Alternative 4A

from the studied alternatives as the final Project.⁴¹ BDCP Alternative 4A (often referred to as California WaterFix) now comes before the Court as a broken promise and failed Project. It is legislatively disfavored, ineligible for inclusion in the state's master plan for the Delta, and forever barred from state funding.

D. The Project Harms The Environment And Violates The Law By Increasing Diversions In A Way That Decreases In-Stream Through-Delta Flows, Placing the Delta In A Chronic State Of Drought.

In this multi-party complex litigation, many parties will address the impacts of the Project on Delta in-stream flows and Delta ecology resulting from operations of the Project. It is only common sense that diverting up to an additional 45% of the Delta's source fresh water (which has already been depleted by upstream diversions before the river reaches the new proposed intakes) will place the Delta in a chronic state of drought, causing great harm to Delta ecology.

There is international scientific consensus that for protection of public trust resource in-stream flows "scientists recommended the equivalent of no less than 90% UF [unimpaired flow] to achieve a high level of ecological protection, and no less than 80% UF to achieve a moderate level of ecological protection." Letter from United States Environmental Protection Agency Bay-Delta Program Manager, Tim Vendlinski, to California State Water Resources Control Board Clerk, Jeanine Townsend, March 28, 2013, p. 6 [addressing in-stream flow needs of the Delta and summarizing world-wide scientific consensus].) Flows can be reduced by 10 to 20% *at most*, while still affording any reasonable measure of protection of public trust resources.

There is scientific consensus that diversion rates should be less in low flow summer-fall months, with limits on diversions as stringent as a maximum 6% diversion rate in low flow months, while diversions may be as high as “20-35% in higher flow months.” (*Id.*)

The BDCP perversely imposes almost no restriction on diversions in low-flow summer months, and its stated project objective is to *increase* diversions from a system that is already vastly exceeding ecologically tolerable diversion rates based on consensus in the relevant scientific community.

Because of world-wide scientific consensus on minimizing diversions to protect freshwater ecosystems, the California Legislature ordered a report on the Delta’s in-stream flow needs to be used specifically in assessing the BDCP. (Water Code § 85086(c)(1).) The report was completed in 2010 (“2010 Flow Criteria Report”).

The legislative history of the Delta Reform Act shows how the 2010 Flow Criteria Report reflects the legislature’s revolutionary change in thinking--away from maximizing Delta exports and toward a new regime of protecting public trust resources first through technologically sophisticated local and regional supply measures that do not depend on Delta exports:

This bill's ‘flow criteria’ reflect a landmark concept of the state exercising its public trust authority to ask - FIRST - what the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay Delta Conservation Plan.

DWR turned legislative intent on its head, concluding that flows deemed necessary by the Flow Criteria Report for protection of public trust resources were not consistent with the Project objectives of maintaining and increasing exports, and therefore

achieving the Flow Criteria Report's objectives was not feasible, even over the very long term. Instead, DWR seeks to eliminate existing flow requirements that the Flow Criteria Report recommended be strengthened.

E. DWR's Infliction Of Avoidable Construction Impacts On Modest Rural Delta Communities And Recreational Family Businesses.

Because the illogic of the Project's operating objectives is plain, DWR has expended enormous resources on shaping a complex Project narrative that obfuscates the obvious: diverting more water, and diverting it at a point before it flows into the Delta will harm the Delta ecosystem.

Many Petitioners, including national environmental groups, will no doubt call the illegality of proposed project operations, which substantially change hydrodynamics throughout the Delta, to the Court's attention. Parties will likely respond in detail to DWR's extensive mathematical modeling and specious claims of increasing system flexibility.

Delta Alliance will brief these issues as well. However, because of the herculean effort DWR has expended in camouflaging a water grab to make it look like an environmental benefit (even after deleting the gold-standard habitat restoration entirely), it has done less to cover its tracks with regard to the impacts that massive amounts of construction activity will have on Delta communities and Delta Recreation.

DWR has shown disregard toward the small rural communities and family businesses—of modest means--that will be obliterated by eleven years or more of continuous heavy construction. It made no meaningful effort to consider alternative infrastructure locations or employ alternative construction methods with regard to construction impacts on Delta recreation and communities.

Delta Alliance will focus a significant amount of its briefing on DWR's failure to consider construction impacts in any serious way, and will attempt as best it can within its limited means to give voice to the voiceless before this Court.