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Grand Theft Water – Part II

Last month a historic overview of the water projects affecting the West Coast of the Americas' most important estuary – the San Francisco Bay/Sacramento-San Joaquin River Delta – was presented. This estuary is the migratory route for Central Valley chinook salmon from their natal Sierra streams to the Pacific, a large nursery area for Dungeness crab, spawning grounds for Pacific herring, as well as habitat for freshwater smelt and bass, anadromous sturgeon, striped bass, and shad, together with marine species such as English sole and California halibut, and once burgeoning populations of oysters and Bay shrimp. In Part II the story continues from 1982, and the ballot initiative to kill the proposed "Peripheral Canal" project designed to route water around the estuary for delivery to Southern California, to the current plans for massive "peripheral tunnels" and their potential for decimating economically important fish populations.

Interest in the estuary or the impact from the water projects did not end in 1982 with the referendum vote to stop the Peripheral Canal. A court decision on freshwater flow into and through the estuary led California's State Water Resources Control Board to conduct an extensive set of science-based, quasi-judicial hearings and deliberations from 1986 through 1988.

In October 1988, the State Board staff prepared a draft order calling for an additional 1.6 million acre-feet of freshwater flow through the system. That draft order if implemented would, in many years, reduce the level of diversion by the Delta pumps. Because of the impact this could have on existing diversions, and certainly on the desire among water contractors for much more Delta water in the future, Governor George Deukmejian at the behest of the water contractors and the San Joaquin Valley

members in the State Legislature quickly pressured the Board's Chairman to kill the draft order. Two years of work by the State Board staff was seemingly dead.

But in the following year, the Bureau of Reclamation advertised that it had an additional 1.5 million acre-feet of project yield available for contract. Before the Bureau recognized their faux pas and withdrew the offer, fishing and conservation groups said "Fine, that's the water we need for the Delta and its fish." In the next two years, there were numerous Congressional hearings on proposed changes to the Central Valley Project (CVP) in light of its impact on fish and the estuary.

What ultimately came out was a measure by then-Senator Bill Bradley (D-NJ) and Representative George Miller (D-CA) to create the "Central Valley Project Improvement Act" (CVPIA) which was attached to an omnibus water

bill and signed by President George H.W. Bush in October 1992. Among other things, the legislation provided for 800,000 acre-feet of flow dedicated to fish and wildlife restoration (the federal share for the impacts of the two projects), an adoption of the state's statutory goal for doubling salmon populations, and adding fish and wildlife protection to the CVP's statutory purposes.

It would have seemed the CVPIA would go a long way toward fixing the problem in the estuary. Unfortunately, it did not. There was agency resistance from the outset, and those who are now clamoring for Jerry Brown's newest water project were actively working to subvert the CVPIA. When Endangered Species Act (ESA) restrictions were finally put in place to curtail pumping – Sacramento winter-run chinook were ESA-listed in 1989, followed soon thereafter by the spring-run – and the potential for CVPIA changes to operations was clear, Governor Pete Wilson put in place his "Grand Accord" with the Clinton Administration aimed at resolving the environmental problems in the Delta and creating a "reliable water supply." This was on the heels of the Republican's November 1994 take-over of Congress.

What came out of this Wilson-Clinton deal was "CALFED," a joint state-federal program that spawned a thousand meetings, a tab of \$3 billion –



The BDCP

and blithely ignored the single biggest issue in the room, i.e., low flows. Quite simply, the system was dying from both the reverse-flow pumping and the volume of freshwater being removed. The only science-based answer was to reduce the level of diversion and find new sources of water outside of the estuary. CALFED, however, pleaded ignorance.

With little to show from CALFED, the State Water Project (SWP) and CVP increasingly combined their operations – the Feds had most of the water, the State had the delivery system. Pumping levels increased dramatically beginning in 2000. In 2004 they openly announced their OCAP ('Long-term Central Valley Project and State Water Project Operations and Criteria and Plan') to increase the levels of Delta pumping even further – despite concerns about the health of the estuary or the impact on endangered migratory or resident fish in the Delta, including winter-run and spring-run chinook, sturgeon and the Delta smelt.

Then in 2004, the George W. Bush Administration overruled its own scientists at NMFS (salmon, sturgeon) and US Fish & Wildlife Service (Delta smelt), making a finding of "no jeopardy" from OCAP pumping. PCFFA, represented by Earthjustice and the Natural Resources Defense Council, sued the Department of Commerce (NMFS) in 2005 in the case PCFFA, et al. v. Gutierrez. From 2004 to 2007, as the scientists had feared, record levels of Delta pumping under OCAP triggered a massive Delta salmon ecosystem collapse followed by widespread Delta-driven ocean salmon fishery closures in California and Oregon.

At stake were not only the listed salmon species, but fall-run chinook, which are the backbone of California's and much of Oregon's salmon fishery. A similar lawsuit was filed by conservation groups against Interior (USFWS) over the Delta smelt. In 2008, in two different decisions, a federal court ruled in favor of the fishing and conservation plaintiffs and the fishery agencies were ordered to prepare Biological Opinions for the protection of the salmon and smelt.

What followed the two court cases were a series of actions beginning in 2008 aimed at protecting the salmon and other fish in the estuary from the impact of the two water projects. Those protections, in addition to improved water conditions, increased estuary through-flow. These court-ordered actions, together with improved trucking and net-pen operations, are credited with the rebound of Central Valley salmon stocks in 2012.

The water contractors who already had long-term contracts for the water have been working for automatic renewal of those contracts at favorable rates – basically creating a private property right out of a public resource. They have also been working to loosen up rules on the transfer of the water. "Water-marketing," championed by neo-liberal groups such as the Environmental Defense Fund, would take the water contractors' ability to secure water permanently at taxpayer subsidized rates to the next step by making it a freely traded commodity they could sell on the open market to the highest bidder. This is an instant formula for a creating a handful of millionaires, or billionaires, at taxpayer – and most likely the fisheries' – expense.

To perfect their claim to as much water as possible with no disruption in delivery, the contractors have to put in place a better way to get the water to the San Joaquin Valley canals. Following the federal court rulings in favor of the fish, the water contractors began developing what they called a "habitat conservation plan" (HCP) under the federal ESA, and a Natural Communities Conservation Plan (NCCP) under California's ESA, which would allow them to "take" listed species under the ESA with impunity. Never ones to pass up an opportunity to line their pockets at public expense, what they began developing in the Schwarzenegger Administration, and now in the second Brown Administration, is essentially a resurrection of the old "Peripheral Canal" proposal. But this time they're putting the water into

two tunnels to run from the Sacramento River to the pumps at Tracy. It's euphemistically being called the Bay-Delta Conservation Plan, or "BDCP."

In addition to the water agencies and their contractors, the planning meetings for the BDCP have included the fishery agencies needed to bless the HCP/NCCP along with a handful of mostly compliant environmental organizations. The Delta counties, whose agriculture and water supplies are threatened by the plan, as well as fishing groups, have been carefully excluded from the table.

Midway through the BDCP process in 2009, the California Legislature stepped in, passing a water package to create a dual goal of (1) environmental restoration – presumably the estuary and its fish – and (2) water reliability. The 2009 water bill package included an \$11 billion water bond act, which has now been put over until November, 2014 for a public vote. The Legislature also created a "Delta Stewardship Council" that was to develop a plan for Delta protection pursuant to the dual goals. And, there was language requiring that new sources of water outside of the Delta be developed, recognition for the first time that the estuary cannot support the current level of water extraction.

That 2009 legislative package also added statutory language to the Water Code: "85023. The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta," and "85086 (c) (1). For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources."

The State Water Board subsequently held Delta flow hearings and in 2010 issued its report finding that a 75 percent unimpaired flow level was required for protection of public trust fish resources. This is very similar to the studies done by Michael Rosengurt for



the 1986 Board hearings where he found that diversions in excess of 30 percent cause serious permanent damage to an estuary. The State Board, at the time of this writing, is currently in a three-phase set of hearings on flow requirements, where they will begin balancing various "beneficial uses."

Undeterred by the 2009 legislation, the State Board findings, or a series of "red flags" raised by scientists on the adequacy of the science behind the BDCP and its capability of complying with the ESA, BDCP proponents are still pushing ahead. It's a brazen strategy – build the facilities and then when they don't protect the fish or the estuary, or the conditions imposed restrict water deliveries, seek to change the law. They almost got away with it in this Congress and they most certainly will try again. Science has never stood in the way of water development in California – and Westlands, the Met and the rest of the big water contractors will be there to see

that it doesn't in the future.

As far as the cost of building this massive new water project is concerned, look for two things to happen, if history is any guide. First the water agencies will seek to foist as much of the cost as possible off on the public – the so-called "environmental costs" (which are, in reality, mitigation costs for the massive project). Second, to the extent funds actually come from the water contractors for construction, these will be in some form of loans or bonds that most likely will never be paid off.

The Alternatives

There are alternative water sources available for farms and cities, including conservation (efficiency) measures, water recycling (reuse), groundwater cleanup and storage, and desalination. None of these, however, would deliver the few large water contractors massive amounts of taxpayer paid-for water

to turn around and sell to the highest bidder – scarce resources in a thirsty state. And, by thwarting development of alternative water sources the contractors also assure they'll have little competition when it comes to selling their ill-begotten gains.

What's at stake here is the heist of billions of dollars of water by a few large water contractors. The taxpayers will be left to foot the bill, and likely pay higher retail costs for their water in the future. And, the fish and fishermen will be the likely victims of collateral damage from this grand theft of the public's water. 🐟

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