



California Sportfishing Protection Alliance

“An Advocate for Fisheries, Habitat and Water Quality”

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El Dorado Water & Power Authority (EDWPA)
3932 Ponderosa Road, Suite 200
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Dear Sir or Madam:

The California Sportfishing Protection Alliance offers the following comments on the *Draft Environmental Impact Report for the Supplemental Water Rights Project Acquisition of 40,000 Acre- Feet Per Year of New Consumptive Water Rights* (State Clearinghouse Number SCH #2008102090). The DEIR was released on or about July 15, 2010.

Required mitigations, and who needs to do what to achieve them

The description of the regulatory and legal context within the DEIR is inadequate, incomplete, and at times inaccurate. This is particularly important because of the unusual and in fact precedent-setting nature of this water rights application.

The County of Origin statutes, under which the current applications seek priority over the Central Valley Project, explicitly contemplate a situation where the fulfillment of state filed applications requires that water available under previously granted permits or licenses will be reduced in order to meet the needs of a county of origin. El Dorado Water and Power Authority (hereinafter, “El Dorado”) asserts, and CSPA agrees, that to compel El Dorado to mitigate the environmental impacts of water diverted under its state filings by reducing the gross amount of its diversions under those filings would be contrary both to the letter and the intent of the County of Origin statutes.

El Dorado errs under CEQA, however, when it asserts that the Bureau of Reclamation (“Bureau”) is the only entity capable of mitigating the environmental impacts of its project. It errs procedurally when it states that no enforceable mitigation for its project is possible. It also substantively errs when it proposes to mitigate its project by means of actions by the Bureau that would both transfer the impacts and in some cases cause far greater environmental harm than the project itself.

The mitigations for diversion-related impacts, as stated on pp. 6.1-48ff for water supply impacts, and restated for subsequent subsections for fisheries impacts (section 6.2) and cumulative impacts to American River fisheries (see pp. 9.4-3 through 9.4.-4), leaves the Bureau to mitigate El Dorado's impacts on a "discretionary" basis:

Simulating specific CVP operational modifications and actions to meet future supply constraints would be unreasonably speculative. To avoid predicting how USBR might choose to operate, the following listing and accompanying discussion identifies broad, reasonably foreseeable and probable actions that USBR could take to accommodate the increasing demands placed on the CVP/SWP by superior water rights holders such as EDWPA. USBR could exercise and otherwise implement the following range of potential actions:

1. Utilize surplus water
2. Modifying CVP reservoir storage balancing operations (Trinity, Shasta, Folsom and San Luis reservoirs)
3. Modifying coldwater pool management (Shasta and Folsom reservoirs)
4. Imposing deficiencies to CVP water service contractors
5. Increasing CVP water supplies through new facilities or modifications to existing facilities such as the reoperation of Folsom flood storage
6. Acquiring additional water supplies by purchases from willing sellers

One or more of these discretionary actions by USBR could offset the increased demands placed on the system by those entities holding superior water rights. Such actions would be implemented, in part, through the existing Coordinated Operations Agreement (COA) with the Department of Water Resources (DWR). In fact, DWR could implement similar actions, but in order to avoid redundancy and because USBR's water rights on the American River were expressly subordinated to the future needs of El Dorado County, only USBR's actions are described here. The following describes, in greater detail, these reasonably foreseeable actions that USBR could implement to mitigate the environmental effects of the exercise of a superior water right.¹

Before examining these proposed "mitigations," CSPA believes that it is important to point out that the State Water Resources Control Board ("State Board" or "Board") has not only the ability but the obligation under its public trust responsibilities to place conditions on the Bureau's permits and licensees to mitigate the environmental impacts of the proposed diversion of additional water from the American River watershed by El Dorado. In addition, the Board has the ability, under its public interest responsibilities, to place restrictions on El Dorado's new permits that reduce the impacts of those permits as much as possible. We shall next discuss each of these, and return below to El Dorado's proposal for "reasonably foreseeable and probable actions by the Bureau."

The DEIR, on page 5.0-2, cites Water Rights Decision 1486, in which the State Board affirmed the right of its regulatory predecessor to limit diversions by the Bureau from the

¹ DEIR, pp. 6.1-48 – 6.1-49.

Santa Ynez River in order to meet water needs downstream within the watershed. This limitation was initially made in Water Rights Decision 886, Condition 11. The DEIR, on the same page, also cites to the limitation on the Bureau's rights that was placed in Water Rights Decision 893, which reserved to El Dorado the right to diversions upstream of the Bureau's facilities on the American River, and explicitly contemplated reductions in diversions by the Bureau. These decisions effectively address the Board's ability to "mitigate" the water supply impacts to the Bureau that may be caused by El Dorado's project.

It is in fact incorrect to suggest that impacts *to CVP water supply* must be mitigated. As stated in Decision 893, CVP water supply was always subject to reduction in favor of the senior El Dorado rights if and when El Dorado's state filings were permitted. What must be mitigated are the environmental impacts of additional diversions from the hydrologic system of the American River and the Sacramento – San Joaquin ("Bay-Delta") system. The responsibility to achieve this falls in the first instance squarely with the State Board. In the past, the State Board has relied, in granting new permits in the Central Valley, on standard permit terms 80, 90 and 91 for new non-CVP or SWP diversions, and on D-1641 for new CVP and SWP diversions. Neither of these approaches has protected fish and wildlife in the Bay-Delta system. In order to effectively mitigate increased diversions by El Dorado, the State Board must effectively reduce diversions in the Bay-Delta system by the amount diverted under El Dorado's proposed permits. This will require an entirely new approach or mechanism by the Board.²

El Dorado's proposed exercise of the proposed permits, and reasonable conditions that should be placed upon them

The DEIR claims:

The 40,000 acre-feet of annual water supply under the proposed project would serve a portion of anticipated growth-related demand for water supplies. There is no evidence to suggest that by meeting this demand, additional growth and water demand, beyond that already projected under the County General Plan will be generated that would, in turn, result in the need for new or expanded water entitlements beyond that sought under the current water right application.³

The DEIR does not disclose the fact that, in the past, El Dorado Irrigation District has sought to rely on other entities to maintain water supply reliability within the District's service area.⁴ If the District must in the future maintain reliability for an even greater supply in a likely expanded service area in support of new development, the likelihood can only increase that El Dorado Irrigation District or other EDWPA purveyors may need

² This is over and above the need of the Board to reduce *overall* diversions from the Bay-Delta system, as discussed below.

³ DEIR, p. 10.1-16.

⁴ In 2007, El Dorado Irrigation District sought to purchase 15,000 af from the City of Sacramento on a "onetime" basis to protect the District in case a dry 2008 followed a dry 2007. Sacramento Bee, July 24, 2007.

to turn to the Bureau or other Folsom Lake diverters, making it that much harder for the Bureau (or others) to fulfill the environmental requirements that are required pursuant to its water rights, its other regulatory requirements, and its operations. The Board could mitigate the potential for such future (greater) impacts by placing conditions on El Dorado's new permits under applications 5644 and 5645 that require that a certain portion of stored water be devoted specifically to maintaining reliability within the (present and future) El Dorado service areas; requirements could be placed for a dry year or drought reserve, for example.

Placing such conditions on new permits granted to El Dorado would not only be consistent with the Board's prerogatives, it would be prudent given El Dorado's historic approach and its position as stated in the DEIR. Page 4.0-17 of the DEIR explicitly contemplates "the next increment of water supply need," as if, once El Dorado goes about developing with the same abandon as it has done in the past, and uses up the available water under a permit granted under a state filing as proposed in this application, it can simply line up for another go-round. As the present author stated in comments on the El Dorado *Water Resources and Development Management Plan* in 2003 and again in 2007, "There is nothing that addresses the issue of how the County will avoid a situation where newly developed water supplies quickly become as fully appropriated as present supplies, and where even further supplies are needed to protect the users of the newly developed supplies from drought or simply from lack of water in dry water years."

According to our calculations, if El Dorado's current application is permitted at its full 40,000 afy storage amount, its remaining storage in the American River watershed under state filings 5644 and 5645 would be 12,269 afy.⁵ This appears to leave little room for further water development in the South Fork American watershed, whose fully appropriated status is not governing vis-à-vis the present application only because this status was held by the Board in Water Rights Order 98-08 not to apply to state-filed applications. The Cosumnes, where state-filed application 5645 has significant storage heretofore unassigned, has, for its part, remained largely undeveloped because it is a small, relatively low elevation watershed with limited snow, and conveyance from its three forks to the developed portion of El Dorado County would necessarily be elaborate and expensive. It would therefore be, in other words, an inherently unreliable potential source of future water development for the County, not to mention a magnet for controversy.

The imperative for El Dorado to devote part of its new supply to reliability is also consistent with recently elaborated legislative policy. SB 7X 1, passed in the fall of 2009, states in relevant part:

85021. The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of

⁵ In order that both the State Board and the public can evaluate the long-term impacts of the present applications, El Dorado should explicitly and clearly disclose its own calculations of storage remaining under all of its state filings for the American River watershed as well as for the Cosumnes watershed in the Final EIR.

investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

Further, SB X7 7, also passed in the fall of 2009, requires urban water users to reduce consumption by 20% by 2020. While El Dorado Irrigation District has adopted water conservation measures that may reduce its requirements for compliance with SB 7X 7 insofar as its existing rights are concerned, any new permits should be granted taking this mandate into account. Assignment of a portion of the face value of its permits as a dry year or drought reserve could address this mandate. Indeed, the 2005 *El Dorado – SMUD Cooperation Agreement* in Section 5.1 explicitly contemplates carryover storage by El Dorado in SMUD reservoirs of up to 15,000 af. The *Drought Plan for El Dorado County Water Agency West Slope* (December, 2007) lists an “EID White Rock Diversion” as a “Drought impact avoidance project” on page 3, and proposes an allocation of water stored in the Upper American River Project on page 2-8: “White Rock Diversion allows for 20,000 ac-ft of water storage in SMUD reservoirs under normal year conditions, with an additional 15,000 ac-ft available for carryover purposes.”⁶

Neither El Dorado nor the Board should assume that there will necessarily be another opportunity for a “next increment.” Part of Decision 1486 that El Dorado chose not to quote offers a caveat that may apply to the priorities of state filings just as it may to the priority system in general:

The “first in time, first in right” rule contained in Water Code Sections 1450 and 1455 must be read together with Water Code Sections 1253 (authority to impose public interest conditions), 1255 (authority to reject applications not in the public interest), 1256 (duty to consider California Water Plan in determining the public interest), and 1257 (duty to consider the relative benefit to be derived from all beneficial uses of water). If the State Water Rights Board had read or if this Board were now to read Water Code Sections 1450 and 1455 myopically, without considering other applicable provisions of law, as the Bureau and CCRR request, a skewed administration of water rights in this state would result.⁷

The DEIR does not allow reasoned evaluation of actions that could mitigate the thermal impacts to the Lower American River of its proposed diversions.

Water temperatures in the lower American River place salmon and steelhead in dangerous conditions almost every year. In 2001, 2002 and 2003, there were widespread fish die-offs in the Lower American. The flow standard for the Lower American that has been under development for several years through the Sacramento Water Forum is carefully structured to address thermal conditions in the fall as well as in the summer.

⁶ *Drought Plan for El Dorado County Water Agency West Slope*, 2007, p. 3 and p. 2-8.

⁷ D-1486, Point 27, p. 25.

Any worsening of the thermal conditions of the lower American River needs to be considered as significant.

In seeking to address mitigation for the effects of its proposed diversions on thermal conditions in the Lower American, El Dorado simply suggests that it is someone else's problem. However, regardless of who must take such action, the EIR should *state just what actions are needed* to assure that thermal conditions are no worse under its proposed project than they would be without it. The Final EIR should at least demonstrate that there are feasible actions available to junior diverters that could offset the thermal effects of its proposed new diversions. The Final EIR should model and analyze actions that would leave the lower American River thermally neutral or better compared to existing conditions. It should also state what conditions the Board would need to place in El Dorado's permits or other permits or licenses to make the mitigation of these thermal impacts complete and enforceable.

The DEIR contains an inadequate description of the water rights that affect the present application, and that are affected by it

The DEIR does not discuss or analyze the 1957 contract between the City of Sacramento and the Bureau of Reclamation that allows the City to store water in Folsom Reservoir while at the same time giving the Bureau the right to any water abandoned by the City in Folsom Reservoir. The Final EIR should analyze the relationship between this key contract and the current applications of El Dorado, which has the de facto function of granting priority to the Bureau over El Dorado, in spite of El Dorado's state filings.

In addition, the DEIR does not set the context of state filings, either on a statewide basis or within the American River watershed. According to Decision 893:

Applications by the State Department of Finance to appropriate water from the American River and tributaries for consumptive use within the counties of Placer and El Dorado above Folsom dam aggregate 1,031,325 acre-feet. ...These filings are prior to all of the applications to be acted upon in this decision....It is apparent that this reservation of water for the areas of origin represents some 38 percent of the total flow that passes the Fair Oaks gage during a normal year. Hence, in the absence of further consideration it would appear that the development potential of American River for downstream use is seriously hampered by the existence of these filings. (pp. 28-29)

Although the situation is not unique, it is a problem confronting the Board in determining the extent water is available for downstream long-time development which, in order to do so, requires a realistic estimate of the needs of these areas of origin. Evidence in this connection is far from conclusive....

In view of the foregoing, it is apparent that the reservation of water for the counties of origin under Department of Finance applications is far in excess of

their ultimate needs, varying between 135% and 1500%, depending on whether the estimates of the counties, the State or the United States are accepted. (p.30).

The cumulative impacts analysis in the Final EIR should discuss both the local and statewide effects of state filings, both in terms of their “inchoate” existence and in terms of their prospective partial or complete assignment.

The DEIR contains an inadequate description of the environmental baseline

Page 6.1-52 selectively cites SB 7X 1 in order to support a contention that additional surface storage in California may come about in the foreseeable future. SB 7X 1 also required the State Board to conduct a proceeding in order to determine the flow needs of the Delta ecosystem. The bond measure that might support storage increases (as provided in SB 7X 2), which could be surface storage but which could also be groundwater storage, has been postponed until 2012. However, the State Board has completed its Delta flow proceeding and, on August 3, 2010⁸ approved a report that answers the basic question: “what are the flow needs for fish in the Delta ecosystem?” This report, entitled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (hereinafter, “*Delta Flow Criteria Report*”), states as its purpose: “the flow criteria developed in this proceeding are intended to halt population decline and increase populations of certain species.”⁹ The conclusions of the *Delta Flow Criteria Report* are of such import that they should be included in the Final EIR for the El Dorado Supplemental Water Supply Project as new and significant information that must be disclosed to the public.¹⁰ The report confirms that both pelagic and anadromous fisheries are in severe crisis, and, in short, concludes that on average the quantity of outflow through the Delta needs to be doubled. This amounts to a need to increase Delta outflow by an average of 7 million acre-feet annually.

In contrast, the DEIR presents the condition of fisheries in the Bay-Delta ecosystem in an astoundingly rosy light:

Changes have also been made in ocean salmon fishing regulations, particularly beginning in 2007 and continuing through 2009 when the coastal ocean commercial and recreational harvest was banned in the San Francisco Bay area. Modifications to SWP and CVP export facility operations have also been made to improve the survival of juvenile Chinook salmon during migration through the Delta. In fact, modifications to SWP and CVP export operations in recent years have largely focused on reducing mortality to listed fish such as delta smelt, winter-run and spring-run Chinook salmon, steelhead, and other fish in response to SWRCB D-1641, VAMP, CVPIA, and FESA requirements of the USFWS and

⁸ While this report was not available when the El Dorado DEIR was being prepared, the written testimony for the proceeding was posted on the State Board’s website in February and March, 2010. The oral proceeding was open to the public, and DVD’s of those proceedings were made available by the Board.

⁹ *Delta Flow Criteria Report*, footnote, page 5.

¹⁰ The State Board as a responsible agency is also required to take into account this significant new information and disclose its impacts.

NMFS OCAP Biological Opinions, and associated federal court order see Chapter 13.0; Laws, Regulation, Ordinances, Policies).

These and other changes in management actions, in combination with favorable hydrologic and oceanographic conditions in recent years, are thought to have contributed to increasing abundance of adults returning to the upper Sacramento River since the mid-1990s. However, while Chinook salmon have shown increasing abundance over the last decade, recent reports show a sharp decline in the Chinook salmon population abundance in recent years. Although the causes for the decline in salmon abundance are not fully understood at this time, changes in ocean conditions are thought to be the primary reason (NMFS 2008).¹¹

The *Delta Flow Criteria Report*, and dozens of documents submitted in the informational proceeding that led to the Report's development, show that the cited regulatory measures and those listed in DEIR Chapter 13.0 have been abject failures at protecting salmon and other anadromous species, and that "recent declines in salmon abundance" cannot be glibly explained by a biased reading of a NMFS report that was subsequently qualified by NMFS itself.¹²

The discussion of pelagic species in the Delta in the DEIR is equally inadequate:

Modifications to SWP and CVP export facility operations have been made over the past decade to improve the survival of delta smelt and other fish species. As discussed previously, modifications to SWP and CVP export operations in recent years have reduced mortality to listed fish such as delta smelt.¹³

If mortality to listed fish has been reduced, it is only because listed fish now exist in such small numbers that there are almost none left to kill. As scientist Bill Bennett stated during the oral portion of the Delta Flow informational proceeding, you can only kill a fish once. Moreover, following the line of argument that was pursued by the state and

¹¹ DEIR, p. 6.2-87.

¹² See Lindley et al, *What Caused the Sacramento River Fall Chinook Stock Collapse?* (July 2009), esp. pp. 38-40. See also Peter Moyle, et al: *Salmon, Steelhead and Trout in California: Status of an Emblematic Fauna* (2008), p. 146:

The overall message here is that indeed "ocean conditions" have had a lot to do with the recent steep decline of salmon populations in the Central Valley in recent years. However, they are superimposed on a population that has been declining in the long run (with some apparent stabilization in recent decades, presumably due to hatchery production). The salmon still face severe problems before they reach the ocean, especially in the Delta. Overall, blaming "ocean conditions" for salmon declines is a lot like blaming Hurricane Katrina for flooding New Orleans, while ignoring the many human errors that made the disaster inevitable, such as poor construction of levees or destruction of protective salt marshes. Managers have optimistically thought that salmon populations were well managed, needing only occasional policy modifications such as hatcheries or removal of small dams, to continue to go upward. The listings of the winter and spring runs of Central Valley Chinook as endangered species were warnings of likely declines on an even larger scale.

¹³ DEIR, p. 6.2-91.

federal water contractors in the Delta Flow proceeding, the DEIR lists “changes in the seasonal timing and magnitude of freshwater inflow to the Delta and outflow from the Delta” as simply one bullet point among many in a washing list as factors affecting the abundance of Delta smelt and other pelagic fishes. In issuing its conclusions, the State Board clearly rejected this approach. Additionally, under CEQA, an EIR is required to weigh and analyze the interaction of various impacts, which the bullet list on pp. 6.2.91 – 6.2-92 clearly fails to do. Indeed, most of the other factors cited in the DEIR (entrainment, pollution, predation, reduced food, changes in salinity) are directly related to the alteration of Delta inflow and Delta outflow.

Inadequate description of the environmental baseline leads to inadequate proposals for mitigation and to an inadequate cumulative effects analysis

The appropriation of water by El Dorado under the proposed assignment of Applications 5644 and 5645 that is analyzed in the DEIR takes place in a context where there is not sufficient water in the American River and the Bay-Delta system to meet all existing uses. This is implicitly recognized in the DEIR when it suggests that the Bureau must mitigate the impacts of El Dorado’s proposed diversions. But while overallocation of a particular watershed was clearly contemplated when the state made its state filed applications in 1927, a situation of the cumulative overallocation of the entire Sacramento – San Joaquin, Bay-Delta system was apparently not. That cumulative overallocation is something that El Dorado does not seem to comprehend to this day, and this lack of comprehension infects the DEIR.

Many of the mitigations that El Dorado proposes that the Bureau could carry out reflect this lack of comprehension. According to the DEIR, if the Bureau is short on water supplies from the American River watershed, it can simply develop supplies somewhere else. While El Dorado recognizes at least the sometime lack of “surplus water,” i.e. real, *wet water*, in the American River system, it proposes to replace its own new diversions by substituting *paper water* elsewhere in the Bay-Delta system, water which as wet water does not exist.

As quoted above, the DEIR on pp. 6.1-48 – 6.1-49 lays out potential mitigation measures that the Bureau could undertake to offset the proposed future diversions from the American River watershed by El Dorado:

USBR could exercise and otherwise implement the following range of potential actions:

1. Utilize surplus water
2. Modifying CVP reservoir storage balancing operations (Trinity, Shasta, Folsom and San Luis reservoirs)
3. Modifying coldwater pool management (Shasta and Folsom reservoirs)
4. Imposing deficiencies to CVP water service contractors
5. Increasing CVP water supplies through new facilities or modifications to existing facilities such as the reoperation of Folsom flood storage

6. Acquiring additional water supplies by purchases from willing sellers

Actions 1, 5 and 6 each suggest mitigating El Dorado's proposed future diversions by increasing diversions elsewhere in the Bay-Delta system. Actions 2 and 3 would require changing reservoir operations so that measures to protect cold water pools and flows for fisheries were sacrificed to increase water supply; or else would require the benefits to fisheries of measures that improved cold water management to be sacrificed to the "paramountcy" of El Dorado's new diversions. Only measure 4 contemplates reducing CVP diversions in order to offset El Dorado's increased diversions, and this would be only on an ad hoc basis (as signaled by the term "deficiencies"). In regard to these deficiencies, the DEIR states that under existing regulatory constraints, the CVP would require no reductions in allocations in 65 to 68 percent of the 82 years in a modeled period of record.¹⁴ In other words, the water diverted out of the American River by El Dorado would, two-thirds of the time, simply be that much more water that comes out of the Bay-Delta system, the same system that the State Board just reported needs an additional 7 million acre-feet of annual outflow to restore fisheries.

The subordination of fisheries to El Dorado's aspirations approaches the theater of the absurd when the DEIR discusses the details of specific possible mitigations. The DEIR suggests as a possibility the construction of new water storage facilities such as Sites Reservoir west of the town of Maxwell in the Sacramento Valley. Sites is (elsewhere) envisioned as a reservoir with a 1.9 million acre-foot capacity and a firm yield of 470,000 to 640,000 acre-feet per year.¹⁵ It would be relatively shallow, and would provide little or no storage of cold water. Nonetheless, the DEIR discusses potential "benefits" of Sites and other proposed new reservoirs or reservoir expansions:

Surface storage is one component of a broad array of water management tools that includes conveyance improvements, water conservation and recycling measures, conjunctive management and groundwater storage, reoperation of existing reservoirs, water transfers, and other actions needed to build an in-delta solution. Additional surface storage will provide flexibility to the state's constrained water management system, which can be operated to contribute to the long-term sustainability of the delta ecosystem, maintain water quality and supply reliability, and prevent and plan for catastrophic failure of the Delta system.

The added flexibility created within the water management system will likely prove to be essential in developing solutions to delta ecosystem challenges.¹⁶

Right. Pulling an estimated firm yield of 470,000 to 640,000 acre-feet of water per year out of the Sacramento River will prove "essential" to solving the problems of a Delta system in need of an additional 7,000,000 acre-feet of outflow per year. But not to worry,

¹⁴ DEIR, p. 6.1-38.

¹⁵ <http://www.colusa-sun-herald.com/articles/reservoir-5194-water-agreement.html>. The Pacific Institute, in a recent new document, *The Next Million Acre-Feet*, however, pegs the firm yield of Sites at 184,000 afy. See http://www.pacinst.org/reports/next_million_acre_feet/index.htm. p. 22.

¹⁶ DEIR, p. 6.1-52.

the Department of Water Resources proposes to use up 140,000 to 240,000 acre-feet per year¹⁷ of nice warm water for “environmental” improvements.

Water that is not available cannot be conjured simply by changing the hypothetical manner in which it might be moved around. “Flexibility” does not increase quantity.

Inadequate baseline analysis leads to a faulty and misleading DEIR alternative

Alternative 4 of the DEIR, New Storage Facilities (Alder Creek Reservoir, Lower Ice House Reservoir, Canyon Creek Reservoir and Texas Hill Reservoirs), is said on p. 4.0-17 to have failed “the Environmental Fatal Flaw criterion.”¹⁸ It is also stated to be more expensive than other alternatives “providing equal benefit.” Nonetheless, it is analyzed as an alternative in the DEIR. It states on p. 4.0-16 that this alternative “possesses new and potentially significant benefits.” Among these benefits are “coldwater supply” for anadromous fish “at the regional and system-wide level, at the cost of temporary, localized impacts.” El Dorado, however, does not demonstrate how cold water might get from these potential upper elevation sites to the lower American River downstream of Folsom Reservoir (the current upstream-most extent of anadromous fish in the American River watershed) and still remain cold enough to provide cold water benefits. Water entering Folsom Reservoir from the South Fork of the American River during the summer is not sufficiently cold under existing conditions to increase Folsom Reservoir’s cold water pool, even though a large amount of cold water is brought down through the Upper American River Project in pipes and penstocks. Equally inexplicable is how El Dorado imagines that water from new reservoirs would benefit anadromous fish or “State-wide supply augmentation,” since the ostensible purpose of these developments would be to divert additional water before it ever reached the lower American River.

The alleged benefits to fisheries of new storage in the South Fork American River watershed are simply an ideology of new storage in search of a purpose. Predictably, the old pro-water-development generalization about response to climate change is trotted out as well. Here, the newest argument rediscovers one of the oldest: “It would do so by putting existing unimpaired runoff to maximum beneficial use, rather than having such supplies lost to the Pacific Ocean each year.” Evidently, in spite of a *Delta Flow Criteria Report* that shows an immediate and crying need for huge increases in Delta outflow, provision of such flows would not in the eyes of El Dorado constitute a “beneficial use.”

The authors of the DEIR got it right on first impulse: Alternative 4 is fatally flawed. It should be changed in the Final EIR to an alternative that was rejected from further consideration, and the alleged benefits should be deleted.

Conclusion

The Final EIR should disclose the opportunities the State Board has to condition permits assigned under state-filed applications 5644 and 5645 to protect the public interest and

¹⁷ <http://www.water.ca.gov/news/newsreleases/2007/091707sites.pdf>

¹⁸ All cites from the DEIR in this section are to pp. 4.0-16 and/or 4.0-17.

the public trust. The Final EIR should discuss how thermal impacts of the proposed projects to the lower American River can be practically and feasibly mitigated. It should describe the key elements of the legal context of the proposed applications in terms of water rights law. The Final EIR should adequately and accurately describe the severely degraded baseline conditions of fisheries in the Bay-Delta system in general and the Lower American River in particular. It should describe the opportunities that the State Board has to require enforceable permit conditions to mitigate existing conditions of Bay-Delta fisheries, and other enforceable measures the State Board must consider to correct the cumulative condition of those fisheries. Finally, the Final EIR should delete the ideology of increased surface storage from its analysis, since use of this rationale inaccurately portrays further degradation as mitigation.

Thank you for the opportunity to comment on the *Draft Environmental Impact Report for the Supplemental Water Rights Project Acquisition of 40,000 Acre- Feet Per Year of New Consumptive Water Rights*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Shutes", with a horizontal line extending to the right.

Chris Shutes
Water Rights Advocate
California Sportfishing Protection Alliance