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Ratepayers, Farmers, & Conservationists File Suit to Block Southern Ag Water Grab

SANTA BARBARA, *Calif.*— Today groups are seeking to block a secret backroom deal signed by five water contractors along with the Department of Water Resources [DWR] to undo water contracts underlying voter approved bonds four decades earlier. Absent court action, contract changes that largely benefit southern central valley corporate irrigators at the expense of urban ratepayers will trade away ratepayer funded projects and allow massive diversions of water from the Delta charging only pumping costs.

“These contract changes break promises made to bond holders and ratepayers,” said Carolee Krieger, President and Executive Director of the California Water Impact Network [C-WIN], one of the groups seeking to block the contract changes. “These changes undo decades of urban ratepayer protections for the benefit of a few agribusiness corporations and real estate developments at the expense of ratepayers and bondholders.”

The back room deal, known as the “Monterey Amendments” signed in 1995 without public input was challenged in court. The courts ruled the contract changes, deeding of portions of the State Water Project known as the Kern Water Bank, and removal of protections for southern California ratepayers would not be valid until a new analysis of the impacts had public review and was certified as complete.

“The State Water Project and the Kern Water Bank were developed by the state, at ratepayer expense, to benefit all of California—our cities, our farms, and our fish,” said Adam Keats, lead attorney with the Center for Biological Diversity. “But with the Monterey Plus Amendments it has been hijacked by private interests who are using it for their own ends, including stockpiling water to enable destructive speculative development. Meanwhile the state’s entire water system gets closer and closer to collapse and multiple fish species—salmon, Delta smelt, even Sacramento splittail—are brought closer to the brink of extinction so that subsidized growers can make profits off of water sales and new sprawl development can be built in the last of our wild places.”

The suit, filed today in Sacramento Superior Court, was brought by C-WIN, the California Sportfishing Protection Alliance, the Center for Biological Diversity, and the Central Delta Water Agency and the South Delta Water Agency agencies that deliver water to Delta-area farmers. The suit challenges the legality of the following:

- Institutionalizing the concept of “paper water” – water promised by contract that can never realistically be delivered.
- Eliminating the “urban preference,” which prioritized water deliveries to municipal customers during drought. This change resulted in water shortages and higher utility rates for southern California ratepayers.
- Illegally transferring state property known as the Kern Water Bank to private entities and undermining the California Water Code by masking the purpose and place of water use.
- Increasing water exports from the Sacramento-San Joaquin Delta, thus worsening water quality problems and triggering the collapse of the Delta’s ecosystem and fisheries.

The lawsuit seeks to reinstate the urban water preference during drought in State Water Project contracts, reduce the pumping of Delta water that has resulted in the collapse of fisheries, and return the Kern Water Bank to public ownership.

“This was a poorly negotiated backdoor deal that put the wealthy growers of subsidized crops ahead of fisheries and the need for a sustainable and reliable supply of clean drinking water for California's cities,” said Bill Jennings, chairman of the California Sportfishing Protection Alliance in Stockton. “The Metropolitan Water District gambled it could raid the Delta for ‘surplus’ water. It not only lost that bet, but the Monterey Plus Amendments triggered the collapse of Delta ecosystems and our once-great salmon fisheries.”

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For more information on the Monterey Plus Amendments, see <http://www.c-win.org/monterey-plus-agreement.html>. The California Water Impact Network promotes the equitable and environmental use of California's water, including instream uses, through research, planning, public education, and litigation. www.c-win.org

CSPA is a non-profit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality and fishery resources and their aquatic and riparian ecosystems. www.calsport.org

The Center for Biological Diversity is a nonprofit conservation organization with more than 200,000 members and online activists dedicated to the protection of endangered species and wild places. www.biologicaldiversity.org

Background: The Monterey Plus Amendments

In 1994, after negotiating for several months in secret at a resort in Monterey, the California Department of Water Resources (DWR) and five State Water Project (SWP) contractors executed the Monterey Agreement, which significantly modified the contracts of the State Water Project. Subsequently, DWR transferred public ownership of the Kern Water Bank, a million acre-foot underground storage facility, to the agribusiness dominated Kern County Water Agency, which in turn deeded the water bank to the Kern Water Bank Authority, a privately controlled joint powers authority.¹

After years of litigation and delay, DWR has recently given final approval to the agreement, now called the Monterey Plus Amendments. These amendments fundamentally alter the State Water Project by:

- Eliminating the “urban preference,” which prioritized water deliveries to municipal customers during drought. This change results in widespread urban water shortages and higher utility rates for southern California ratepayers;
- Illegally transferring state property in the Kern Water Bank to private entities and undermining the California Water Code by masking the purpose and place of water use;
- Increasing water exports from the Sacramento-San Joaquin Delta, thus worsening water quality problems and triggering the collapse of the Delta’s ecosystem and fisheries;
- Authorizing a new deregulated market for buying and selling “paper water” – water promised by contract that can never realistically be delivered;
- Opening the door to privatizing the publicly financed State Water Project.

For the first time in State Water Project history, publicly owned water rights and facilities are in essence privatized and placed under the control of for-profit corporations. A number of privately financed “water banks” have come into existence, allowing, in some cases, more money to be made selling water than farming.

The Monterey Plus Amendments are DWR’s second attempt at amending the long term water contracts. In 1995, three organizations successfully sued DWR and the Central Coast Water Authority on the inadequacy of the environmental impact report for the first attempt, called Monterey Amendments. The courts agreed that, given the statewide implications of the first Monterey Amendments, environmental documents should have been prepared by DWR and not a local agency, the Central Coast Water Authority.

DWR issued a draft environmental impact report (EIR) on the Monterey Plus Amendments in 2007 and released a final document in 2010. The California Water Impact Network, California Sportfishing Protection Alliance, Center for Biological Diversity and the South and Central Delta Water Agencies filed suit in June 2010 to overturn the Monterey Plus Amendments and force the return of the Kern Water Bank to state ownership and the return of all illegally secured profits.

The lawsuit, filed under the California Environmental Quality Act (CEQA), alleges that the Environmental Impact Report was deficient and failed to provide (1) an adequate project description; (2) adequate disclosure of project impacts; (3) an accurate description of the environmental baseline without

¹ See <http://www.c-win.org/monterey-plus-agreement.html> and <http://www.c-win.org/monterey-amendments-state-water-project-contracts.html>.

the Monterey Plus Amendments; (4) evaluation of feasible alternatives; (5) meaningful mitigation to lessen project impacts on the environment; (6) an acceptable response to comments and (7) substantial evidence to support conclusions of no significant environmental or ratepayer impacts.

The lawsuit asks the court to vacate and set aside approval of the Monterey Plus Amendments and EIR and suspend all activities pursuant to the project until DWR has complied with all requirements of CEQA and other applicable laws. It further asks the court to void the Kern Water Bank Exchange Agreement as an unconstitutional gift of a public asset and seeks a return to state ownership of the Kern Water Bank, a return of all of the ill-gotten gains from private use of the Kern Water Bank, and a prohibition of the Kern Water Bank Authority's use of the Kern Water Bank.

Specifically the lawsuit seeks to vacate:

1. Article 18(a) of the Monterey Plus Amendments.

The original Article 18(a) required that, in times of drought, deliveries to agricultural users would be reduced before deliveries to urban users would be cut. This was known as the urban preference. As a matter of state policy and the California Water Code, during shortages, drinking water for people and water supplies for most of California's industrial economy was superior to water used to grow surplus non-food crops in the desert. The Monterey Plus Amendments change that to ensure that agricultural contractors, representing a small fraction of the California economy, would receive as much water during droughts as the South Coast, which comprises over half of the state's population and economy.

For urban southern California, this change results in serious water shortages and increased water rates. The lawsuit seeks to vacate the revised Article 18(a) and to reestablish the urban preference to protect people and California's economy during our recurring droughts.

2. Article 18(b) of the Monterey Plus Amendments.

The SWP was planned to deliver supplies of up to 4.23 million acre-feet of water, much of it imported from North Coast streams (the Eel, Van Duzen, Klamath and Smith rivers). These rivers were declared wild and scenic in the 1970's and off limits to the State Water Project. As a result, the State Water Project was only partially built and has only been able to reliably deliver less than half the originally promised, contracted amounts. The original Article 18(b) provided for a permanent reduction in water deliveries in the event the entire State Water Project was not fully built out. Even though the Project has never been completed, the Monterey Plus Amendments eliminate this provision, thus allowing water contractors to continue to include and rely upon "paper water" in their contracts.

This change results in a reliance on interruptible paper water for permanent crops and urban expansion. The lawsuit seeks to reverse the modified Article 18(b) in order to preserve the state's ability to bring unrealistic promises of water into balance with reliable water yields.

3. Article 21 of the Monterey Plus Amendments.

The original Article 21 addressed the sale of "surplus" water and prohibited the delivery of such water for purposes that would require a reliable and sustained delivery of water such as homes, factories, businesses and permanent crops. The Monterey Plus Amendments eliminate these restrictions and made available the delivery of "interruptible water" to permanent development whenever the normal supplies had been made. This not only eliminates the safeguard against establishing economies based on unreliable water supplies but it also allows the massive increase in State Water Project Delta export pumping after 2000, triggering the collapse of Delta fisheries. For example, State Water Project exports increased from an average of

993,686 acre-feet in the 1970s to 1,925,758 acre-feet in the 1980s to 2,011,369 acre-feet in the 1990s to 3,078,838 between 2000 and 2006.

The Metropolitan Water District of Southern California (MWD), the water supplier to agencies throughout the South Coast, gambled when it gave up its “urban preference” in hopes of securing even larger amounts of “surplus” water. In wetter years, MWD was successful, but it never received more than 200,000 acre-feet from Article 21 in a single year, whereas in 2005, agricultural contractors received 531,000 acre-feet through Article 21. These deliveries of “surplus” water triggered Delta fisheries declines. Subsequent federal biological opinions under the Endangered Species Act to protect salmon, steelhead and Delta smelt, as well as court rulings on those biological opinions slammed the door on this gambit. Consequently, during the last drought, MWD and its customer agencies were faced with water shortages and had to increase rates for water it delivered, which were in turn passed on to consumers and rate payers.

These increased exports from the Delta estuary during critical periods wreaked havoc on endangered fish species and California’s commercially valuable fall Chinook salmon runs. They also increased dependence upon interruptible water supplies. The lawsuit seeks to void the revised Article 21 and limit the use of interruptible sources of water to purposes that can withstand inevitable water shortages.

4. Transfer of the Kern Water Bank.

In 1987, DWR established the Kern Water Bank as a “SWP conservation facility” that was integrated into the overall SWP operations as part of the State Water Resource Development System. In 1995, DWR transferred ownership -on an interim basis pending final approval of the first Monterey Amendments- of the Kern Water Bank to agricultural contractors, including Kern County Water Agency (KCWA), in exchange for 45,000 acre-feet of paper water; i.e., water that the KCWA had never received and for which KCWA was required to pay for as part of State Water Project construction. In other words, KCWA received property worth many millions of dollars in exchange for something it had never received and which reduced KCWA payments to the SWP at the same time. The very next day KCWA transferred ownership in the water bank to the Kern Water Bank Authority, a privately controlled joint powers authority. Although still operated by the Kern Water Bank Authority, this transfer is subject to final approval of the Monterey Plus Amendments.

The transfer of the Kern Water Bank to private parties violated the California Constitution and Water Code, among other provisions that prohibit the gift of state assets to private parties. The lawsuit seeks to void the transfer and recover all ill-gotten profits from the private use of public assets.

Chronology of the State Water Project, Its Monterey Contract Amendments and the Kern Water Bank (1929-2010)

1929-1934	First lengthy statewide drought resulting in runoff that was less than 60 percent of average conditions.
1931	State engineer Edward Hyatt submits first official State Water Plan to the Legislature
1956	California Department of Water Resources (DWR) created during special legislative session from a bill authored by Assembly Member Caspar Weinberger.
1959	Burns-Porter Act authorizing the State Water Project signed by Governor Pat Brown.
1960	<ul style="list-style-type: none"> • January: State issues "contracting principles" to govern water service contracts of the State Water Project. • November 4: Metropolitan Water District signs first State Water Project contract. Over the next several years, 28 additional water districts, mostly in the San Joaquin Valley and southern California, would sign similar contracts. • November 8: California voters narrowly pass Proposition 1, the bond initiative to fund Burns-Porter Act State Water Project facilities. Margin of victory was 174,000 votes out of 5.8 million votes cast; the bonds won overwhelmingly in southern California and desert counties.
1962	State Water Project begins deliveries to districts in Santa Clara and Alameda Counties.
1968	State Water Project begins deliveries to contractors along the California Aqueduct, including Kern County Water Agency and Castaic Lake Water Agency.
1970	California Water Plan update stated, "In the San Joaquin Valley, ground water storage can be used to provide regulation of surplus water imported from Northern California during wet years for later local and possible export use during subsequent drier periods, thus complementing off-stream surface reservoir storage....Such an operation could enable the deferral for a subsequent water supply facility."
1972	State Water Project begins deliveries to Metropolitan Water District of Southern California, and other smaller desert region water agencies.
1974	California Water Plan update states: "...[T]he Department and the Kern County Water Agency are conducting a cooperative investigation...to determine means of managing the [San Joaquin Valley] basin to make the best use of supplemental water obtained through the facilities of the California Aqueduct."
1976-1977	Worst drought in state history leaves California with less than 40 percent of average historical runoff.
1987	California Water Plan update stated, "The Department of Water Resources proposes to establish a ground water project in Kern County that would permit SWP water to be recharged stored, and extracted....Known as the Kern Water Bank, the project will serve two important functions. First, it will be operated in conjunction with State Water Project facilities and local facilities to increase SWP dependable supplies. Second, its facilities will also be used by local agencies to increase the amount of local that can be captured and stored....The initial phase of the Kern Water Bank is expected to increase the dependable supply of the State Water Project by about 140,000 acre-feet....The greater ability to make local exchanges of water, along with elimination of pumping to irrigate property acquired for the project will reduce regional overdraft.
1987-1992	Longest drought in modern California history leaves state with just 56 percent of average Sacramento Valley runoff and 47 percent of average San Joaquin Valley runoff.
1988	DWR acquires 20,000 of the Kern Fan Element west of Bakersfield to form the Kern Water Bank. Combined with seven other water bank properties in Kern County, the state reported that these lands and facilities could store up to 3.0 million acre-feet and deliver about 400,000 acre-feet in dry and critical years, including to State Water Project contractors. The water bank was still undergoing feasibility studies.
1991	With runoff at 43 percent of average in 1991, State Water Project deliveries to Kern County Water Agency plunged from 1.15 million acre-feet (MAF) in 1989 to 42,087 acre-feet in 1991. For Metropolitan Water District, state deliveries fell from 1.4 MAF in 1990 to 0.4 MAF in 1991.
1991-1993	Agricultural lenders unwilling to extend credit to growers in Kern County because of low reliability of state supplies during drought, threatening agricultural water districts with defaulting on water payments to the state. In turn, the problem threatens the rating of the State Water Project's bonds.
1993	With another dry year looming in 1994, Metropolitan Water District directors defer paying their annual share of SWP costs to the state, in protest over the system's high cost and unreliable water supply.

Chronology of the State Water Project, Its Monterey Contract Amendments and the Kern Water Bank (1929-2010)

1994	<ul style="list-style-type: none"> • June to August: California Research Bureau reports to the Legislature on State Water Project financing issues and recommends options for changing the system. • December 1: After negotiating for several months in secret at a resort in the Monterey Peninsula, the Department of Water Resources, Kern County Water Agency, Metropolitan Water District, Tulare Lake Basin Water Storage District, Solano County Water Agency, Coachella Valley Water District, and Central Coast Water Authority execute the Monterey Agreement. Central Coast Water Authority was the only entity present that was not a state water contractor (and still is not).
1995	<ul style="list-style-type: none"> • January: Carolee Krieger of Santa Barbara, who was monitoring the agency's activities, learns that the Central Coast Water Authority would prepare an program environmental impact report on the Monterey Agreement's implementation at a meeting in Buellton, Santa Barbara County. She contacts every environmentalist she knows for help. • June: 11 environmental organizations to review the report and submit comments on the environmental report. This report was subsequently sued by Planning and Conservation League, the Citizens' Planning Association of Santa Barbara County, and Plumas County Flood Control and Water Conservation District, on grounds that the report was inadequate, that the Monterey Agreement was invalid, and that the author of the report should have been the Department of Water Resources, not the Central Coast Water Authority. • October: Kern Water Bank Authority formed in Kern County to operate the Kern Water Bank. • December 13: Department of Water Resources executes an Agreement to give the groundwater-rich Kern Fan Element lands (formerly agricultural lands owned by oil company Tenneco Corporation) to Kern County Water Agency. The water agency agrees to give up 45,000 acre-feet from its contract "entitlement."
1996	<ul style="list-style-type: none"> • August 9: DWR deeds over the Kern Water Bank lands to the Kern County Water Agency. The same day, the Kern County Water Agency deeds over the Kern Water Banks to the Kern Water Bank Authority, a joint powers authority comprised of Dudley Ridge Water District, Kern County Water Agency, Semitropic Water Storage District, Tejon-Castaic Water District, Westside Mutual Water Company (a private entity owned by Paramount Farming Corporation), and Wheeler Ridge-Maricopa Water Storage District.
1997-1998	<p>With heavy runoff from a strong El Niño climate event, Kern County Water Agency begins using the Kern Water Bank (through its member agency the Kern Water Bank Authority) as it brokers water trades among agricultural water agencies using SWP and Central Valley Project water, including Westlands Water District and many others, and arranging both storage in Semitropic Water Storage District and Kern Water Bank Authority's underground aquifers for later delivery. One trade in 1998 involves Westside Mutual Water Company selling 20,000 acre-feet in a complex exchange of water that also involved Harris Ranch, Tulare Lake Basin Water Storage District, and Westlands Water District, according to a DWR report in 2001.</p>
2000	<p>Plaintiffs prevail in <i>Planning and Conservation League v. Department of Water Resources (PCL v. DWR)</i>, where the Third District Appellate Court ruled unanimously that the Department had to be the lead agency on the environmental report, the report had to be redone, and the transfer of the Kern Fan Element (water bank property) was invalidated.</p>
2003	<p>May 5: the parties eventually settled <i>PCL v. DWR</i>, agreeing to retain the basic principles of the Monterey Agreement, but with the Department paying out \$5.5 million and promising to prepare a "Monterey Plus" environmental impact report that would evaluate the Monterey amendment principles fully. Language about contract "entitlements" to water were replaced by reference to "Table A Amounts" with notes stating that amounts shown in the contracts may not be fully delivered. DWR also agreed to prepare biennial reports on State Water Project supply reliability. Under this "Monterey Plus" agreement, the the Department and its water contractors could operate the State Water Project according to the Monterey Amendments and new amendments pending completion of the new EIR and termination of the litigation.</p>
2007	<p>October: The Department of Water Resources issues the draft environmental impact report on the Monterey Plus agreement (that is, the SWP contract amendments "plus" requirements of the subsequent settlement agreement). The Department receives thousands of pages of comments from dozens of commenters by January 2008.</p>
2007-2009	<p>Three-year drought leaves state with about 70 percent of its average historical runoff. In 2008 Governor Arnold Schwarzenegger declares a drought emergency as a pretext for exempting a water transfer program from environmental review under the California Environmental Quality Act (CEQA). California Water Impact Network, California Sportfishing Protection Alliance, and Butte Environmental Council challenge the state's water transfer exemption in court and emerge victorious in March 2010.</p>
2010	<p>February to May: DWR issues a final "Monterey Plus" environmental report in April and waits three months before it publishes its final notice authorizing the document.</p> <p>June 3: California Water Impact Network, California Sportfishing Protection Alliance, Center for Biological Diversity, Central Delta Water Agency, and South Delta Water Agency challenge the Monterey Plus agreement and the adequacy of its environmental report.</p>

