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13 August 2014

Ms. Barbara L. Evoy
Deputy Director
Division of Water Rights
State Water Resources Control Board
1001 "I" Street, 24th Floor
Sacramento, CA 95814
Barbara.Evoy@waterboards.ca.gov

VIA: Electronic Submission
Hardcopy if Requested

RE: July 23, 2014 Letter From DWR and USBR and Related Correspondence, Complaint by CSPA Regarding Illegal Diversion by DWR and USBR, Petition to Adjudicate Central Valley Waters

Dear Ms. Evoy:

The California Sportfishing Protection Alliance (CSPA) read, with great interest, the 23 July 2014 letter from the California Department of Water Resources (DWR) and U.S. Bureau of Reclamation (USBR) accusing the south and central Delta diverters of illegally diverting water in excess of their water rights and requesting that the State Water Resources Control Board (State Board) exercise its statutory authority to require Delta water users to provide proof of their "assumed" water rights or require curtailment of the unauthorized diversions. The State Water Contractors and Westlands Water District submitted letters in support of the DWR and USBR request on August 5 and 7, respectively.

CSPA believes: the 6 August letter by Jeanne M. Zolezzi, representing Banta-Carbona, West Side, Patterson and West Stanislaus Irrigation Districts; the 7 August 2014 letter by Jennifer L. Spaletta, representing Delta landowners; the 7 August letter by John Herrick, representing South Delta Water Agency; and the 8 August 2014 letter by Dante John Nomellini, representing Central Delta Water Agency, eloquently refute those allegations and conclusively establish the right of Delta landowners to divert water from the Delta. CSPA incorporates those comments into this complaint and petition.

However, CSPA wishes to bring to the State Board's attention the continuing illegal diversion of water from the San Joaquin, Mokelumne, Cosumnes and Calaveras Rivers and Delta agricultural return flow by DWR and USBR at their Delta pumping facilities and the illegal diversion of San Joaquin River riparian flow by the USBR at its Friant Project. CSPA urges the State Board to use its statutory authority to investigate these illegal diversions, require DWR and USBR to furnish proof of their right to divert water from these sources and to curtail these illegal diversions. By this letter, CSPA files a formal complaint alleging that DWR and USBR are

illegally exporting water they are not entitled to divert at their Delta pumping facilities and that San Joaquin River riparian flow is being illegally diverted upstream of the Delta.

The EIR/EIS for the Bay Delta Conservation Plan (BDCP) used DSM2 to model or fingerprint source waters in the Delta, as part of its water quality assessment.[1] The source water modeling results are reported in Appendix 8D, of the EIR/EIS and the results of the source water analysis for Clifton Court Forebay and the Jones Pumping Plant are included below. DWR also routinely reports source water analysis for various sites in the Delta, including Clifton Court Forebay and the Jones Pumping Plant. Those results, from 14 April to 14 July 2014 are also included below.

Together, they demonstrate that DWR and USBR have been illegally exporting water from the San Joaquin and eastside rivers that they are not entitled to export. The BDCP EIR/EIS source water fingerprinting shows that water sourced from the San Joaquin River and eastside tributaries (Mokelumne, Cosumnes and Calaveras Rivers) is exported at DWR's Banks Pumping Plant during all months modeled.[2] During the months of March through June, water from the San Joaquin and eastside tributaries comprises the majority of water exported in all years modeled. They comprise a significant minority of exports during drought years modeled.[3] The DWR modeled volumetric fingerprint at Clifton Court Forebay between 14 March and 14 July 2014 also demonstrates that water from the San Joaquin River and eastside tributaries comprises a significant percentage of water exported at the Banks Pumping Plant.[4]

DWR has no facilities on the San Joaquin River or eastern tributaries and no water rights to divert these waters. In so far as flows from these rivers are considered abandoned in the Delta, senior water rights holders in the Delta have priority over the junior water rights of DWR. DWR is entitled to divert these waters only after the needs of Delta water rights holders and all water quality and flow standards are met.

Further, the BDCP EIR/EIS modeling shows that water from agricultural sources within the Delta is exported from the Banks Pumping Plant in all years modeled. The percentage of agricultural sourced water exported significantly increases during drought years modeled. Again, the DWR modeled volumetric fingerprint at Clifton Court Forebay between 14 March and 14 July 2014 enclosed below shows that a significant percentage of exports come from agricultural sources in the Delta. Senior appropriators within the Delta and area of origin have first call on these flows. DWR is entitled to divert these waters only after the needs of Delta water rights holders and all water quality and flow standards are met.

The situation is similar for USBR's Jones Pumping Plant. The BDCP EIR/EIS source water fingerprinting shows that water sourced from the San Joaquin River and eastside tributaries (Mokelumne, Cosumnes and Calaveras Rivers) is exported at USBR's Jones Pumping Plant

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[1] BDCP EIR/EIS, Chapter 8, Water Quality, page 8-133.

[2] BDCP EIR/EIS, Appendix 8D, Source Water Fingerprinting Results, Figure 19, NA LLT – Banks Pumping Plant #1 for All years, page 8D-21.

[3] BDCP EIR/EIS, Appendix 8D, Source Water Fingerprinting Results, Figure 20, NA LLT – Banks Pumping Plant #1 for DROUGHT years (1987-1991), page 8D-22.

[4] DWR's "Fingerprint" Data for various Delta locations can be found at: http://www.water.ca.gov/waterquality/drinkingwater/Delta_Fingerprints.htm

during all months modeled.[5] During many months, water from the San Joaquin and eastside tributaries comprises the vast majority of water exported in both all years modeled and drought years modeled.[6] The DWR modeled volumetric fingerprint at Jones Pumping Plant between 14 March and 14 July 2014 also demonstrates that water from the San Joaquin River and eastside tributaries comprises a significant percentage of water exported.[7]

The USBR has no facilities on the Mokelumne, Cosumnes and Calaveras Rivers and no water rights for these waters. As virtually no flow from USBR's Friant project reaches the Delta, the only other USBR facility on the San Joaquin River is New Melones on the Stanislaus River. The places of use specified in USBR's water rights permit on the Stanislaus are Stanislaus, Calaveras, Tuolumne and San Joaquin Counties. They have no legal right to export water sourced in the Stanislaus River. In so far as flows from these rivers are abandoned in the Delta, senior water rights holders in the Delta have priority over the junior water rights of USBR. Again, USBR is entitled to divert these waters only after the needs of Delta senior water rights holders and all water quality and flow standards are met.

The BDCP EIR/EIS modeling shows that water from agricultural sources within the Delta is exported from the Jones Pumping Plant in all years modeled. The percentage of agricultural sourced water exported significantly increases during drought years modeled. Again, the DWR modeled volumetric fingerprint at Jones Pumping Plant between 14 March and 14 July 2014 shows that a significant percentage of exports come from agricultural sources in the Delta. Senior appropriators within the Delta and area of origin have first call on these flows. USBR is entitled to divert these agriculturally sourced waters only after the needs of Delta senior water rights holders and all water quality and flow standards are met.

With respect to riparian flows on the San Joaquin River, the USBR and other upstream diverters on the San Joaquin River have deprived Delta riparian landowners of the ability to divert riparian water because of their illegal diversion of riparian flows in the upper San Joaquin watershed. Regardless of any contractual arrangements between USBR, the Exchange Contractors or other entities, neither they nor the State Board have a legal right to deprive riparian landowners on the lower San Joaquin River of riparian flows from the upper watershed. The appropriative water rights of the Exchange Contractors or members of the Friant Water Authority cannot obviate the rights of Delta riparian landowners to their fair share of riparian flows on the San Joaquin.

The rights of riparian landowners on the lower San Joaquin extend to the winter flows necessary to maintain the streambed between Gravelly Ford and the confluence of the Merced River. They further extend to the flows necessary to maintain the water table below Gravelly Ford at levels that ensure that riparian flows will reach the confluence of the Merced River and will not infiltrate into the ground because of illegal diversion or excessive groundwater pumping adjacent to the river.

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[5] BDCP EIR/EIS, Appendix 8D, Source Water Fingerprinting Results, Figure 21, NA LLT – Jones Pumping Plant for All years, page 8D-23.

[6] BDCP EIR/EIS, Appendix 8D, Source Water Fingerprinting Results, Figure 22, NA LLT – Banks Pumping Plant for DROUGHT years (1987-1991), page 8D-24.

[7] See below or: http://www.water.ca.gov/waterquality/drinkingwater/Delta_Fingerprints.htm

As of this writing, the inflow to Friant Reservoir is almost twenty times the flow in the San Joaquin River above the Merced confluence despite intervening agricultural return flows. The inflow into Friant is greater than San Joaquin River flow at Vernalis, despite the intervening inflow from the Stanislaus, Tuolumne and Merced Rivers. The riparian rights of Delta landowners also extend to the tributaries of the San Joaquin River, including the Stanislaus, Tuolumne and Merced Rivers. Rights to riparian flow are above and beyond water released by USBR to maintain water quality standards and dilute salts, selenium and boron discharged by irrigated agriculture on the west side of the San Joaquin River.

The unwarranted and baseless accusations by DWR, USBR, Westlands and the State Water Contractors bring to the forefront the long overdue necessity of adjudicating the basins. During the 13-14 November 2012 Workshop #3, of Phase II of the update to the Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary, CSPA, the California Water Impact Network and AquAlliance presented testimony by Tim Stroshane regarding the enormous over-appropriation of water in the San Joaquin and Sacramento Valley Basins.[8]

The total consumptive water right claims in the San Joaquin River Basin total 32,656 thousand-acre feet (TAF) versus an average annual unimpaired flow of 6,181 TAF.[9] The ratio of total consumptive water right claims versus average annual unimpaired flow in the San Joaquin River Basin is 5.28. The total consumptive water right claims in the Sacramento River Basin total 120,571 TAF versus an average annual unimpaired flow of 21,619 TAF.[10] The ratio of total consumptive water right claims versus average annual unimpaired flow in the Sacramento River Basin is 5.58. Appendix D, of Mr. Stroshane's testimony contains 243 pages of itemized consumptive water rights claims in the respective basins.[11]

Water rights to flows in the San Joaquin and Sacramento basins were oversubscribed before the California Legislature passed the Water Commission Act of 1914, which established todays permitting process. They were oversubscribed before: the 1927 state filings to reserve unappropriated water, the basis for the claimed water rights of the state and federal export projects; the Legislature passed the Central Valley Project Act in 1933 and long before the old Water Rights Board, this Board's predecessor, was created in the early 1940s.

In 1942, Henry Holsinger, long time chief attorney for the Division of Water Resources and subsequently Chairman of the Water Rights Board, authored a report titled *Necessity For Comprehensive Adjudication Of Water Rights On The Sacramento And San Joaquin Rivers In Aid Of The Central Valley Project.* Holsinger and then Governor Earl Warren testified to the Engle Congressional Committee in 1951 that adjudication of vested rights should have occurred before construction and operation of the Central Valley Project.

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8 Stroshane T., Testimony on Water Availability Analysis for Trinity, Sacramento, and San Joaquin River Basins Tributary to the Bay-Delta Estuary, 2012, see: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments111312/tim_stroshane.pdf

9 *Id.* PDF Page 12.

10 *Id.*

11 *Id.* Appendix D, PDF Pages 59-299.

The last seventy years of California's water wars must be read in the light of junior water right claimants seeking to break in line and disenfranchise those who hold senior riparian and appropriative water rights. The reckless accusations by DWR, USBR, Westlands and the State Water Contractors are but the latest example in a long line of assaults on 150 years of water law and precedent.

Millions of Californians have mortgaged their hopes and futures on the illusion of an adequate and reliable water supply. Because water speculators sabotaged previous efforts to adjudicate the state's waters, many of those Californians are now grievously suffering. It's past time to end the charade and initiate a process of bringing the legal claims to water into balance with actual water in California. As State Water Board Executive Director Tom Howard observed in the recent hearing on drought emergency rules, adjudication would be a long and involved process but would greatly benefit future generations. Indeed, California's future prosperity depends, in significant measure, upon bringing demand into balance with supply. An initial step toward that goal is establishing the availability of water and the legal rights to it.

If an aggrieved party does not initiate a legal adjudication in the near term, it will likely arise during Phase III of the update to the Water Quality Control Plan for the San Francisco Bay-Sacramento/San Joaquin Delta Estuary or during hearings to change the point of diversion for DWR and USBR pursuant to the BDCP. It would be in the State Water Board's interest to manage that proceeding rather than being a party to it.

In conclusion, this letter serves as a formal complaint by CSPA against the unauthorized and illegal diversions of water by DWR and USBR at their Delta pumping facilities, a complaint against USBR and others for unauthorized and illegal diversion of San Joaquin River riparian flow and a petition to the State Water Board to initiate, on its own motion, an adjudication of Central Valley water rights.

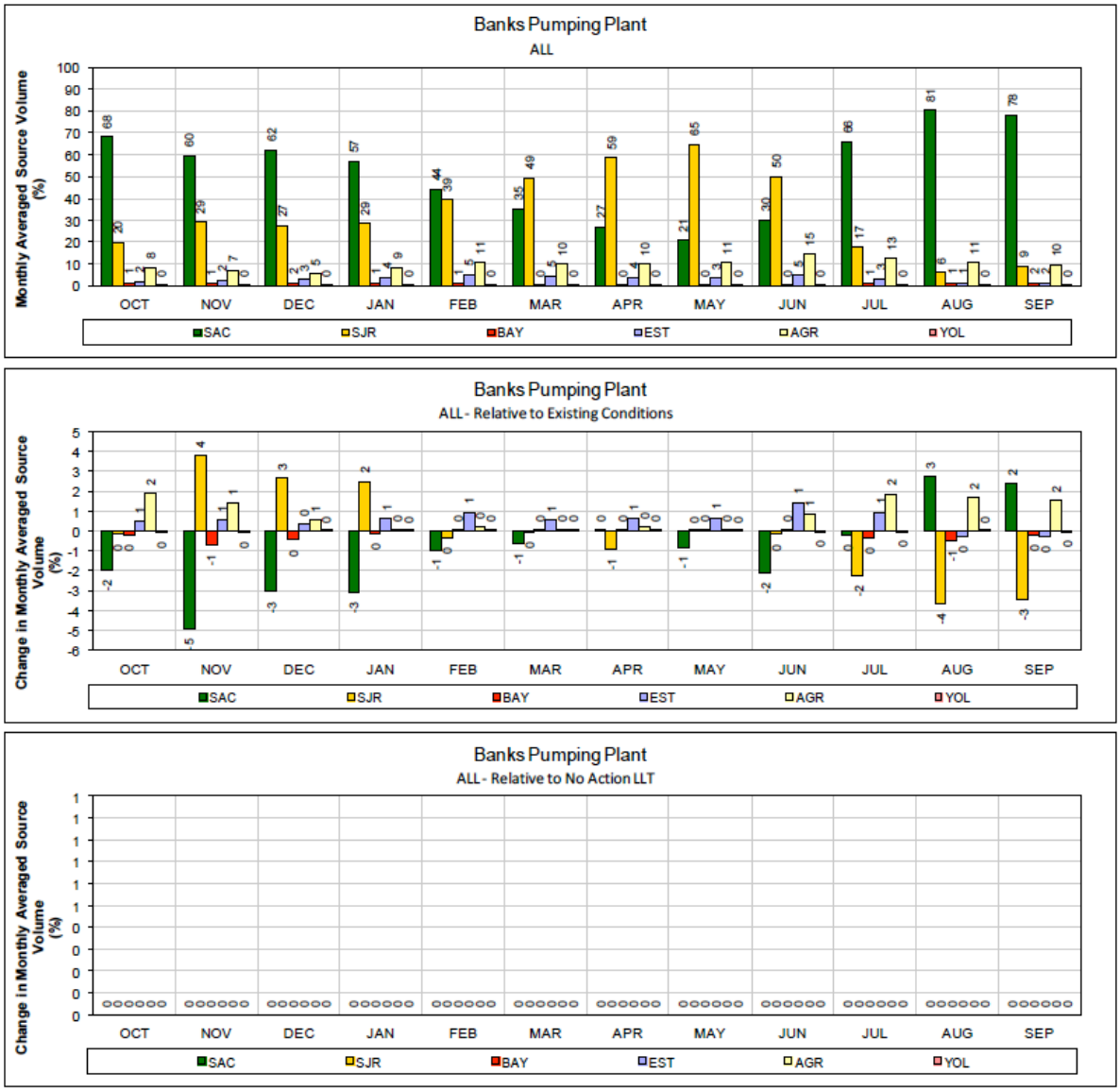
Thank you for your consideration. If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,

Bill Jennings, Executive Director
California Sportfishing Protection Alliance

Enclosures

Cc: Felicia Marcus
Frances Spivy-Weber
Tam M. Doduc
Dorene D'Adamo
Steven Moore
Tom Howard
Craig Wilson



1 **Figure 19. NA LLT – Banks Pumping Plant #1 for ALL years (1976-1991)**

2 **Monthly average source volume (top figure) and change in monthly average source volume relative to**
3 **Existing Conditions and No Action Alternative Late Long Term (bottom two figures).**

From BDCP EIR/EIS Appendix 8D, Page 8D-21, Source Water Fingerprinting Results at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_EIR-EIS_Appendix_8D_-_Source_Water_Fingerprinting_Results.sflb.ashx

Figure 20.NA LLT – Banks Pumping Plant #1 for DROUGHT years (1987-1991)

Monthly average source volume (top figure) and change in monthly average source volume relative to Existing Conditions and No Action Alternative Late Long Term (bottom two figures).

From BDCP EIR/EIS Appendix 8D, Page 8D-22, Source Water Fingerprinting Results at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_EIR-EIS_Appendix_8D_-_Source_Water_Fingerprinting_Results.sflb.ashx

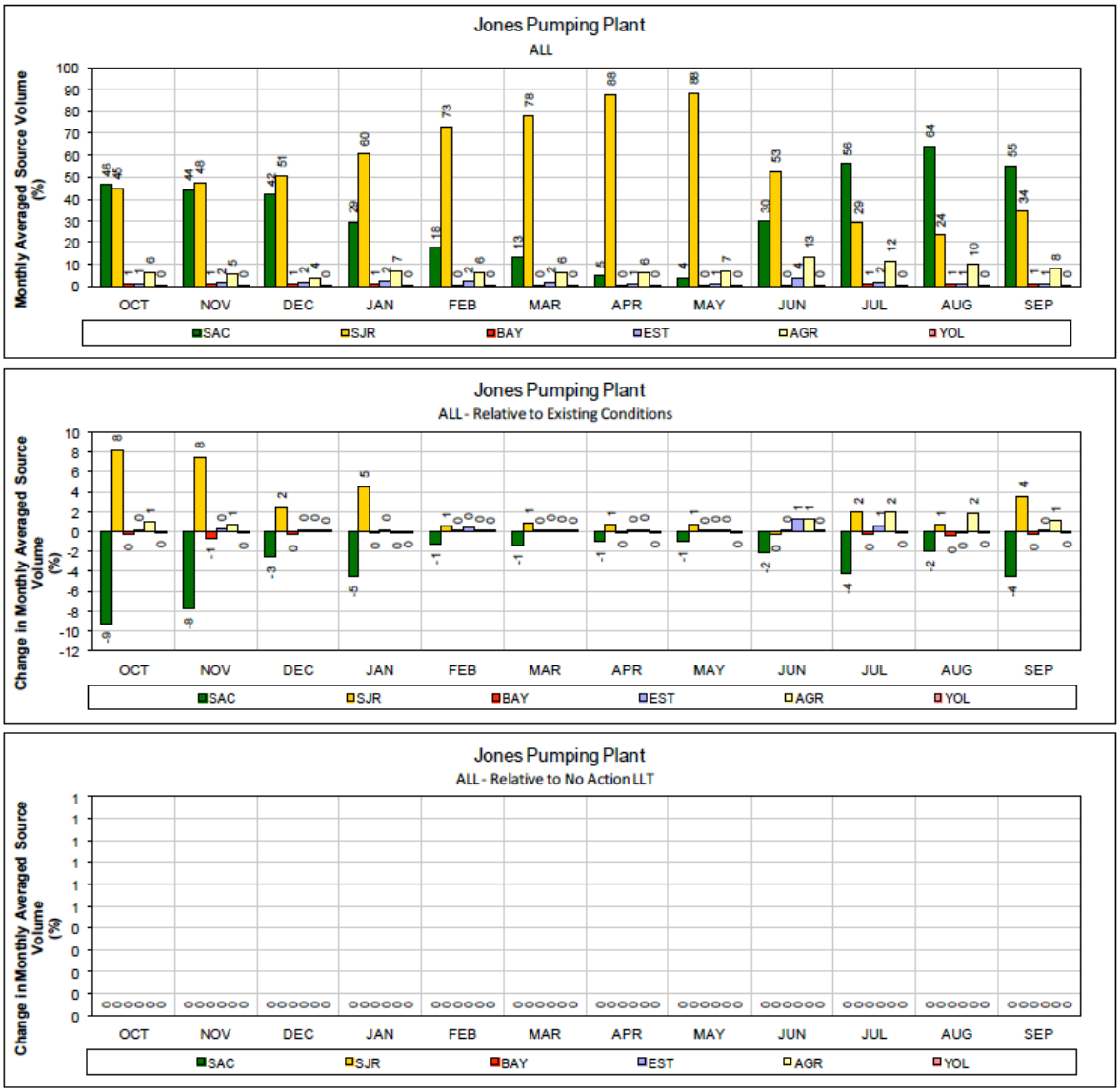


Figure 21.NA LLT – Jones Pumping Plant for ALL years (1976-1991)

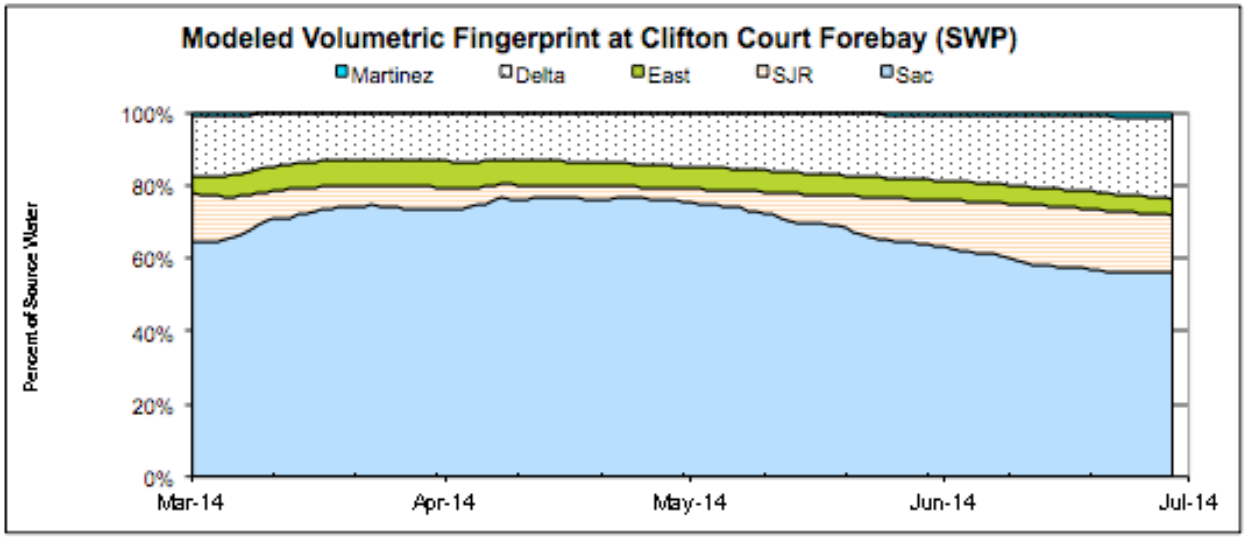
Monthly average source volume (top figure) and change in monthly average source volume relative to Existing Conditions and No Action Alternative Late Long Term (bottom two figures).

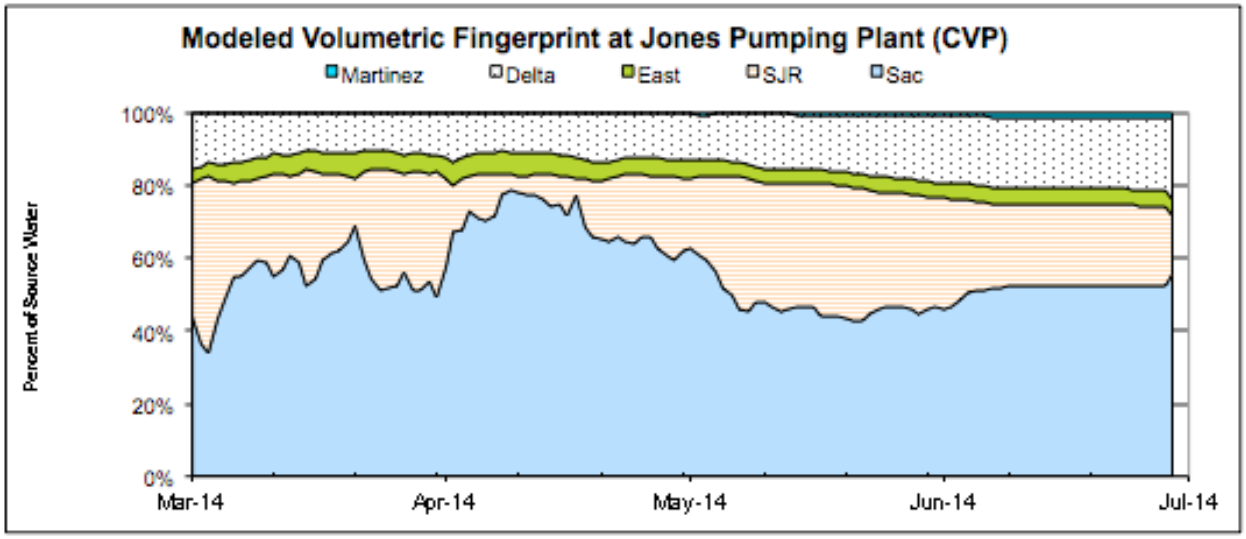
From BDCP EIR/EIS Appendix 8D, Page 8D-23, Source Water Fingerprinting Results at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_EIR-EIS_Appendix_8D_-_Source_Water_Fingerprinting_Results.sflb.ashx

1 **Figure 22.NA LLT – Jones Pumping Plant for DROUGHT years (1987-1991)**

2 **Monthly average source volume (top figure) and change in monthly average source volume relative to**
3 **Existing Conditions and No Action Alternative Late Long Term (bottom two figures).**

From BDCP EIR/EIS Appendix 8D, Page 8D-24, Source Water Fingerprinting Results at: http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Public_Draft_BDCP_EIR-EIS_Appendix_8D_-_Source_Water_Fingerprinting_Results.sflb.ashx





DWR's "Fingerprint" data for various Delta locations can be found at:
http://www.water.ca.gov/waterquality/drinkingwater/Delta_Fingerprints.htm