



April 15, 2021

Joaquin Esquivel, Chair
Members of the Board
State Water Resources Control Board
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commentletters@waterboards.ca.gov
Via electronic mail

Re: 2021 Sacramento River water temperatures, deliveries, and transfers

Dear Chair Esquivel and members of the Board:

The California Sportfishing Protection Alliance (CSPA) and the California Water Impact Network (CWIN; collectively, CSPA et al.) respectfully comment on the pending operation in 2021 of the Sacramento River and Shasta Reservoir. The primary overall concern of CSPA et al. is water temperature management in the Sacramento River downstream of Keswick Dam. These comments focus specifically on proposed water deliveries to Sacramento River Settlement Contractors in light of water temperature management pursuant to Water Rights Order 90-05. These comments also focus on the related issue of proposed water transfers from Sacramento River Settlement Contractors to other Central Valley Project (CVP) contractors south of Delta.

The State Water Resources Control Board's (Board) Water Right Order 90-05 enforces the Central Valley Water Quality Control Plan's (Basin Plan) water quality objectives for the upper Sacramento River, the requirements of Article X, Section 2 of the California Constitution (Water Code Section 275), and the Public Trust Doctrine (Authorities).

CSPA et al. request that the Board use its Authorities to require the Bureau of Reclamation (Reclamation) to limit water deliveries in 2021 to Sacramento River Settlement Contractors levels significantly below the levels it delivered to these contractors in 2015. In addition, CSPA et al. request that the Board uses the same Authorities to disallow proposed transfers south of Delta from Sacramento River Settlement Contractors.

The issues of Sacramento River temperature management and transfers from the Sacramento River watershed are interrelated due to the inability of Reclamation to maintain temperature control without maintaining sufficient cold water in storage. Both deliveries to Sacramento River Settlement Contractors and transfers from those contractors "under those contracts" create demands on the Shasta cold water pool that risk loss of temperature control in

2021. In addition, the greater these deliveries and transfers are in 2021, the more they will reduce carryover storage in Shasta Reservoir and increase the likelihood of loss of temperature control in 2022.

Sacramento River Water Temperature Management

CSPA received from Board staff a copy of a March 30, 2021 letter to the Board from Andrew Hitchings, Somach Law, and Meredith Nikkel, Downey Brand, on behalf of the Sacramento River Settlement Contractors (Downey Brand letter). The Downey Brand letter responds to a March 12, 2021 letter from the National Resources Defense Council (NRDC) and other environmental organizations, including CSPA. The Downey Brand letter purports to explain why Reclamation cannot as a matter of water rights priority manage water for Sacramento River temperature control unless it fulfills contract obligations to Sacramento River Settlement Contractors, stating at pages 3-4:

[N]ot only does Reclamation lack any discretion to modify the terms of the SRS Contracts, it must comply with them as a condition of its water rights to operate the Shasta Reservoir, including for temperature management purposes. . . . NRDC effectively asks the State Board to curtail more senior priority water rights holders on the Sacramento River so that a more junior diverter can use its water rights to meet downstream water quality objectives.

The Downey Brand letter is incorrect, because it equates uses to protect the public trust with purposes of use assigned under a water right. However, public trust uses are fundamentally different. They are also superior to uses under a water right, including senior rights and riparian rights. These principles are clearly spelled out in [*Light v. State Water Resources Control Board*](#) (2014) 226 Cal.App.4th 1463 [173 Cal.Rptr.3d 200]:

[T]he Board has the ultimate authority to allocate water in a manner inconsistent with the rule of priority, when doing so is necessary to prevent the unreasonable use of water. (El Dorado, supra, 142 Cal.App.4th 937, 966.) Because "no one can have a protectible interest in the unreasonable use of water" [citation] . . . when the rule of priority clashes with the rule against unreasonable use of water, the latter must prevail." (Ibid.) {Slip Opn. Page 23}

This case, moreover, involves more than traditional water rights. As the Supreme Court held in *Audubon Society*, no party can acquire a vested right to appropriate water in a manner harmful to public trust interests and the state has "an affirmative duty" to take the public trust into account in regulating water use by protecting public trust uses whenever feasible. (*Audubon Society*, supra, 33 Cal.3d at pp. 446--447.) Although the *Audubon Society* court considered the public trust doctrine only in relation to permitted appropriative water rights, subsequent decisions have assumed the doctrine applies as well in the context of riparian and pre-1914 appropriator rights. (*United States*, supra, 182 Cal.App.3d at p. 106 [in *Audubon Society*, "the court determined that no one has a vested right to use water in a manner harmful to the state's waters"]; *El Dorado*, supra, 142

Cal.App.4th at p. 966 ["when the public trust doctrine clashes with the rule of priority, the rule of priority must yield"].)

The Sacramento River Settlement Contractors and any other water rights holders do not have the right to have Reclamation deliver water to them when that water needs to be held in storage to maintain temperature control in Shasta Reservoir. A March 23, 2021 model run performed for the Sacramento River Temperature Task Group predicted 2021 mortality of winter-run Chinook salmon of 89%.¹ That's "harmful to public trust interests" by any definition. And the recommendations of the NGO's absolutely do observe priority to the degree possible: Sacramento River Settlement Contractors are the only entities on the Sacramento River who in 2021 have water deliveries left to reduce. Reclamation has already denied deliveries to junior diverters in the watershed.

A second letter made available to CSPA from Board staff is a March 31, 2021 "CVP Contractors' Response on 2021 Upper Sacramento River Temperature Management and Requests for Actions under Order 90-5." This CVP Contractors' Letter responds to the March 12, 2021 letter to the Board from NRDC and others and to a March 14, 2021 letter to the Board from the Winnemem Wintu Tribe. The CVP Contractors' Letter recommends that the Board reject "the NGOs' and Tribe's singular focus on one element of habitat for one species" as "myopic and outdated."

Outdated? Well, call us old fashioned for thinking that you shouldn't spend more than you have. Call us old fashioned for thinking that math and science matter. We focus first winter-run salmon because it is the most sensitive species in the Sacramento River. But we've called out how over-delivering water devastates other runs of salmon and sturgeon in the Sacramento River, and smelt species in the Delta, as well.

Myopic? We think it was short-sighted to deliver too much water in 2020 and leave too little in storage in Shasta (and Oroville and Folsom) for 2021 (*see* Figure 1 below). That's not "favorable" as the CVP Contractors' letter describes it; it's deferral in the hope that the following year will not be dry. Oops. As Board staff stated last year, 2020 was more akin to 2013 than to 2014. Now, having made the same mistakes in 2020 that it made in 2013, Reclamation faces the 2014-equivalent in 2021. In some respects, 2021 is worse than 2014 because Reclamation and DWR have less water in storage. If Reclamation doesn't wise up and limit 2021 Shasta releases to less than those of 2015 (not 2014; *see* Figure 2 below), fish will once again massively die (*see* water temperatures in Figure 3 below), and a dry 2022 would make 2015 look like the good old days when there was water in the reservoirs to mismanage.

¹ See https://www.nrdc.org/sites/default/files/media-uploads/tdm_march_2021_srttg_summary_3.pdf.

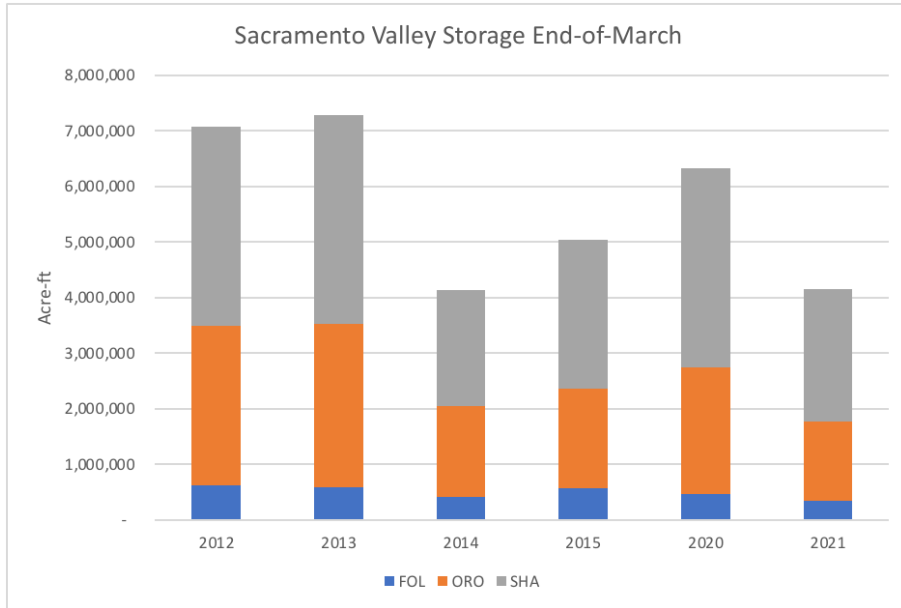
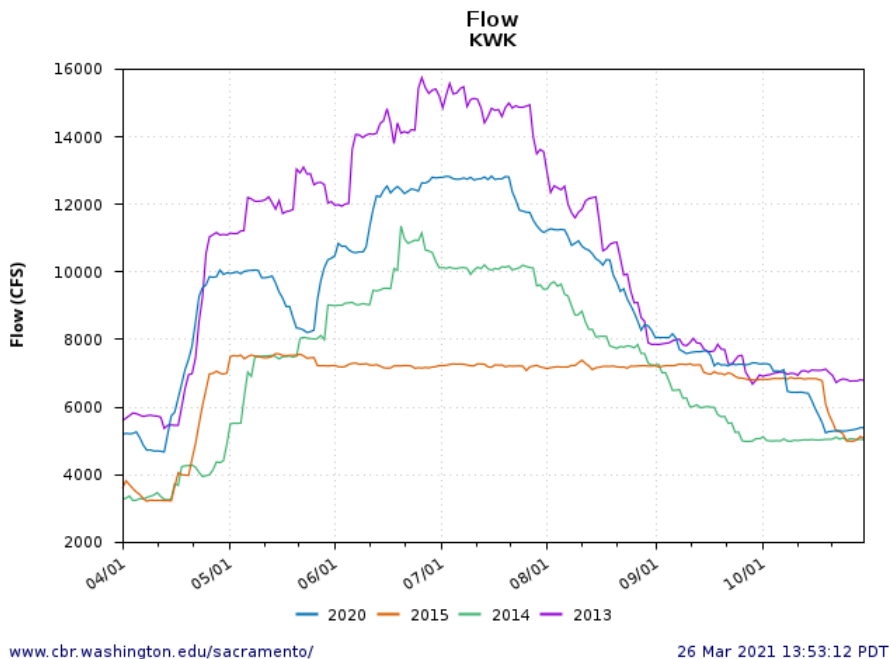


Figure 1: End of March Storage levels in Shasta, Oroville and Folsom reservoirs, 2012-2015 and 2020-2021. The Trump administration’s policy of “maximizing deliveries” enshrined in the 2019 Biological Opinions for the CVP and SWP, combined with DWR’s added responsibility for Delta water quality in dry years under the 2018 revision to the Coordinated Operations Agreement, made reckless reservoir operation official policy.



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Figure 2: April-October releases from Keswick Reservoir immediately downstream of Shasta Reservoir 2013-2015 and 2020

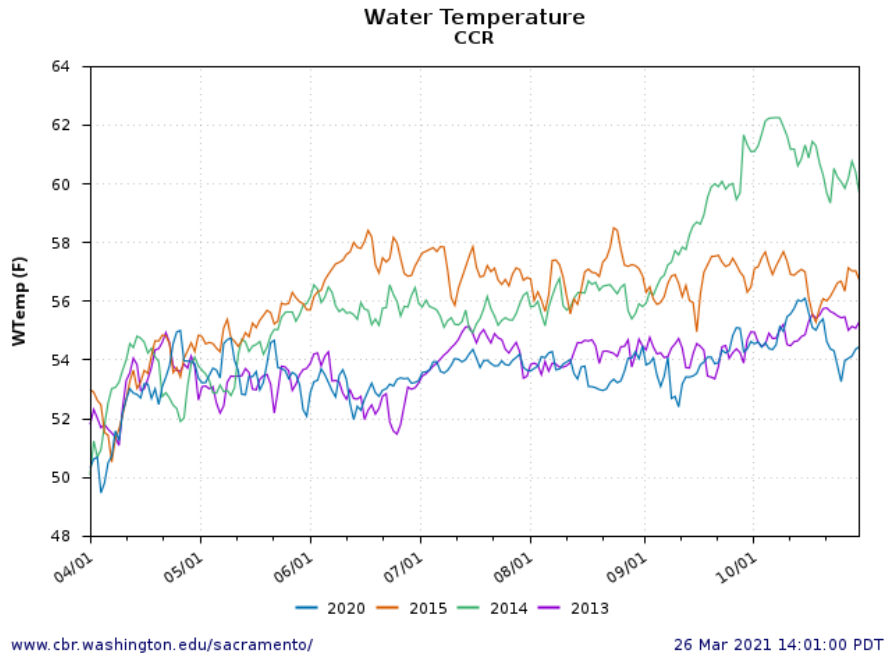


Figure 3: Water temperatures at the Clear Creek gauge 7 miles downstream of Keswick Dam 2013-2015 and 2020. The outcome in 2015 is not the goal. Releases in 2015 were still too warm.

The CVP Contractors’ Letter promotes “coordination and collaboration” and touts the 2020 CVP temperature management outcome as “favorable.” As shown in Figure 1 above, storage levels in Shasta, Oroville and Folsom reservoirs tell a different story. Collaboration does not make unreasonable use of water any less unreasonable.

The primary lesson learned in 2014 and 2015 is that reducing early deliveries to Settlement Contractors and limiting overall deliveries to them is essential to protect cold water species and to maintain temperature control in Shasta Reservoir.² The Board should act immediately to limit those deliveries in 2021.

2021 Transfers

On March 21 and 29, the Board issued notices of petitions for proposed 2021 transfers by the Sacramento River Settlement Contractors with a combined face value of greater than 200,000 acre-feet. On April 5, 2021, the Board issued a notice that the petitioners had withdrawn their petitions. Apparently, the petitioners initially thought that they might use SWP facilities as well as CVP facilities in order to execute the transfers, and thus believed they needed Board approval. However, having subsequently decided they could execute the transfers using exclusively CVP facilities, the petitioners also decided Board approval was no longer required.³

² Please see also [Lake Shasta and Sacramento River Operations: Lessons Learned – #1, Part 1, Lake Shasta and Sacramento River Operations: Lessons Learned – #1, Part 2](#), and [Summer Reservoir Releases – Lessons Learned #2](#).

³ Lyrus e-mail April 5, 2021 stated: “Notice is hereby given that on April 2, 2021, the twenty-eight (28) petitions listed in the table below were **withdrawn**. The persistent drier conditions have resulted in the U.S. Bureau of

CSPA et al. are also aware of plans by Glenn-Colusa Irrigation District, another Sacramento River Settlement Contractor that did not petition the Board for transfer, to transfer an additional 70,000 acre-feet of water south of Delta in 2021.

Regardless of whether the notices and petitions stand or not, the underlying principle outlined in them holds: “In order to make water available for transfer, the joint petitioners have proposed to reduce their consumptive use (CU) of surface water by a like amount.” (Notice for Batch A, March 21, 2021, p. 2; Notice for Batch B, March 29, 2021, p. 2; Notice for Batch B, March 29, 2021, p. 1).⁴

This begs the question: how much water could Reclamation deliver to Sacramento River Settlement Contractors in 2021 at their stated places of use and still remain within the requirement that all use of water must be reasonable? That amount should be the ceiling for **total storage releases** from Shasta to meet 1) north of Delta deliveries to Sacramento River Settlement Contractors, **PLUS** 2) transfers from Sacramento River Settlement Contractors. The Board must not allow Sacramento River Settlement Contractors to transfer water they could not use north of Delta while still complying with the requirements of the public trust and reasonable use. Stated differently, transfers must not be a workaround to evade reasonable use.

There are many issues involved with transfers by Sacramento River Settlement Contractors that have become so predictable that they have become part of a business model. At minimum, the Board must immediately confront at least this one: the Sacramento River Settlement Contractors have stated on paper that they don’t need almost 300,000 acre-feet of water in their stated place of use in 2021. The Board must decide whether drawdown of Shasta Reservoir by that additional 300,000 acre-feet to make transfers in water year 2021 is a reasonable use of water. In making its decision, the Board should recall how much came out of storage in 2013-2015 (Figure 1 above).

Reclamation and the Sacramento River Settlement Contractors have made an issue of the timing of releases, and suggested that cooperation allows longer preservation of the Shasta cold water pool. However, because the water is proposed for transfer in May-September, that also means that the water is likely to be removed from storage no later than it would be if delivered north of Delta, and likely, in part, sooner. And in any case, it’s first of all an issue of how much water will be left in Shasta for next year if next year is also dry. If Shasta water is needed for Delta outflow and salinity control in 2021, that water needs to pass downstream because of delivery reductions, not because the Sacramento River Settlement Contractors are transferring paper water while diverting what they need north of Delta. That paper water becomes real water

Reclamation (Reclamation) identifying that capacity will be available at the Central Valley Project (CVP) Jones Pumping Plant for the conveyance of transfer water to the San Luis & Delta-Mendota Water Authority (SLDMWA). Thus, the petitions are no longer necessary as the transfers will occur under existing Sacramento River Settlement Contracts, associated with the petitioners and Reclamation, and through Reclamation’s operations for the CVP and related water rights.”

⁴ Notice A further explained: “The majority of this reduction will be achieved by increasing groundwater pumping to make surface water available for transfer (groundwater substitution, or GW). The remaining CU reduction will be achieved either by voluntary fallowing of lands which, absent the transfer, would have been planted (crop idling, or CI) or varying the types of crops planted to reduce water demand (crop shifting, or CS).”

when it's no longer available for the public trust: for the depleted Shasta cold-water pool, for the water not available for public trust resource management in 2022, for the dewatered fall-run Chinook redds downstream of Keswick in the fall of 2021.

Conclusion

CSPA et al. thank the Board for its consideration of these issues. CSPA et al. recommend that the Board use its Authorities to limit combined 2021 deliveries to Sacramento River Settlement Contractors and transfers by them to levels that protect public trust resources.

Respectfully submitted,



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