

Legacies of the Monterey Agreement

- *Diablo Grande*
- *Newhall Ranch*

Diablo Grande: A Signature Experience

By Steve Burke

“A signature experience is that defining moment or event that tells you who you are. It is what you are known for,” says Diablo Grande developer Donald Panoz.¹ Diablo Grande, a 29,500-acre new town and destination resort in the hills west of Patterson in Stanislaus County, is a “signature experience” in that County’s urban development and in California water politics.

Held up for 11 years over its missing ingredient, water, Diablo Grande’s water solution — pumping water uphill from the California Aqueduct to money — may portend conjunctive use schemes watering leapfrog sprawl in California’s future.

Diablo Grande hopes to get its water supply through a convoluted stratagem putting surplus agricultural water in the ground near Bakersfield while Diablo Grande turns out water 200 miles to the north from the California Aqueduct, “It’s not a sleight of hand,” says California Department of Water Resources director Tom Hannigan, himself a former commer-

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Watering Newhall Ranch on a wish and a prayer

By Lynne A. Plambeck

Southern California has a water problem. Government and court decisions the past several years make clear that it is time to re-examine how we view water and our water resources:

- Courts forcing Los Angeles Department of Water and Power (LADWP) to leave 15 percent of its water diversion in the Owens Valley to wet down alkali dust in Owens Lake bed and reduce particulate air pollution;
- Setting aside approval in June 2000 of the 21,000-unit Newhall Ranch project in Los Angeles County, the largest development project approved in California, for lack of an identified water source;
- A Record of Decision in the six-year CalFED public dialogue now facing several lawsuits, making the outcome of CalFED’s labors uncertain, despite its protests of good faith and equitable statewide water solutions;
- A court decision in Amador County in 1999 underlining the need to address water in local general plans¹;
- A Public Utilities Commission decision requiring environmental review for Valencia Water Company’s water management plan before further service area annexations are allowed²; and
- A Sacramento appellate court setting aside the Monterey Agreement environmental impact report (EIR) as inadequate (particularly its project description, the Agreement itself).

Southern California’s water problem is not just a problem of supply. It is also a problem of concept.

Signs of Change

The Sacramento appellate court made this abundantly clear last September when it opined that “paper water [referring to undeliverable portions of state water project entitlements] always was an illusion... ‘Entitlements’ is a misnomer, for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store and deliver. Paper water represents the unfulfilled dreams of those who, steeped in the water culture of the 1960s, created the expectation that 4.23 maf [million acre-feet] of water could be delivered by the SWP built to

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Doolittle Hopes to Do More

The *Sacramento Bee* reports that Congressman John Doolittle, R-Rocklin, won appointment to a seat on a key House subcommittee that writes funding legislation for energy and water projects, giving him a crucial role in the future of water projects throughout California, and including influence over funding for the CalFED Bay-Delta Program.¹ It also means he will have a role to play in any legislative initiatives addressing California's electric power crisis.

Doolittle "aggressively pursued the seat" on the House Appropriations Committee's energy and water subcommittee, says his spokesman Richard Robinson. His appointment "is good for many reasons, but most of all because it will force this region [northern California] to work together more than it has before," says Robinson.

Doolittle is a staunch supporter of the Auburn Dam on the south fork of the American River, and has recently been critical of CalFED. He has also been a thorn in the side of flood control advocates for the Sacramento region when they have not "log-rolled" support for new water supplies from the American River for his home base of Placer County.

NOTES

1. David Whitney, "Doolittle wins appointment to key water-finance panel," *Sacramento Bee* 8 March 2001.

MWD Studies Electricity Deregulation

Beginning last August, the Metropolitan Water District of Southern California (MWD) took up studying the failed deregulation of the electric power industry to see what the

water wholesaler for 17 million people could learn from the power debacle.

Board members heard Janice Beecher and Scott Rubin present findings of their national study "Deregulation! Impacts on the Water Industry," which was funded by the American Water Works Foundation in Denver.¹ "Last May," said Beecher, "Secretary of Energy Bill Richardson predicted that there would be outages and brownouts this summer, calling America a superpower with the grid of a Third World nation."²

"I think energy deregulation in San Diego was a real wake-up call," said MWD general manager Ronald Gastelum, referring to skyrocketing power bills last summer there. "The directors asked, 'Is that going to affect water too?'"³

The study cited some general differences between the water industry and the energy industry. For one, no one can survive without water. The same cannot be said of electricity.

While all electricity is the same when it is transmitted, water varies in its quality and taste depending on where it came from and how it has been treated. Water resists technological change, as one MWD board member noted: "We're still stuck with this heavy, incompressible product that needs to be piped pretty much the same way the Romans did it."⁴

Rubin pointed out that one of the biggest losers in the deregulation of electricity has been energy conservation. "Because investments in energy conservation could not be shown to have an immediate bottom-line benefit, many programs that in the long run would have eased the stresses on the system were abandoned. This happened at the same time that investments in new generation came to a grinding halt. Herein lies the ingredients for a crisis," said Rubin.

When discussing the future of the water industry in California, some board members objected to the word "deregulation." "Well," said member Jim Turner of San Diego, "water isn't regulated in California."⁵

NOTES

1. Janice A. Beecher, *Beecher Policy Research, Inc., and Scott J. Rubin, Esq., Attorney and Consultant, Deregulation! Impacts on the Water Industry*, published by the American Water Works Association Research Foundation, Denver, CO, n.d.

2. *Metropolitan Water District of Southern California Breaking News*, "Deregulation experts advise MWD Board of power crisis lessons," 21 August 2000. Available at www.mwd.dst.ca.us/Docs/BreakingNews/PressReleases/2000-08/Dereg3.htm.

3. Quoted in Joe Mozingo, "MWD eyes possible effects of competition," *Los Angeles Times* 22 August 2000.

4. Anonymously quoted in *ibid*.

5. *Ibid*.

SPILLWAY

California Water, Land, and People

Spring and Summer 2001

Volume 1, Numbers 3 and 4 (double issue)

Editor and Publisher: Tim Stroshane

Contributors: Gray Brechin, Steve Burke, Alex Hildebrand, Lynne A. Plambeck, Tim Stroshane, Roanne Withers.

Guest opinions and unsolicited submissions are welcome. This issue went to press on 2 April 2001.

Send communications to:

Editor, **SPILLWAY**

P.O. Box 8362

Berkeley, CA 94707-8362

Phone: 510/524-6313

Fax: 510/528-8645

E-mail: spillwaynews@yahoo.com

Arresting Developments

- Water funds buy power
- CalFED lawsuits

Water Funds Taken to Buy Energy

“You want to talk about the next crisis facing California? You take the word energy and electricity outside of this discussion...and reinsert the word water, and you won’t have deregulation to blame.”

So says state senator Jim Costa, D-Fresno, last February discussing the concerns San Joaquin Valley farmers have over the effects of the energy crisis on water supplies.¹ They face decreased surface water supplies this year from the Central Valley Project and the State Water Project. To replace the water will mean using electric pumps to lift water from underground to irrigate crops — at a time when power costs are out of control, and supplies unreliable.

In February, the *San Diego Union-Tribune* reported that “the state’s spending on power has consumed \$335 million reserved for Colorado River and Sacramento Delta projects crucial to satisfying California’s water appetite.”² The California Department of Water Resources (DWR) admits to spending about \$45 million per day on average for electricity at present. The water supply funds lasted no more than 8 days. No one knows if those funds will ever be reimbursed to the state.

The *Union-Tribune* reported that \$200 million was for an Imperial Valley canal-lining project involving Colorado River water, the water-savings of which would have been transferred to San Diego County. The other \$135 million came from the CalFED Bay-Delta Program, which was earmarked for water quality and ecosystem restoration in the Delta. About 80 percent of San Diego’s water comes from the Colorado River, and 20 percent from the Delta.

“I do not think Governor Davis ever intended to trade an energy crisis for a water crisis,” said former San Diego mayor Maureen Stapleton, now executive director of the San Diego County Water Authority.

“I don’t anticipate any controversy, but who knows,” said Tom Hannigan, DWR’s director. “We’ll cross that bridge when we come to it,” referring to efforts now under way to replace the money with new legislative appropriations.³

San Diego has long depended on MWD for water supplies through both the California Aqueduct and the Colorado River Aqueduct. Its regional elites are desperate to acquire more direct sources of water, mainly from the Imperial Irrigation District, to continue San Diego’s growth and development.⁴

In a short-sighted bit of self-interested regional reasoning, the *Union-Tribune* opined three days later, “This raid on state water department coffers shows exactly why the state must pass through to consumers the costs of whatever long-term energy contracts it negotiates. If we continue to use the state budget to subsidize power purchases, we’ll eat up money that’s supposed to go to other crucial programs, like maintaining our water system. We needn’t remind anybody

how important a secure water supply is to California, where most of the population of 34 million lives in areas that must import water to exist.”⁵

The San Diego editors did not stop to consider that passing through to ratepayers the gouging costs of California’s deranged power bills will not make it easier for taxpayers to pay their taxes for the public services from which all Californios benefit.

NOTES

1. Leslie A. Maxwell, “Water agency ready for electricity duties: Valley districts hope reliable partnership won’t fall to wayside,” *Fresno Bee* 4 February 2001. Costa repeated these remarks at the Water Education Foundation, “New Leaders, New Challenges” meeting, Sacramento, California, 15 March 2001.
2. Michael Gardner, “Water funds diverted to help pay energy bills,” *San Diego Union-Tribune* 3 February 2001.
3. Stapleton and Hannigan quoted in *ibid*.
4. Robert Gottlieb and Margaret FitzSimmons, *Thirst for Growth: Water Agencies as Hidden Government in California*, Tucson, AZ: University of Arizona Press, 1991.
5. Editorial, “Damage spreads: State robs water system to pay for energy,” *San Diego Union-Tribune* 6 February 2001.

Will Suits Bring CalFED to Heel?

Lawsuits filed last fall against the CalFED Bay-Delta Program by mainly agricultural coalitions hope to stop implementation of the hydra-like plan and force the multi-agency, joint state-federal program to produce a more comprehensive and revealing environmental review of its plan.¹

One of the suits (actually, one filed in California superior court, the other in federal court, but which are essentially the same complaints) was filed by the California Farm Bureau Federation and a handful of Fresno-area farmers.² Another lawsuit was filed by a coalition of the Regional Council of Rural Counties (RCRC), Central Delta Water Agency (CDWA), the South Delta Water Agency (SDWA), and a number of Delta-area farmers interested in area of origins protection of northern California and Delta region water interests.³

Both lawsuits complain that CalFED’s final environmental impact statement and report (FEIS/R) fails to analyze the impacts of CalFED’s plans to convert large amounts of farm land and agricultural water supplies to other uses, jeopardizing the Central Valley’s agricultural economy.

Bill Pauli, President of the California Farm Bureau Federation, blistered the program for its “lack of respect for the public CalFED exhibits by its refusal to extend the extremely curtailed period for comment” beyond 30 days for the enormous FEIS/R it turned out in support of the 28

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Arresting Developments

• CalFED lawsuits

CalFED to Heel?

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August 2000 Record of Decision.

Moreover, the difficulty of finding one's comments and CalFED's responses in the FEIS/R prompted Pauli to comment sarcastically, "The authors of these volumes appear to have taken as their model the tout in the Marx Brothers' film, 'A Day at the Races,' who sold a tip that required a form book that required a deciphering key that required...and so on until a cart load of documents were purchased, but by then the race was over."⁴

Pauli's comments also highlight the "extra-legal" nature of CalFED's existence. The Program seeks to establish new standards for water quality, for example, despite the fact that the Program itself admits that "CalFED does not possess independent, regulatory authority over water quality. However,...CalFED will work with all entities in support of achieving its water quality goals....CalFED has identified target levels for water quality parameters of concern....these targets are not regulatory."⁵

CalFED doesn't get it though, says Pauli. "These target-setting deliberations conducted by CalFED's inner circle of agencies and activists that make careers of meetings evade the lawfully-established public processes by which water quality objectives and implementation programs (of which target-setting is necessarily a part) are required to be determined....[This] extra-legal target setting function of CalFED forecloses full public examination of and participation in the development of the fundamental factual assumptions that will determine future actions and expenditures."⁶

The Farm Bureau maintains that farmland conversion impacts resulting from water development, habitat conservation, and ecosystem restoration efforts in CalFED's plan have not been meaningfully analyzed. Pauli specifically singled out CalFED's multi-species conservation strategy (MSCS) for his wrath, contending that the MSCS would convert more than 1.2 million acres of land to other uses.⁷

Despite these serious criticisms, the California Farm Bureau Federation maintains that it supports CalFED in the main. "The Farm Bureau wants to see CalFED work, to be successful," says Brenda Johns-Southwick, Farm Bureau counsel, and a former attorney in the California Attorney General's office.⁸

The RCRC lawsuit raises broader and more far-reaching issues about CalFED's program.⁹ RCRC seeks to set aside the CalFED ROD because its FEIS/R is inadequate, and to stop CalFED implementation until the coalition's concerns are addressed (see "Hold CalFED to Its Word!" this issue).

Central Valley Project (CVP) and State Water Project (SWP) export pumps are located near Tracy in the southwestern portion of the Sacramento-San Joaquin River Delta. The RCRC suit argues that CalFED's proposal for "no net

loss of exports" will degrade Delta water quality and harm the largely riparian water rights of water users in the central and south Delta. Their water rights predate the those of the CVP and SWP.¹⁰

In the water war for the hearts and minds of Californios, CalFED uses the vague term "water supply reliability" to reassure its listeners that water will be available in the future. Delta partisans, attempting to defend their livelihoods in the Delta and to call a spade a spade, say CalFED's term really means "no net loss of exports" to southern California and the San Joaquin Valley.

"No net loss to exports" is a principle of reliability," says Dante Nomellini, counsel for the Central Delta Water Agency, a party to the RCRC complaint. "Instead of surplus water to be moved across the Delta from northern California rivers, at least with regard to environmental regulation, no net loss means endangered species get the short end of the stick."¹¹

"Rather than redirect the water planning for the State," the Delta plaintiffs told Sacramento County Superior Court, CalFED has "elected to carry the banner of the export contractors and extract greater and greater quantities of water from the already over-depleted Sacramento-San Joaquin River watersheds."¹²

More specifically, the Delta suit charges CalFED failed to examine other feasible alternatives that examined area of origins impacts and realistic quantified limits on the amount of water available for export. They argue also that the project description was changed significantly when CalFED issued its Framework for Action in June 2000, and that the environmental report should have been recirculated for additional public review. CalFED also failed to identify specific water sources for its proposed Environmental Water Account.¹³

The Delta suit also charges that the CalFED ROD fails to plan for meeting the 1995 Water Quality Control Plan by the State Water Resources Control Board (SWRCB), and that ROD activities will violate the public trust.

Finally, the suit alleges the California Environmental Protection Agency (as the parent agency of the SWRCB) created a conflict of interest for itself when Cal-EPA Secretary Winston Hickox signed the CalFED ROD last August, biasing water rights proceedings involving the CVP and SWP — all in violation of the due process and equal protection clauses of the U.S. Constitution.¹⁴

NOTES

1. SPILLWAY is aware that the Orange County Municipal Water District has also sued CalFED, but has not researched this lawsuit.
2. The federal suit is Don Laub, Debbie Jacobsen, Ted

- Sheely, and California Farm Bureau Federation v. Bruce Babbitt, et al (*including all heads of CalFED-affiliated federal agencies*), Case No. CIV F-00 6601 AWI SMS, U.S. District Court, Eastern District of California, December 20, 2000. Hereafter Laub v. Babbitt. The California court case is Don Laub, Debbie Jacobsen, Ted Sheely, and California Farm Bureau Federation v. Gray Davis, Jr., et al (*including the State of California, its Resources Agency, and the California Environmental Protection Agency*), Case No. 00CECG11667, filed December 20, 2000. Hereafter Laub v. Davis.
3. *The Delta case is Regional Council of Rural Counties, Central Delta Water Agency, R.C. Farms, Zuckerman-Mandeville, Inc., Rudy Mussi, and South Delta Water Agency v. State of California, et al, (including its CalFED-affiliated agencies under the Resources Agency and the California Environmental Protection Agency), filed September 15, 2000 in Sacramento County Superior Court. Hereafter RCRC v. California. "Areas of origin" have water rights under state water law that may be invoked for their region's future development, and which have priority over those of the CVP and SWP. These plaintiffs represent key areas of origin, including the Feather River and the Sacramento-San Joaquin River Delta. The RCRC brief is available at the Council's web site, www.rcrc.org.*
4. *Letter of Bill Pauli, President, California Farm Bureau Federation, to Steve Ritchie, Acting Executive Director, CalFED Bay-Delta Program, David Hayes, Deputy Secretary U.S. Department of Interior, and Mary Nichols, Secretary for Resources, State of California Resources Agency, August 21, 2000, available at www.cfbf.com/calfed2a.htm. These comments were from Section II, Discussion.*
5. *Ibid., Section B.2.*
6. *Ibid., Rejoinder.*
7. *Ibid., Section D, CalFED's Treatment of the Multi-Species Conservation Strategy, beginning with the section on "The Strategy fails to discuss, or even consider, its impacts on agriculture."*
8. *Brenda Johns Southwick, counsel, California Farm Bureau Federation, speaking at "New Leaders, New Challenges," Executive Briefing organized by the Water Education Foundation, 15 March 2001.*
9. *Also, the lawyer for RCRC is Michael Jackson, who in 1994 alerted the Plumas County Board of Supervisors to the existence of the Monterey Agreement, and himself no stranger to big-thinking challenges to the water industry. See Tim Strohane, "Bloodless Coup: The Monterey Agreement," SPILLWAY v1n2 Winter 2000, p. 1.*
10. *RCRC v. California, op. cit., note 3, pp. 4-5.*
11. *Dante Nomellini, Central Delta Water Agency, remarks before the Water Education Foundation on CalFED Bay-Delta Program's Framework for Action, Sacramento, California, 24 July 2000. Nomellini added, "No one says the framework will solve California's water problems."*
12. *RCRC v. California, op.cit., note 10 p. 14.*
13. *Ibid., pp. 14-18.*
14. *Ibid., pp. 19-21.*

Who is the next State Fossil? **Jumping in the Tar Pit**

By Gray Brechin

A lifesize bronze statue of *Smilodon*, the long-extinct sabre-toothed cat, stands on a small plaza just to the south of the Earth Sciences Building at the University of California, Berkeley, where I was asked to give the commencement address for this year's crop of geography graduates. The sculpture was made by Vic Bergeron. Though better known as celebrity-restaurateur Trader Vic, Bergeron is also an accomplished sculptor.

Bergeron's *Smilodon* is not very flattering to such a splendid beast. It sits on its haunches, one paw out with talons extended, its enormous fangs bared in a snarl. The sabre-toothed cat had little choice but to bare its teeth; they had evolved to such a size that the big cat apparently could not tuck them in its mouth without committing suicide. However unflattering Bergeron's depiction, this is probably the way that such an animal appeared to one of the earliest humans in California immediately before that person became lunch meat.

Holocene humans had little concern for the beneficence of nature when it came in the form of a hypertrophied feline bearing down with sharp talons and fangs. And so, those early California inhabitants, with their crude stone weapons did everything that they could to wipe out the cat. They succeeded in driving *Smilodon* to extinction, and in 1968 the legislature declared it the official state fossil.

Fortunately, we know a lot about the state fossil because it doesn't appear to have been very smart. Anyone visiting the La Brea tar pits on Wilshire Boulevard in Los Angeles has seen the lifelike statues of mammoths, dire wolves, ground sloths, and other animals trapped in the tar. Paleontologists have exhumed the bones of these animals from the pits, and they give us a pretty good idea of what Los Angeles was like during the Pleistocene. When an animal became mired, hungry smilodons piled on it, and themselves became trapped. Vultures and others would also descend, and they too became caught in the ooze.

Smilodon was superbly designed for rending flesh, but it had a tragic flaw: it didn't have much of a sense of causality. That is, its thinking didn't run as follows: "If that mammoth is floundering about in all that black stuff, maybe I'd better not go there myself." Smilodons had a very short sense of time, or, if you like, a short attention span. We *Homo sapiens*, on the other hand, can use our sapience to foresee the results of our actions, and change course to avoid similar disaster.

Or can we?

Though the tar seeps had bubbled for as long as anyone could remember, it was only in 1892 that Edward Doheny applied causality to them. He drilled for oil just east of downtown Los Angeles and hit the oil fields and quickly became one of the world's richest men.

Unfortunately for California's oil kings, there was just

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Jumping in the Tar Pit

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too damned much of the stuff as their drilling crews kept hitting gushers early in the century. By 1910, the state ranked as the world's greatest oil producing region, and the price per barrel plummeted. Such superabundance was a calamity for those who hoped to make killings in "black gold." A new market had to be created to keep profits up. That market was provided by the fortuitous marriage of the automobile and advertising.

Everything conceivable was done to stimulate auto sales and road construction in a promotional campaign that worked so well that by 1949, California had to begin importing its energy from other states, and then from Iraq, Indonesia, Venezuela, and other nations whose political destinies became inextricably entangled with the famed California lifestyle.

Protesters at the time of the Gulf War rhetorically asked, "What if Kuwait produced broccoli?" If we do not think of California today as a major oil-producing state, that's because we so effectively used up what once puddled so plentifully beneath the golden landscape.

Where, you might ask, did all of that oil go, along with the coal and other fossil fuels used to power our hyperconsumptive civilization?

Out of exhaust pipes and chimneys and into the atmosphere, of course. This should come as no surprise. Global warming and climate instability are becoming more alarming as realities on a daily basis. Major insurance companies have recently become very worried about mounting losses, and

We Homo sapiens can use our sapience to foresee the results of our actions, and change course to avoid similar disaster. Or can we?

especially about the growing number and size of hurricanes hitting the East Coast. Rising sea levels have long ceased to be theoretical to those inhabiting low-lying islands in our world's oceans, and Venice, Italy — one of the world's most beautiful cities.

At the same time, it appears that our voracious appetite for energy means that we may be about to run out of oil globally as we have locally in California. Global oil production may well peak within the next ten years, possibly sooner, with a fall-off and steep price rise inevitably follow-

Gray Brechin delivered this speech in May 2000 at the commencement ceremonies of the Geography Department at the University of California, Berkeley. He authored two recent books on California, Imperial San Francisco: Urban Power, Earthly Ruin, and, with photographer Stephen Dawson, Farewell Promised Land (both published in 1999).

ing. With increasing scarcity of oil, we will find it very hard to sustain food production, processing, and distribution.

But then, we don't seem to care much about that either. For as population grows, we get rid of our best farmlands by covering them with limitless cities seemingly designed to waste energy. Water becomes most profitable when it is diverted away from crops to grow subdivisions, strip malls, high-tech office parks, and highrises.

Meanwhile, Florida, Arizona, Colorado, and other former farm states are permitting developers and highway departments to pave over their farmlands to grow more cities which will, in turn, require yet more food. Throw in climate instability including the probability of prolonged drought, and the near future looks a little less giddy than the business sections of our newspapers would lead us to believe.

We have responded to this looming crisis by buying more sport utility vehicles, making them larger, and using up available oil even faster. Anyone who drives the roads of California knows that for the last five years, as climatic instability has grown ever more certain, hypertrophied SUVs and monster trucks have proliferated as hot fashion statements. Many who buy them are reasonably well-educated citizens, but their attitude appears to be: "I just don't care. What matters is now."

Ford Motor Company publicly announced that its SUVs are an environmental disaster, and yet, Ford says that it cannot stop making them since they are so profitable. The company is only fulfilling a demand, it says.

Yet an advertising supplement which fell out of my newspaper shortly after Ford made its announcement featured a full color illustration of a Ford Explorer Sport Trac parked on coastal rocks and sexily burnished with the setting sun. The copy read: "Eager to maintain its leadership role in the SUV market, Ford has been working overtime to expand the niche and bring fresh versions of this popular formula to new customers." Ford makes \$18,000 profit on its top-of-the-line Expedition, each of which requires ten miles per gallon to give you the prestige of owning one.

Just as the sabre-tooth cats could not stop jumping into the tar pits, we appear to have a similar attention span. William C. Ford, Jr., chair of Ford Motor Company and a noted environmentalist, was fatalistic when his company bowed to the inevitability of the SUV market which it had been so instrumental in creating, telling reporters that "[Wall Street] analysts are focused on the next quarter's report, and at most, our next year's report." Short-term profit appears to be inimical to our species' survival in the long run.

What we need, I believe, is a longer sense of time, one that covers not just the next quarter or next year, but thousands of years of human alteration of the environment. I can only hope that we who teach give that longer attention span to those who graduate from the earth sciences at the state's universities so that we may ourselves avoid the fate of the sabre-toothed cat. If we do not, there will be no one around to declare us the state fossil in the Golden State's long tomorrow.

Congress decides funding **Hold CalFED to Its Word!**

By Alex Hildebrand

The CalFED Bay-Delta Program (CalFED), a joint state-federal program addressing water and ecological problems in the Bay-Delta region, makes laudable progress on statewide water use efficiency, water quality, and watershed programs. CalFED also brings policy focus to levee system integrity for the 1,100 miles of levees protecting farms, cities, and towns in the Sacramento-San Joaquin River Delta immediately west of Stockton.

However, the public has been led to believe that CalFED will resolve almost all water issues in California's Central Valley, but they are being misled.

After its inception in 1995, CalFED adopted goals and principles that were derived in a public process. Those principles included commitment that CalFED's program would reduce conflicts over water, would be "durable" and "equitable," would avoid "redirected impacts" (that is, those in which solving a problem in one place creates a new problem somewhere else in the water system), and that "solutions will solve problems in all problem areas" such that "improvement for some problems will not be made without corresponding improvement for other problems."

Re-authorization and further funding of CalFED by Congress and the state Legislature should be contingent on CalFED revising its implementation plan to adhere to its publicly adopted principles, and to assure that it addresses groundwater overdraft, electric power, salt pollution, and more, throughout California. CalFED has not even been willing to evaluate the magnitude and the long-term consequences of its plan's deficiencies. CalFED has ignored the advice of its own Bay-Delta Advisory Council on these matters. These are fundamental water issues; CalFED ignores them at the peril of California's future.

Inadequacies in CalFED's Plan

In February 2001, San Joaquin County and Delta area farmers presented to California Senator Dianne Feinstein and Congressman Richard Pombo of San Joaquin County the following proposals on which CalFED's continued funding from Congress should be made contingent.

- California now depends on an unsustainable net long-term overdraft of groundwater. Pumpers take out more water, year-in and year-out, than is returned to the ground. Large overdrafts of groundwater now get California through droughts, but the underground supply is not fully restored in other years. CalFED's plan would increase the rate at which we destroy the availability of groundwater for overdraft during droughts.

- CalFED has been unwilling to estimate the water supply

needed in and from the Delta watershed to meet urban, agricultural, and environmental needs during the life of its plan. It has also been unwilling to determine and reveal the effect of its plan on the adequacy of future water supplies, and it has misled the public regarding the extent to which its storage proposals could increase water supply.

- California has a serious power shortage, but CalFED promotes types of water storage (like off-stream pumped-storage reservoirs, and conjunctive use schemes) which would be substantial power consumers instead of power generators. Increased Delta water exports called for in CalFED's August 2000 Record of Decision will also be a net power consumer.

- CalFED has not disclosed the extent to which its implementation plan can comply with key state and federal laws.

- CalFED's plan would increase the ongoing destructive accumulation of tens of millions of tons of imported salt in agricultural soil and groundwater south of the Delta.

- CalFED pledges to reduce conflicts, but has not resolved the injustices when state flood control agencies require reclamation districts to do levee maintenance needed

The public has been led to believe that CalFED will resolve almost all water issues in California's Central Valley, but they are being misled.

for flood protection and then other agencies (particularly federal) delay and deny permits, and threaten criminal actions prohibiting those same measures.

- CalFED's plan would reduce agricultural production by converting large amounts of land and water from food production to other uses (see "Decimating Delta Farming," this issue).

In exchange for future funding, the CalFED Bay-Delta Program must assure Congress it will address fundamental issues affected by its plan for California water, and will evaluate the consequences of failing to address any broad water related issues that it does not address. In what follows, several specific contingency items need immediate congressional attention:

Goals and Principles

CalFED's program must comply with its publicly-adopted goals and principles, and a public process should be required to bring its implementation actions into line with its goals and principles.

Groundwater Overdraft

California will experience a major catastrophe when it can no longer overdraft millions of acre-feet of water during its recurring droughts. Furthermore, overdrafting causes

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Alex Hildebrand is a Manteca-area corn farmer, a member of the CalFED Bay-Delta Advisory Council, and secretary of the South Delta Water Agency. He has farmed since the 1950s, and is a past-president of the Sierra Club.

CalFED's Word

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aquifer sediments to compact and irreversibly lose water storage capacity. This lost storage capacity in California's Central Valley is already equal to more than 40 percent of all of the state's surface storage reservoirs.¹

CalFED's plan proposes groundwater storage in some unquantified degree that will provide drought year water. However, the plan also exacerbates agricultural water shortages that will increase the need for groundwater pumping in most water years. The plan does not assess these effects on long-term groundwater depletion, nor does it seek to eliminate them.

Future CalFED funds must be contingent on revising its plan to avoid exacerbating the net long-term overdraft of groundwater in the short-term and to make that overdraft unnecessary in the long-term.

Water Supply

CalFED refuses to estimate the overall water need within and from California's Central Valley during the life of the CalFED plan in order to adequately provide for all water uses, including urban and environmental needs, and domestic production of food and other agricultural commodities needed for a growing population. CalFED ignores its Bay-Delta Advisory Council's (BDAC's) recommendation to do this, and the Council's proposed basis for the calculation.²

CalFED is also unwilling to estimate net overall effects of its proposals on the adequacy of water supplies needed for use within and from the Central Valley (which is the Delta's watershed). CalFED's plan proposes multiple uses of water and proposes a few new storage facilities for study. But it

CalFED's plan will be insufficient to avoid a major overall water shortage as the population grows. The public should know the extent of this potential shortage and the extent to which CalFED's plan will exacerbate it.

also proposes new stream flows, substantial conversion of farm lands to wetlands (which consume substantially more water than farmlands), more water consumption by terrestrial habitat, and reservoir "re-operations." These actions may reduce water yields.

CalFED has neither revealed the amount of new water supply its storage proposals would provide nor acknowledged that the resulting firm yield in water supply derived from new storage would be far less than the volume of new storage capacity.

When cumulated with other governmental actions, CalFED's plan will seriously deplete agricultural water supplies and will be insufficient to avoid a major overall

water shortage as the population grows. The public should know the extent of this potential shortage and the extent to which CalFED's plan will exacerbate the shortage.

CalFED funding should be contingent, first, on the Program estimating and publicly disclosing the total water supply needed within and from the Central Valley during the 30-year life of CalFED's plan in order to provide for urban needs, environmental needs, and the need to produce an adequate domestic supply of food and other farm products. CalFED's funding should also be contingent on the Program estimating and disclosing the net effect of its proposed actions on the adequacy of California's water supply and the extent to which the resulting supplies will meet estimated need.

Power

CalFED's preferred types of new or expanded storage, its water management proposals, and its emphasis on increased Delta water exports will all require a lot of power and may collectively cause a substantial increase in both total and peak power consumption. Yet California already has a power shortage, and its crown jewel, the State Water Project, has long been a net consumer of electrical energy.

CalFED funding should be contingent on the program disclosing the overall net effect of its plan on power consumption and on peak power loads and demands.

Compliance with Laws

CalFED must be required to disclose a review of its plan for compliance with all existing state water quality standards and with all existing and relevant state and federal laws, including but not limited to water rights, Area of Origin Statutes, and the Delta Protection Statutes, as well as compliance with California Environmental Quality Act and National Environmental Policy Act requirements that relate to proposed reallocation of agricultural land and water to other uses.

Accumulation of Imported Salts

One effect of the California State Water Project (SWP) and the federal Central Valley Project (CVP) is to import tens of millions of tons of salt from the Delta into the Central Valley south of the Delta, since water exports began in the 1940s. Water exports to the south contain salt from tidal action in the Delta. Most of this salt accumulates in soil and groundwater of land receiving water imports for San Joaquin Valley irrigation. Gradually, the productivity of those lands will be destroyed.

Several hundred thousand tons of salt also drain into the San Joaquin River each year at high concentrations with resulting salinity problems for downstream users and river ecosystems. Furthermore, some of CalFED's proposals would improve the quality of urban water deliveries by water trades (such as one proposed between the Metropolitan Water District of Southern California and the Friant Water Users Authority in the east side of the San Joaquin Valley) that would exacerbate this salt accumulation.

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CalFED's funding should be contingent on assurances that the Program's proposals must not worsen salt accumulation in Central Valley soil and groundwater in the short-term. Instead, it must stop this accumulation of imported salt in the long-term either as part of CalFED's plan or through a separate plan concurrently administered by CalFED agencies.

Delta Levees

One of CalFED's purposes is protection of land and water in the Delta as part of its system reliability objective and to reduce conflict among all objectives. CalFED also strives to increase ecosystem restoration options including revegetating Delta channel levee banks to increase habitat.

But CalFED fails to provide sufficient assurances for permanent levee protection through long-term funding strategies or the leadership needed to resolve conflicting demands by different agencies regulating levee-related activities.

State flood control agencies and legal obligations of local reclamation districts require that levees be managed to control burrowing rodents (whose normal activities, if unchecked, undermine levees' structural integrity), maintain visibility for inspection of "boils" and seepage flow, armor banks and levees as needed to prevent erosion, and so forth. These obligations are critically necessary to protect life, property, infrastructure, and habitat within the levees as well as maintain eligibility for state and federal disaster funding. Other agencies have delayed, opposed, and denied permits for these activities, and even threatened to bring criminal charges against Reclamation Districts for carrying out some of these responsibilities. Similar problems occur with regard to channel maintenance.

CalFED funding must be contingent on the program resolving these conflicts so that, first, reclamation districts and other entities cannot be prevented from doing levee and channel maintenance necessary for primary flood protection purposes. In addition, any levee-related requirements for environmental enhancement or protection of endangered species must not jeopardize the levees' primary purposes of flood protection. Finally, CalFED should help resolve these conflicts without creating a new layer of administration over the state's Delta Flood Protection Program (administered by the California Department of Water Resources).

Conversion of Land and Water

CalFED proposes converting a substantial acreage of agricultural land and thousands of acre-feet of agricultural water to other uses, particularly in the Delta (see "Decimating Delta Farming," this issue). This is proposed without regard to the consequent reduction in domestic food production and other agricultural products that will be needed as California's population grows.

CalFED asserts disingenuously that its implementation plan will increase agricultural water supplies by 15 percent. CalFED has only committed to restore part of the water previously taken from some imported water users by

governmental action, for example under the Central Valley Project Improvement Act, state and federal endangered species acts, and from State Water Resources Control Board decisions. There is no commitment that there will be an increase in overall agricultural water supply.

The negative socioeconomic impacts of CalFED actions in the Delta must be addressed and mitigated. CalFED must not use funds directly or indirectly for the acquisition of land or property rights in land within the Sacramento-San Joaquin River Delta as described in California Water Code Section 12220 if such acquisition diminishes the value of land for agricultural purposes unless first certified by the U.S. Secretary of the Interior, the California Secretary of Resources and in consultation with the California Delta Protection Commission. These parties must find that no publicly owned or controlled land is available for the purpose to be served by such acquisition. CalFED must also disclose the long-term reduction of domestically produced food and other agricultural products resulting from all its proposed land use conversions and water reallocations.

No More Excuses

CalFED will continue to provide benefits for some water needs, such as those of the Metropolitan Water District of Southern California, but it appears to have removed itself from any commitment to address its proposals to all of the water-related social and ecological needs of our growing population. The California Legislature and the U.S. Congress should insist as a minimum condition of future funding that CalFED at least assess the consequences of failing to address these issues.

The fact that there are no perfect solutions to complex and conflict-ridden water-related needs does not excuse a failure to address and quantify what is and is not feasible. Quantification of potential unmet needs will focus attention on what can be done, and will prepare us for whatever austerity we must endure. If CalFED ignores these issues, there is no other entity that will address them.

NOTES

1. *Worldwatch Institute*, State of the World 2001, p. 24.
2. *Letter from Mike Madigan, Chair, and Sunne Wright McPeak, Vice Chair, Bay-Delta Advisory Council, to David Hayes, U.S. Deputy Secretary of Interior, and Mary Nichols, California Secretary of Resources, May 24, 2000, Specific Recommendation 12, pp. 8-9.*

Editorial

Power Crises

California smolders this winter in the white heat of energy deregulation. And the summertime could burn.

As Governor Gray Davis attempts to save his political career and return stability to the allocation of energy here, the state's two largest utilities teeter at the brink of ruin, threatening large and small suppliers and creditors, including other energy companies, Wall Street investment banks, and the Bank of America. Even the State of California is not immune.¹ Their instability threatens to strand more costs than just those hot old nukes.² Bankruptcy of Pacific Gas & Electric Company (PG&E) and Southern California Edison (SCE) could "strand" California's economy and wreak havoc in the financial world.

PG&E and SCE ran up \$13 billion to date in debts to suppliers for power purchases since last summer. Their fiscal crisis became so hot it had to be transferred to the State of California with its convenient taxing powers. State legislators handed the hot potato of keeping the power on in California to the Department of Water Resources (DWR), itself the owner of the largest single power consumer in California, the State Water Project.

From its auction January 31, the California Department Water Resources executed various long-term contracts with power generators, arrangements that Sacramento hopes will salve the burns it feels from skyrocketing energy bills, just not this summer.

U.S. Energy Secretary Spencer Abraham told Congress in mid-March he believes the golden state will have blackouts with regularity this summer.³

While urging the public to conserve energy (and the sooner the better) industry and many public officials also champion construction of new natural gas-powered generating plants.⁴ They will contribute more carbon dioxide (CO₂) at a time when the world looks to the United States of America for leadership in fulfilling the greenhouse gas reduction goals of the Kyoto Accord. And President Bush in mid-March backpedaled from his campaign promise to implement CO₂ emission reductions in the U.S. amid charges he caved in to energy industry influence.⁵

Not to be outdone in the U.S. one-party political system (the party of growth and capital), Governor Davis issued an order to state workers instructing them not to enforce environmental laws that would slow down or prevent power

plant construction or limit existing power production.⁶ As Gray Brechin points out elsewhere in this *SPILLWAY*, maybe we're not as collectively blessed with forethought as we fancy ourselves.

Consumers and the state are to blame for the crisis, utility representatives told state legislators in February.⁷ Yet a *San Francisco Chronicle* report in early March found that peak winter electrical loads (power demand) were actually lower than in previous years.⁸ Yet the state experienced more than a month's worth of Stage 3 alerts and four days of blackouts so far this year, probably from market manipulation by power generating companies, many of whom are headquartered out of state.

"They're making money so fast, it's hard to nail down an exact number," says Mindy Spatt of the Utility Reform Network. "But it's clear that this is one of the highest transfers of wealth from people in this state to those outside

"They're making money so fast, it's hard to nail down an exact number," says Mindy Spatt of the Utility Reform Network. "But it's clear that this is one of the highest transfers of wealth from people in this state to those outside the state in history."

the state in history."⁹ Perhaps we could get DWR analysts to run the numbers on that Gold Rush century before last and compare its impacts on native California Indians.

Private utilities' hydropower facilities on nearly every Sierra Nevada river were the real prize assets to acquire if the utilities are allowed to outlive their unpayable debts.¹⁰

These assets run on falling water owned by all the people of California to begin with; realistically, we all "own" the gravity too that gives that falling water its kinetic energy, certainly as much as PG&E does! These facilities are used mainly during peak electricity demand, at precisely the times when California has been buying its power on the spot market at the rate of \$45 million per day. This is the very definition of unsustainable.

Hydropower's low cost flies in the face of paying for power on the spot market through the California Independent System Operator (ISO).¹¹ Most dams are paid for, so there's no mortgage to cover; their costs are mainly in maintaining the penstocks and turbines generating the wattage from falling water. They have very few moving parts, especially when compared with nuclear gas burning plants employing steam turbines, and are thus cheaper to operate.

That Davis won't seize power plants, including those owned by gouging out-of-state generators, indicates how beholden he and state legislators are to the utilities' campaign contributions. His inaction represents an incalculable blunder in the state's now quixotic quest for energy self-sufficiency, and probably makes him a one-term governor. Not that that is *SPILLWAY*'s problem.

To SPILLWAY Readers

With this double issue, I will take a brief hiatus from producing SPILLWAY. Taking this time will enable me to undertake a number of personal and SPILLWAY-related projects. SPILLWAY will return to your mailbox this fall.

Tim Strohane
Editor and Publisher

The utilities clearly want it both ways: to be relieved of their culpability for failed deregulation, bailed out from their crushing debts, and to retain their most profitable power plants from whose juice they could still reap profits in the irrationally exuberant spot market, even after lobbying for the legislation and regulatory adjustments that got them to this point. Real political leadership would have reminded the utilities that their very corporate charter provides them a solemn, publicly granted existence and they had better play along to get along.

Davis's leadership serves only the status quo. He told a meeting with Wall Street leaders on 28 February, "I'm going to solve [the power crisis] in a way the banks get paid, bondholders get paid, the generators voluntarily agree to make a modest contribution, utilities are back in business, and we have a stabilized rate structure that avoids [the Rosenfield] initiative that could be counterproductive to us ever acquiring a surplus. [This way] I'm leaving you with a market that is still deregulated and will not collapse unto itself thereby precluding deregulation from ever working in California."¹²

Davis has wasted precious time and taxpayer money on the most expensive and wasteful ways to pay for energy ever devised by a modern government. State and federal leaders are spooked by the prospect of capitalist growth ceasing in California, never confronting the question: how much capitalist-driven growth is enough, and when is it too much? Indeed, when might it be too late?

In the meantime, recent gains under Davis in housing, environmental clean-up, public transit, and other worthy public services and investments face the prospect of budget cuts the longer the power crisis goes on. California will accomplish less while privileged to have it cost more than ever.

One meaningful option is for California communities to aggregate into blocs of energy buyers to counter the market power of generators now engaging in the equivalent of shooting fish in a barrel. Aggregating customers with similar load profiles (such as residences, various business types) into large rate-paying blocs creates the prospect of a countervailing market power on the demand side with which power generators would have to come to terms. Real-time pricing (rather than the average power costs built into our utility rates) could help cool the white heat of the energy market. Only then might we see genuine competition.

The state Legislature must invest in the "soft" energy paths first popularized in the 1970s: efficiency improvements, and more and more windmills, solar panels, and other soft path energy technologies take a larger role in California's energy future. These options must be seen as vital public investments as we inexorably move to a future industrial society without fossil fuels.

But unfortunately these are longer-term, not emergency solutions. Whatever the future holds, worse energy problems lie ahead, not behind. And we can no longer assume that markets will unleash competition to save California from itself. Only Californios can do that.

NOTES

1. "The governor understands that his political survival is at stake," says Harvey Rosenfield, president of the Foundation for Taxpayer and Consumer Rights in Santa Monica, quoted in anonymous, "Financial reprieve for PG&E," Oakland Tribune 23 December 2000. On the linkages between utilities and major suppliers, see J.A. Savage, "Electric wholesalers worry California is house of credit cards," California Energy Markets No. 596, 8 December 2000. Regarding Bank of America's bad loans, and loans by J.P. Morgan and Chase Manhattan to PG&E, see Loretta Kalb, "Utilities feeling credit crunch," Sacramento Bee 4 January 2001; Steve Johnson and Mark Gladstone, "Power bailout fever," San Jose Mercury News 16 January 2001; David Lazarus, "PG&E may default in a matter of days," San Francisco Chronicle 17 January 2001; Sam Zuckerman, "Utility asks banks for more time," San Francisco Chronicle 20 January 2001; and David Lazarus, "Creditors threaten utilities' finances: suppliers try to force Edison into bankruptcy," San Francisco Chronicle 17 March 2001. On the financial harm to California's credit ratings, see Kathleen Pender, "S&P hints at downgrade of state bonds," San Francisco Chronicle 20 January 2001.
2. "Transition costs, also known as stranded costs, consist primarily of continuing obligations for past utility power plant investments and power purchase contracts that will not be recovered in a competitive generation market." California State Legislature, Bill Analysis for Assembly Bill 1890, Concurrence in Senate Amendments as Amended June 19, 1996, p. 7. By far the largest stranded costs utilities possess are for nuclear power plants, such as Diablo Canyon near San Luis Obispo. Investor-owned utilities like PG&E were given until 31 December 2001 to recover these stranded costs in the customers' bills (as found in the "competitive transition charge" on a typical utility bill).
3. National Public Radio, All Things Considered, news report, 15 March 2001.
4. There are now 9 power plants under construction and another 14 seeking permits for siting and construction in California. Carolyn Said, "Turning on the juice," San Francisco Chronicle 30 January 2001. Four of nine under construction are located in Kern County and two others are in Contra Costa County, raising the prospect of serious environmental justice impacts on adjacent communities directly affected by noise, air pollutants, and potential electromagnetic field exposures from more nearby power lines.
5. Editorial, "A Pressured Bush Retreats," Los Angeles Times 15 March 2001; Elizabeth Shogren, "U-Turn on Emissions Shows Big Energy Clout," Los Angeles Times 15 March 2001. Shogren reports that "Speech writers for President Bush were polishing his first major address to Congress last month when a top energy executive called one of the president's closest aides. The request: Urge Bush to drop a line from the speech restating his campaign pledge to regulate carbon dioxide emissions from power plants. The line came out. Unclear at the time was that this deletion of just a few words foretold Bush's abrupt reversal on the issue this week."
6. Governor Gray Davis, Executive Orders D-24-01 and D-25-01, issued 8 February 2001. Available at www.ca.gov in the "press room" page.
7. Robert Salladay, "Utilities pin blame on state for crisis," San Francisco Chronicle 10 February 2001; and Thomas R.

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No surprise?**Habitat Plans Undoing Species Protection****By Roanne Withers**

“California has exceeded its carrying capacity,” stated California Resources Secretary Mary Nichols, keynote speaker at the annual UC Davis Endangered Species Act (ESA) and Water Resources Issues Conference in Sacramento last September.¹ Her statement represents official admission that California’s population exceeds the resource base here supporting it.

Nichols further lamented that she “had no useful answers” to “lots of questions” about how to reconcile providing water to the state’s growing human economy and population and protecting endangered species dependant on that same water for survival — except to “spend money.”

Nichols was referring to the costly and contentious marriage of economic development and species protection in federal Habitat Conservation Plans (HCPs). HCPs in California also result from a 1991 state law called the Natural Communities Conservation Planning Act, creating the state’s HCP counterpart, Natural Community Conservation Plans (or NCCPs).²

Major regional HCPs and multi-species conservation strategies have been adopted or planned by CalFED Bay-Delta Program agencies relating to water supply reliability and ecosystem restoration throughout the Central Valley, as well as for key frog, snake, plant, bird and other species throughout California.³

As developers (and corporate owners of vast tracts of timber land) increased criticism of the ESA and its application to private land, the Clinton Administration adopted policies, such as a “no surprises” rule, to increase use of HCPs. Neither the US Fish and Wildlife Service (USFWS) nor the National Marine Fisheries Service (NMFS) — let alone California’s resource protection agencies — are allocated enough staff and funding by legislators to assess species for their biological status and enforce the ESA on every individual development (or timber harvest plan) despite ESA mandates that assessment and enforcement occur.

Instead, private landowners hire consultants to provide biological assessments for HCPs. The burden of proof of a species’ status relative to ESA is borne by conservationists. To challenge the adequacy of a biological assessment, and in turn argue an HCP does not protect endangered species, conservationists must sue in court to correct the matter.⁴

What Is a Habitat Conservation Plan?

Section 9 of the federal ESA prohibits “take” of federally listed animals without appropriate authorization. Take is defined under the ESA, in part, as “killing, harming, or

harassment” of a federally listed species. “Harm” in the definition of “take” means an act which actually kills or injures wildlife, and may include habitat degradation or changes that actually kill or injure wildlife by impairing such essential behavior patterns including breeding, spawning, rearing, migrating, feeding, or sheltering.

In 1983, Congress adopted Section 10 of the ESA which allows for some “taking” of endangered species. “Incidental take” involves a take that is incidental to, and not the purpose of, otherwise lawful activities.

In 1988, Congress further defined Section 10 by passing amendments to provide a means for non-Federal projects

“The principle underlying the Section 10 exemption is that some individuals of a species or portions of their habitat may be expendable over the short term, as long as enough protection is provided to ensure the long term recovery of the species.”

resulting in take (and harm) of listed animals to be permitted subject to carefully prescribed conditions. These amendments try to balance economic development with endangered species conservation. They encourage public-private partnerships through HCPs (and other similar plans) to accomplish these goals.⁵

“The principle underlying the Section 10 exemption,” says the National Audubon Society, “is that some individuals of a species or portions of their habitat may be expendable over the short term, as long as enough protection is provided to ensure the long term recovery of the species.”⁶

Many conservationists are convinced that HCPs are used to avoid, undermine, and sabotage state and federal environmental protection laws. In San Diego, for example, a widely-used HCP process, called the Multiple Species Conservation Program (MSCP) was only half-baked before approved. Mark Massara of Sierra Club’s Coastal Campaign states, “Despite virtually no funding and no monitoring or evaluation of habitat set-asides, development is moving forward [under the San Diego MSCP]. Open space habitat to be ‘established’ is often existing public parks, or even street medians. Vernal pools and wetlands have already been destroyed.”⁷

The Politics of HCPs

Monitoring and evaluation of HCPs is not readily smiled upon by the powers that be.

The California Coastal Commission (CCC) became concerned last October that US Fish and Wildlife Service-approved HCPs circumvent the Commission’s environmental protection authority. Some 80 HCPs now exist in California, and many include coverage of large stretches of California coastline.⁸ Apparently, the CCC had not been consulted on the growing use of HCPs by USFWS and the California

Roanne Withers is a consultant and environmental activist in Fort Bragg, California.

Department of Fish and Game (DFG), which is surprising since state and federal coordination of coastal protection policies has long been a hallmark of coastal zone management.⁹

Despite CCC's normal procedures for reviewing federal actions for consistency with coastal land use plans, Governor Gray Davis relieved a commissioner of her seat before she could cast a vote to sustain a request for Commission review of federal HCPs before the U.S. Department of Commerce (NMFS's parent agency).

Ten other states, reports the *Los Angeles Times*, had such requests routinely approved by Commerce. But with developers, landowners, and government officials, complaining that CCC review would have a "chilling" effect on development activity in the coastal zone, Governor Davis did not wish to alienate an important and well-heeled constituency, especially in the midst of the state's energy crisis. The CCC voted 6-5 to withdraw the request to Commerce in January 2001.¹⁰

In addition, the North Coast Regional Water Quality Control Board (NCRWQCB) also became concerned regarding the water quality implications of the HCP for the Headwaters Forest settlement.¹¹

HCPs Mean "No Surprises"

Lynn Cox, a lawyer for the US Interior Department stated at the ESA and Water Conference last September that USFWS, despite sparse case law on indirect effects — such as growth inducement caused by expansion of a water district's services — would require a water district to consult with USFWS and/or NMFS for an opinion about possible harm to endangered species as a result of the water service expansion, even though water districts have no authority to regulate growth.

Cox stated that in the absence of an HCP, USFWS would issue a "jeopardy opinion" (which would halt the water service expansion) as a matter of policy. Dawn Andrews-McIntosh, attorney for NMFS, said that NMFS concurs with this policy.

These consultation policies led Interior Secretary Bruce Babbitt to make HCPs more attractive to developers and the water industry in 1994 by issuing a "no surprises" rule, guaranteeing that the federal government will not change conditions of HCPs for a specific time period, even should the situation become more dire for a species. Most clauses last about 30 years, although some cover 100 years and others just a few.¹²

With an HCP in place, then, the water district could expand service, even if it meant incidental taking of an endangered species individual, and could continue doing so for the term of the HCP agreement.

The Surprise in "No Surprises"

Spirit of the Sage Council, a southern California based environmental coalition, filed suit in federal court in the summer of 1998, hoping to invalidate the vast majority of HCPs with a legal challenge of "no surprises" rules. The suit

contends that "no surprises" rules violate the Endangered Species Act, and that Babbitt overstepped his authority in authorizing them.¹³

In effect, Eric R. Glitzenstein of the Spirit of the Sage Council told Congress in 1999, the HCP requirement of the ESA "has been converted from one intended to facilitate the recovery of species into one under which the wholesale 'taking' of endangered species is authorized in exchange for woefully inadequate 'mitigation' — not 'conservation' — plans which do little, if anything, to offset the extensive damage to the affected animals and plants."¹⁴

In 1999, a major scientific analysis of HCPs released by the American Institute of Biological Sciences and the National Center for Ecological Analysis and Synthesis confirms conservationists' long-held concerns about HCPs.¹⁵

A group of 119 independent scientists examining 43 HCPs in detail and 208 more generally, concluded that critical scientific information about endangered species is often not available for the HCP approval process. They specifically cite a major lack of biological monitoring to determine specific effects of the HCP on the species concerned and an over-reliance upon unproven management techniques.

USFWS and NMFS acknowledged these findings, but added, "the HCPs currently in place are based on the best available scientific and commercial information. If we lack critical information regarding the biological needs of a

Many conservationists are convinced that HCPs are used to avoid, undermine, and sabotage state and federal environmental protection laws.

species proposed to be covered under an HCP, we will not issue the permit until such information is obtained or an acceptable adaptive management strategy is incorporated into the HCP to address the uncertainty."¹⁶

In June 2000, USFWS and NMFS clarified policy guidance used by biological consultants and developers for the incidental take permit program and for those applying for incidental take permits under section 10(a)(1)(B) of the ESA.¹⁷ Five areas of policy guidance in the addendum are: establishment of biological goals and objectives, adaptive management, monitoring, public participation and duration of incidental-take permits granted as part of the HCP process.¹⁸

"HCPs were designed by Congress to authorize incidental take [of endangered species], not to be mandatory recovery tools," according to the Handbook. Nor are HCPs required to contribute to recovery of a species or to even have a net benefit to affected species. All that is required is that the issuance of a section 10 incidental take permit based on the HCP must not "appreciably reduce" the likelihood of

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the survival and recovery of the species in the wild.¹⁹

In this world of non-protective protection, “adaptive management” addresses the situation where inadequate information exists about the ecology of endangered species or their habitats. USFWS claims HCPs have been and will be “carefully crafted so that unforeseen circumstances will be rare.”

However, under the “no surprises” rule, the actual extent of adaptive management provisions in the HCP are negotiated between the Services and the developer and can be politically restricted. “Unforeseen circumstances” that arise after the HCP has been approved are to be addressed by land acquisition, and habitat restoration or enhancement the expenses of which are to be paid for by state and federal taxpayers.²⁰

Heavy Hands-On

After two years in office, it is increasingly apparent that California Governor Gray Davis intends to use his office to override science and ecological ethics on behalf of develop-

“HCPs were designed by Congress to authorize incidental takes [of endangered species], not to be mandatory recovery tools,” says the U.S. Fish and Wildlife Service.

ers through politically-motivated adaptive management negotiations during the HCP process. In addition to pressuring the Coastal Commission into withdrawing from its jurisdictional authority over HCPs in the state’s 1,100 mile Coastal Zone, the California Department of Fish and Game (DFG) has also been subject to Davis’ “hands on” approach to resource management.

In the summer of 2000, California Public Employees for Environmental Responsibility (CalPEER) issued (on behalf of DFG staff biologists) a scathing report on the Governor’s interference in the adaptive management portion of Pacific Lumber Company’s (PALCO) Headwaters HCP in southern Humboldt County.

The CalPEER report states in part, “Last minute negotiations left some issues unresolved. According to state employees, weaknesses in the Headwaters HCP stem from the tremendous political pressure to make the deal, and the fact that PALCO employed an army of attorneys as negotiators, while the state had mid-level managers and biologists at the bargaining table.” And after PALCO’s HCP was approved, “According to one biologist, ‘When DFG asks for more information on a THP [timber harvest plan], PALCO goes to Susan Kennedy [of Governor Davis’ office], who relays to DFG, ‘Stop holding up plans.’...Employees cite many

examples of natural resources suffering as a result of excessive political compromise, as well as many instances in which biologists are being told by the Governor’s staff to ‘back off’ in their efforts to protect fish and wildlife.”²¹

ESA: A Failed Law?

American Lands and the Endangered Species Coalition point out that USFWS is failing to identify and “list” imperiled species as Threatened or Endangered, denying these species the benefits of the ESA.

At least 6,480 plant and animal species in the US are at risk of extinction, yet only 18 percent are officially listed as Threatened or Endangered under the ESA. Of those species being listed, most required lawsuits to force the Administration to act. At least 189 species needed lawsuits, and some required as many as 5 suits. More than 300 species are considered “candidates” or are proposed for listing. But unless a court orders it or the species faces a dire emergency, no new species will receive federal protection any time soon.²²

On November 23, 2000, USFWS halted all work on listing new species for the rest of the fiscal year (ending September 2001) in order to complete court-ordered work on designating critical habitat for some 30 species. Additionally, USFWS successfully lobbied Congress for a reduction in its budget.²³

According to a Congressional Research Service Issue Brief to the new 107th Congress, the ESA “could be considered a failure, since only 11 species have been delisted due to recovery, as of November 16, 2000. Seven species were determined to be extinct since their listing, and twelve have been de-listed due to improved data.”

The issue brief further states, however, that “a number of listed species (41 percent of listed species according to one study) have stabilized or increased their populations, even if the species is not actually de-listed. Still other species (e.g., red wolves and California condors) might not exist at all without ESA protection, even though the species are still rare.”²⁴

Tim Stroshane provided research assistance.

NOTES

1. In basic ecology, textbooks define carrying capacity as “number of individuals in a population that the resource of a habitat can support”; Encyclopedia Britannica defines carrying capacity as “the maximum number of animals of one or more species that can be supported by a particular habitat or area through the most unfavorable period of the year. The carrying capacity is different for each species in a habitat because of that species’ particular food, shelter, and social requirements and because of competition from other species that may have similar requirements.”
2. Approved NCCPs provide the basis for issuance of state authorizations for takes of listed species and may provide the basis for issuance of federal take permits. However, the NCCP process does not supplant the listing process of either the federal or state endangered species acts. The Natural Communities Conservation Planning Act gives the California

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Department of Fish and Game discretion on use of NCCPs in California Fish and Game Code Section 2810: "The department may enter into agreements with any person for the purpose of preparing and implementing a natural community conservation plan to provide comprehensive management and conservation of multiple wildlife species, including, but not limited to, those species listed" in the state's endangered species act. "The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land use. The program seeks to anticipate and prevent the controversies and gridlock caused by species' listings by focusing on the long-term stability of wildlife and plant communities and including key interests in the process." Fish and Game Code Section 2800-2840. For complete review of statutes and guidelines of the Natural Communities Conservation Program see ceres.ca.gov/env_law/state.html.

3. See *CalFED Bay-Delta Program, Multi-Species Conservation Strategy, Technical Appendix to the Final Environmental Impact Statement/Report, July 2000*; on the HCP for the red-legged frog, see Annette Kondo, "U.S. Proposes to Designate Habitat for Imperiled Frog," *Los Angeles Times* 9 September 2000, and Peter Felsenfeld, "Red-legged frog may slow Dublin's growth: The U.S. Fish and Wildlife Service will likely designate the entire city as critical habitat," *Contra Costa Times* 27 October 2000; and on the HCP for the Alameda whipsnake, see Associated Press, "400,000 acres of California habitat declared critical for snake," *San Diego Union-Tribune* 3 October 2000.

4. See "Habitat Conservation Plans: Not All They're Cracked up to Be," by Tara Mueller, Attorney-at-law, www.igc.org/epic/pages/hcp_facts.html, and "EPIC's Summary and Critique of the Pacific Lumber Habitat Conservation Plan." at www.igc.org/epic/pages/pl_hcp.html.

5. The final rule (64 FR 32706, June 17, 1999) modified the no surprises policy so that the permitted taking will not appreciably reduce the likelihood of the survival and recovery of the species. If continuation of permitted activities would be inconsistent with the finding, and the inconsistency is not remedied in a timely fashion, the new regulations provide for revocation of incidental take permits, even if they contain no surprises agreements.

6. National Audubon Society, "A Citizen's Guide to Habitat Conservation Plans," at www.audubon.org/campaign/esa/hcp-guide.html.

7. See also Susan Davis, "Plastic Greens," *Anderson Valley Advertiser* 26 July 2000.

8. Deborah Schoch, "Coastal Panel Seeks Wider Role in Plans to Conserve Habitat," *Los Angeles Times* 12 October 2000.

9. In particular, California Public Resources Code section 30330 and 30400 mandate review of federal actions authorizing activities in the coastal zone by the CCC for consistency with the Commission's federally approved Coastal Zone Management Plan.

10. Seema Mehta, "Coast panel drops bid for role in habitat plans," *Los Angeles Times* 11 January 2001. Mehta notes that had the yanked commissioner Kitch Eitzen of Humboldt County "was not sufficiently interviewed in advance," accord-

ing to Mary Nichols who said Eitzen was not appointed properly. Mehta reports, "Had Eitzen voted against withdrawal, as expected, there would have been a tie, meaning the request would have stood."

11. See the North Coast Regional Water Quality Pacific Lumber Company Staff Report, September 9, 2000 at www.swrcb.ca.gov/rwqcb1/palco.html, and the November 9, 2000 Coastal Commission Staff Report for the California Coastal Management Workshop on Nov. 15, 2000, at www.coastal.ca.gov/fedcd/ccmpworkshop.pdf

12. The Services codified the "No Surprises" policy into a final rule, on February 23, 1998 (63 FR 8859). No Surprises Rule, Federal Register: February 23, 1998, Volume 63, Number 35, Rules and Regulations, Page 8859-8873 from the Federal Register Online via GPO Access [wais.access.gpo.gov] [DOCID:fr23fe98-12] at www.epa.gov/fedrgstr/EPA-SPE-CIES/1998/February/Day-23/e4367.htm.

13. *Spirit of the Sage Council is an all volunteer grassroots non-profit 501 (c)3 tax-exempt project and coalition of American Indians, environmental organizations, citizens action groups, scientists, legal experts and wildlife advocates dedicated to the protection and conservation of America's natural and cultural resources.* See www.sagecouncil.com/index.html.

14. *No Surprises Testimony of Eric R. Glitzenstein Before the Senate Subcommittee on Fisheries, Wildlife, and Drinking Water of the Senate Committee on Environment And Public Works* at www.sagecouncil.com/noSurTestimony.html

15. To access the full "Using Science in Habitat Conservation Plans" report see www.nceas.ucsb.edu/ for Kareiva, Peter, Habitat Conservation Plan Data, 1999.

16. Federal Register: June 1, 2000 (Volume 65, Number 106) [Notices] [Page 35241-35257] From the Federal Register Online via GPO Access [wais.access.gpo.gov] [DOCID:fr01jn00- 166] www.eswr.com/f610g.txt.

17. The joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Plan Handbook is available on endangered.fws.gov/hcp/hcpbook.htm and is called "Handbook for Habitat Conservation Planning and Incidental Take Permitting Process."

18. The five-point Addendum to the Handbook is available at endangered.fws.gov/hcp/addendum.html. The Addendum Federal Register took effect July 3, 2000.

19. "Habitat Conservation Planning Handbook," pg 3-20, at endangered.fws.gov/hcp/index.html#Handbook.

20. "No Surprises Myths" at endangered.fws.gov/hcp/nsmysms.pdf

21. "California's Failed Forest Policy: State Biologists Speak Out," California Public Employees for Environmental Responsibility, Summer 2000.

22. "Broken Promises of Recovery: The Clinton Administration's 10-Prong Attack on Endangered Species," American Lands In Cooperation With the Endangered Species Coalition, January 17, 2000 www.stopextinction.org/

23. Congressional Research Service Issue Brief for Congress, IB10072: Endangered Species: Continuing Controversy, M. Lynne Corn, Resources, Science, and Industry Division, February 8, 2001 www.cnie.org/nle/biodv-1.html.

24. Ibid.

CalFED designs Decimating Delta Farming

By Tim Strohane

CalFED, the joint state-federal water planning program, completed its comprehensive, \$9 billion Bay-Delta plan for California's water future last August 28th.¹ The plan affects California water users from Mount Shasta clear to San Diego, promising to restore "ecological health" to the Sacramento-San Joaquin River Delta estuary at the same time it would improve "water supply reliability" for the rest of the state.²

Despite its promises, CalFED's plan is plagued by controversy over proposals that are seen as a thinly disguised land and water grab. Moreover, CalFED's plan begins at a time when the U.S. farm economy faces harrowing conditions, magnifying CalFED's impacts on Delta agriculture.

Most troubling among its 600-plus proposals are the CalFED ecosystem restoration program (ERPP), and a strategy for determining when to build the peripheral canal that is reminiscent of the sword of Damocles.³ These proposals will convert or consume nearly a fifth of the Delta's agricultural land to aqueduct, wetlands, or wider river channel, reducing the supply of agricultural land and increasing competition among California farmers for cultivable land. The peripheral canal will also end Delta farmers' ready access to water of sufficient quality to irrigate crops.

Ironically, the Delta is the region whose complex aquatic environments CalFED professes to save; but while other farming areas of California would be affected by CalFED's actions, its environmental impact report says its program's adverse effects on farming "would be most concentrated and most substantial in the Delta Region."⁴

To be sure, key CalFED programs aim to improve Delta drinking water quality, levee stability, watershed management, farm and urban water conservation, and Delta fish and freshwater habitats to comply with state and federal mandates.

But a legitimate question never confronted in CalFED's deliberations is whether depopulating the Delta's farm communities for ecosystem restoration is equitable.

Now, as Delta farmers and rural "area of origin" counties sue CalFED over its flawed "framework for action," state-wide and Bay Area professional environmental groups find themselves defenders of an increasingly indefensible plan, clutching to a narrowly-conceived ecosystem restoration program in post-CalFED water politics.

Here's how CalFED's August "record of decision" sells out the Sacramento-San Joaquin River Delta.

Why the Delta?

Why is the Delta important to the state's water systems,

its major industries, to CalFED, the governor, and the Bush Administration?

Located about 40 miles east of San Francisco, the Delta is a 738,000 acre farming region through which drain waters of the Sacramento and San Joaquin Rivers from more than 61,000 square miles of the Central Valley watershed, about 37 percent of the state.⁵ The Delta is the largest coastal estuary in the American west and doubly unique because it is an inland estuary (the outlet of California's mountain-rimmed bathtub topography).

Over 7,000 individuals, agricultural and industrial corporations, and big and small cities divert fresh water from streams there, including some 1,800 diverters (mostly farmers) in the Delta proper.⁶ CalFED estimates the farm economy of the Delta averages about \$500 million in gross value of farm output per year; it is a small part of the state's

**With a peripheral canal in place,
the Delta and San Francisco Bay
become expendable to the
state's "peripheral" water system.**

multi-billion dollar agricultural industry.⁷ Nonetheless, some of the state's best agricultural (peat) soils are found here, and smaller family-run farms are common, many tracing their histories back to the original 19th century reclamation of swamp land. The average Delta farm size is smaller than the state's.⁸ Most farmers' water rights here date from the 19th century and run with the land.

Suction and Destruction

Decades ago, state and federal engineers viewing California's virgin waterscape made the Delta the "switching yard" for the state's major developed water projects, including the Central Valley Project (CVP) and the State Water Project (SWP). The engineers came up with two methods of moving pure northern California water to their pumps for export to the south. One way is to suck the water through the Delta's sinuous and languid channels using huge pumps.

This is what the SWP and CVP do now. These systems hoist Sacramento River water from the Delta uphill to the federal Delta-Mendota Canal and the state's California Aqueduct, south of the Delta. (State Water Project water is also pumped over the Tehachapis for southern California.) Water from the Delta irrigates 5 million acres of farm land (mostly in the San Joaquin Valley), and reaches 22 million residents (mostly in southern California, but also in the East and South Bay areas).

To pull in fresh Sacramento River water for export, the suction of CVP and SWP pumps near Tracy must compete with the gravitational force of the Delta's rivers draining to San Francisco Bay. (These facilities help make water-pumping the largest use of electricity production in California.) This suction makes Delta river channels flow back-

Tim Strohane is editor and publisher of SPILLWAY.

wards at times, confusing anadromous (migratory) fish reliant on an aquatic sense of smell as they migrate between the Pacific Ocean and their upstream spawning grounds.

Other times of year, eggs, fingerlings, and young fry get sucked into the pumps, resulting in massive fish kills.

Delta smelt, Sacramento splittail, and various stocks of chinook salmon are now listed as either endangered or threatened species by the state and federal governments. Operation of these vast water projects are largely responsible for their decline, and the projects thereby run afoul of the state and federal Endangered Species acts.

Pollution remains an important cause of food chain collapse in the Delta too. "The United States Geological Survey has characterized the San Joaquin River and its tributaries as one of the most degraded basins in the entire nation," reports Bill Jennings of DeltaKeeper. Yet, the Delta's water quality "has all too often been treated like the crazy aunt locked in the closet at home."⁹

The Delta's aging levees hold back salt water tides from San Francisco Bay by containing relatively fresh waters in their channels from the Sierras and southern Cascade mountains.

But they are vulnerable. As rich peat soils of central Delta islands compacted, lands behind the levees sank as much as 25 feet below water levels in Delta channels. A Noachian flood or catastrophic earthquake today could undermine Delta levees and destroy many of these farming islands, threatening to create an inland salt-water sea that would disrupt the export of fresh water stored at the CVP and SWP's huge Shasta and Oroville reservoirs.

As God promised Noah a great flood, CalFED geologists assure us that relatively moderate earthquakes could cause "3 to 10 levee failures in the Delta, on one or more islands."¹⁰ Just imagine what the Big One tomorrow could do.

Peripheral Canal Politics

The engineers' other idea is to build a canal around the eastern periphery of the Delta (about where Interstate 5 runs now) that would carry Sacramento River water directly to the export pumps. This "Peripheral Canal" would avoid mixing the Sacramento's pure fresh water with salty waters entering the Delta from Carquinez Strait, and salt and pesticide-laden waters from the San Joaquin River.

Many water observers predicted that "the peripheral canal is dead" after it was overwhelmingly defeated by California voters in a June 1982 referendum. But Delta residents never believed it was dead. CalFED's proposals revive its spectre, and introduce an ecosystem restoration program that removes farms and people from the region, easing the canal's return.

With a canal in place, the Delta and San Francisco Bay become expendable to the state's "peripheral" water system.

"I don't think the environmental consequences [of a peripheral canal] would be that great, but the bigger issue here is motivation," says Tom Graff, an attorney and long-time water politico for Oakland-based Environmental Defense. "It may improve export water, but it will signifi-

cantly degrade water quality in the Bay and Delta. The more water you export, the more the Bay and Delta suffer."¹¹

Dante Nomellini, a Stockton water lawyer who is chief counsel for the Central Delta Water Agency, has pleaded the Delta's case for over 30 years, and says the peripheral canal "would destroy the Delta ecologically and economically."¹² He also cites as threats to Delta farming communities not only the canal taking 4,500 acres of important farmland out of production, but CalFED ecosystem restoration projects that may take up to an additional 112,000 acres of farm land out of production, and a CalFED proposal to flood Delta islands to create a freshwater reservoir there.

Acquiring Delta farm land now to restore 30,000 to 45,000 acres of tidal wetlands, Nomellini adds, makes it easier for CalFED to let more tidal salt into Delta channels, simultaneously harming Delta cultivators and making the "need" for a peripheral canal a self-fulfilling prophecy.¹³

If Sacramento River water is diverted to a peripheral canal, or its CalFED euphemism, the "isolated conveyance facility," the cost of peripheral canal water will come dear,

The engineers came up with two methods of moving water to their pumps for export. One way is for the pumps to suck the water through the Delta. The other idea is to build a canal around the Delta to carry Sacramento River water directly to the Tracy export pumps.

ruining the bottom line for most Delta farmers. A CalFED report on water management options analyzes "isolated facility" costs, allocating them to each major urban region in the state, strongly implying that CalFED does not think that Delta farmers will want water from the peripheral canal, though thirsty cities will.¹⁴ Is that perhaps because there would be no Delta farmers to buy it from the peripheral canal?

"CalFED says, 'oh we don't expect to solve everybody's problem,'" says frustrated Manteca (south Delta) corn farmer Alex Hildebrand, who was a member of CalFED's citizen advisory council (see "Hold CalFED To Its Word!" this issue). "But they are very politically motivated about what they say is within their prerogative and what they say isn't. It depends on how many votes are involved and how much the public understands the problem."¹⁵

The CalFED environmental impact report backs up Nomellini's claims:

- The ERPP would use more fresh water than does land currently cultivated in farms. Creating 28,000 acres of seasonal wetland could require 28,000 to 56,000 acre-feet of water per year of additional water. Restoring 58,000 to

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Delta Farming

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74,000 acres of aquatic and riparian habitat would require an additional 175,000 to 222,000 acre-feet a year in the Delta. No crops would be grown with this water.¹⁶

- Up to 15,000 acres of Delta farm islands would be converted to a reservoir by Delta Wetlands, a development partnership headed by John Winther, an Orinda civil engineer. This project received a permit from the State Water Resources Control Board in February. Delta Wetlands hopes to complete the project and sell it either to the California Department of Water Resources or the U.S. Bureau of Reclamation.¹⁷

- Channel widening of Old River in the southwestern Delta region would accommodate increased SWP export pumping and would convert another 4,500 acres of Delta farmland, the equivalent of about 20 average-size Delta region farms.¹⁸

- Construction of the peripheral canal would dig up and convert another 4,500 to 6,000 acres of farmland as well.¹⁹

- The regional economic impacts of CalFED's "preferred program alternative" (no peripheral canal, but with a diversion at Hood) includes up to \$225 million in lost farm revenues (about 20 percent of the Delta region total), loss of up to 11,000 farming jobs (about half the Delta's ag employment base), and those are just the direct effects. Indirectly, all economic sectors may experience losses approaching \$500 million in output, and up to 20,000 jobs foregoing \$400 million in lost personal income.²⁰

"These effects," the CalFED environmental impact report concludes, "could substantially affect the region, especially small communities that depend on agriculture for their income. Some adverse effects also could be expected in the urbanized areas that surround the Delta: Sacramento, Stockton, and Pittsburg/Antioch. The form of these effects would be reduced employment and income, a reduction in property tax base through land conversion and reduced residential property values, and increased costs for social services and other local services — especially in the short run."²¹

Sword of Damocles

CalFED's 30-year plan does not propose to build a peripheral canal — at least not yet. Its plan calls for an intensive "through-Delta" approach that constructs a short canal from the village of Hood on the Sacramento River to the Mokelumne River beginning as early as 2006 so that fresher Sacramento River water pulses into the central Delta on its way to the Tracy pumps to the southwest.²² CalFED hopes this pulse will boost central Delta water quality to enable the SWP and CVP to comply with 1995 state water quality standards.

A peripheral canal is not a self-fulfilling prophecy with the Hood diversion, insist CalFED officials. Still, wags refer to it as an "on-ramp" for the canal.

CalFED also hopes to fine-tune the Delta by widening

river channels, strengthening levees, and providing tidal barriers for key south Delta channels to protect water depths for adjacent farmers and keep anadromous fish fry away from the big CVP and SWP export pumps, making the Delta more reliable as a source of fresh water.

But if these actions fail to improve Delta water quality, sustain restored sensitive aquatic habitat, and replenish the battered populations of endangered fish and other aquatic species that rely on the Delta — and many skeptics think they will fail — then CalFED says the Peripheral Canal, er, the isolated conveyance facility would be all but necessary.

CalFED's "strategy" for getting water to the pumps dangles the peripheral canal like a sword of Damocles over the planned shrinkage of the Delta farm economy.

It should not be necessary, as CalFED claims, to depopulate a large proportion of the Delta region to achieve ESA goals, because most Delta farmland was reclaimed and

CalFED's plan seeks greater CVP and SWP reliability by protecting "no net loss to exports." It will not mitigate impacts on the Delta's in-channel water supply and water quality, nor will it provide "no net loss" of water to users in the Delta and areas of origin. This reverses the priority of water rights.

cultivated there long before the CVP and SWP pumps were installed to export Delta water south. This means that water rights held by Delta farmers have first priority over the more recently granted CVP and SWP rights.

Yet CalFED plans ignore these rights in a fashion reminiscent of a case recently decided by the California Supreme Court that gave older farm water rights holders more priority to water than latecomer urban interests in the Mojave River basin.²³

CalFED's plan proposes, Hildebrand wrote to CalFED in June 2000, "that existing impacts of the [SWP and CVP] projects on fishery [sic] should be mitigated to the extent feasible with 'no net loss to exports.' It does not propose to mitigate existing impacts of the projects on the Delta's in-channel water supply and water quality and does not provide for 'no net loss' of water to water users in the Delta and area of origin water users. This reverses the priority of water rights."²⁴

In other words, CalFED's plan ignores existing higher priority water rights in the Delta region. In doing so, large chunks of CalFED's whole program become vulnerable to litigation — after six difficult years of work — and to the charge of being a huge waste of taxpayer money.

Hildebrand, the South Delta Water Agency, and a coalition of Delta and Feather River water rights holders, sued CalFED over its Record of Decision in September. They were followed by the California Farm Bureau Federa-

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tion a few days later (see “Will Suits Bring CalFED to Heel?” this issue).

NOTES

1. *CalFED Bay-Delta Program*, Programmatic Record of Decision, 28 August 2000. Hereafter CalFED ROD.
2. *Ibid.*, p. 9, where CalFED’s Mission Statement is “to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system.”
3. *CalFED Bay-Delta Program*, Ecosystem Restoration Program Plan, 2 Volumes, (hereafter ERPP); and Phase II Report, pp. 81-86. These documents are both technical appendices for CalFED’s Final Programmatic Environmental Impact Statement/Report, July 2000. Hereafter, CalFED Final EIS/R.
4. CalFED Final EIS/R, July 2000, p. 7.2-27.
5. Phase II Report, op. cit., note 3, p. 10.
6. *Ibid.*
7. CalFED Final EIS/R, p. 7.2-5.
8. *Ibid.*, Table 7.2-1, p. 7.2-4.
9. Bill Jennings, *DeltaKeeper*, remarks before the Commonwealth Club of California, Oakland, 2 March 1999. Available at the Peace and Justice Connections web site, www.sonnet.com/usr/pjc/04-99/
10. *CalFED Bay-Delta Program*, Levee Improvements Program, Technical Appendix of CalFED Final EIS/R, July 2000, Appendix G: Seismic Vulnerability of the Sacramento-San Joaquin Delta Levees, p. iv., 23, and Figure 5-2.
11. Graff quoted in Glen Martin, “Peripheral Canal foes see another try,” *San Francisco Chronicle* 4 August 1999, A15.
12. Dante Nomellini, counsel for Central Delta Water Agency, personal communication, Stockton, California, 3 March 2000.
13. *Ibid.* See also ERPP, Volume II, July 2000, Table 6, p. 114.
14. At \$15 to \$75 more per acre-foot than they currently pay for treated irrigation water, most Delta farmers would not be able to afford peripheral canal water. See *CalFED Bay-Delta Program*, Economic Evaluation of Water Management Alternatives: Screening Analysis and Scenario Development, October 1999, Table 6-6, p. 6-10.
15. Alex Hildebrand, personal communication, Manteca, California, 10 December 1999.
16. CalFED Final EIS/R, op. cit., p. 7.1-16.
17. *Ibid.*, p. 7.1-18; see also Table 4-3, p. 4-13. See also Bill Lindelof, “Visionary engineer’s dream of Delta reservoirs gets closer,” *Sacramento Bee* 27 February 2001. The Delta Wetlands project is actually larger than CalFED revealed, though the total “lake” storage may be the same. According to Lindelof, the islands targeted as reservoirs are Webb Tract and Bouldin Island, totaling 11,000 acres. Holland Tract and Bouldin Island, totaling 9,000 acres would be transformed into “a mosaic of wetlands, lakes, and riparian forest.”
18. CalFED Final EIS/R, p. 7.1-24.
19. *Ibid.*, Table 4-3, p. 4-13. See specifically, Alternative 3, *Delta Region conveyance land use impacts*.
20. *Ibid.*, p. 7.10-12.
21. *Ibid.*, 7.10-24.
22. Phase II Report, op. cit., note 3, p. 84. CalFED blandly states, “Study and evaluate a screened diversion structure on the Sacramento River of up to 4,000 cfs. This evaluation would consider how to operate the Delta Cross Channel [a Central Valley Project structure] to improve drinking water quality, while maintaining fish recovery. If the evaluation demonstrates that the diversion facility is needed to improve water quality in the Delta and at the export facilities, and can be constructed and operated without adverse effects to anadromous and estuarine fish, construction will begin late in Stage 1 [about 2006]. This facility would likely include a fish screen, pumps and a channel between the Sacramento and Mokelumne Rivers. The design, size, and operating rules for this facility would allow for analyses of impacts to upstream and downstream migrating fish as well as impacts from habitat shifts resulting from increased flows in the eastern Delta on Delta species.” The CalFED ROD, p. 49, contains more specifics, and places the start of construction into 2007.
23. *City of Barstow v. Mojave Water Agency*, S071728, 2000. See “Don’t Tread on Mojave,” SPILLWAY v1n1, Fall 2000, p. 2.
24. *South Delta Water Agency*, Assessment of CalFED’s “Framework for Action,” prepared by Alex Hildebrand, 16 June 2000, point 8, p. 3.

Newhall Ranch

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capacity.”³ Now it cannot.

Are land use planners listening to the recent legal and policy decisions and to public outcry to change things? Some are. Although the City of Los Angeles has grown greatly in population, water usage has remained almost steady.

LADWP deserves praise and credit for its great strides in water conservation, a result of its efforts with community groups to ensure that real conservation goals are achieved.

Even the Los Angeles County Department of Public Works, that dinosaur of planning whose staff seems to glory in concrete, has begun a shift of thought, possibly attributable to its membership on local watershed councils. Commu-

The same Monterey Agreement water transfer was promised to three different projects before three different agencies.

nity groups find its staff more open to solutions that will provide both flood control and retain natural waterways such as occurred in the Arroyo Seco and on a smaller scale in the Laing Homes development in the Santa Clarita Valley.

Local and Logical Planning

In the late 1970s, litigation gave Los Angeles (LA) County a specific water planning tool called the Development Monitoring System (DMS). DMS provides LA County a means of analyzing infrastructure needs in light of previous approvals and existing uses. If the DMS finds that fire services, schools, roads, libraries, and water services are inadequate, then a new development project must be downsized, delayed or denied until such public services and utilities exist to serve the development.⁴ Although the decision was 10 years in the making, it forever changed LA County's planning process.

Of course, the reasoning within the DMS seems perfectly logical to most everyone. Just ask the man on the street “should you build housing tracts without a water supply?” The response is inevitably a look of disbelief and an emphatic, “No!, of course not.”

For many years land use planners, on the advice of water agencies often controlled by developers, lived by the mantra that “water supply is infinite, it is only a matter of how much you are willing to pay for it; “water runs uphill to money”; and, “build the houses and the water will come,” etc. More recently, many general plans and many local, state, and

Lynne A. Plambeck operates a small business and is a board member of the Newhall County Water District, a first vice president of Santa Clarita Organization for Planning and the Environment, and the 2000 winner of the Carla Bard Award for environmental advocacy from Public Officials for Water and Environmental Reform.

federal laws require an analysis of water supply for new developments and protection of local aquifers, rivers, tributaries and groundwater recharge areas.

In spite of such local (and logical) planning mandates, agencies from the Army Corps of Engineers to city planning departments allow important LA County watershed resources to be converted to concrete channels, maximizing developer profits at the expense of current and future community needs.

Huge development projects, with Newhall Ranch in the lead, were approved in LA County with little or no attention to the adequacy of the water supply needed for new residents or to the impact potentially massive reductions in existing available water supply that would result to local businesses and established communities.

Fundamental changes in viewpoint are yet to arrive. Southern California will need to rely more heavily on our local water resources than ever before, for example through conjunctive use and living within our means. Have we taken this message to heart? The Newhall Ranch Project is an example of how far Southern California has come, but how far it must go to bring development plans into line with water realities.

Newhall Ranch

Newhall Ranch is a 21,600-unit project proposed for an agricultural area along the Santa Clara River, LA County's last wild and unchannelized river in northwestern LA County, in a watershed spanning two coastal counties (including Ventura County), bounded on the south by the Santa Susana Mountains. The project is not located within any City boundary and is in an area previously zoned by the LA County general plan for only 2,000 units. In one swoop, the County increased its population projections by 70,000 people for the area and re-zoned the agricultural land to allow the project's urban uses.

Under developer pressure, the County refused to address Newhall Ranch's water or watershed issues in any meaningful way.

For example, a regional planning commissioner stated at a 1996 hearing that the developer, Newhall Land and Farming Company's proposed placement of 3,000 new homes in a floodplain of the Santa Clara River obviously created most of the opposition. River habitat, water, flooding and watershed concerns could all be resolved by merely removing these homes and the proposed commercial uses from this area.

There was silence in the room. Reduce a developer's proposal by 3,000 units?

Such a proposition was unheard-of in LA County, though it was eminently logical, probably required by the general plan, and would protect the River and its water supply.

The Commission seemed to support the idea though, and the public held its breath.

But County planning staff returned a month later with the proposal reduced to 300 units, and no loss of commercial zoning. The Commissioner who had previously suggested a

3,000 unit reduction, lauded this token change as an excellent compromise.

We all speculated that in the interim she apparently received a stern lecture on the need for developer campaign contributions.

One Commissioner bravely continued pushing for flood plain protection. He was replaced before he could vote on the project.⁵

LA County approved this massive project in March 1999 knowing that Newhall Ranch had no adequate water supply and it ignored the General Plan's mandate to protect the Significant Ecological Area (SEA) status of the Santa Clara River.

Still, a condition was attached to the County's use permit approval stating that tract maps would not be approved unless and until a sufficient source of water was found for each tract. This condition had the effect of delaying the examination of adequate water supplies to the tract map stage of the approval process. It also locked out the possibility for local watershed protection that would aid water supply by locking in inappropriate land uses granted with approval of the Newhall Ranch specific plan.

Shell Game vs. Common Sense

The Newhall Ranch approval was in part the fault of the area's over-zealous growth-oriented water agencies. Controlled by development interests, these agencies have consistently overstated water supply by reporting access to full State Water entitlement and relying on extensive overdraft of local sources.⁶

Instead of reporting existing planned and available water supplies, the local water districts' state-required Urban Water Management Plan lists aquifers that are currently unusable due to ammonium perchlorate pollution. In addition, the County's water plan relies on water bank availability for which they have no contracts. And it overstates State Water Project entitlement availability.⁷

Water information supplied for the Newhall Ranch EIR claimed availability of full state water entitlement, giving the appearance of a large surplus of available water supply. This was exactly the problem anticipated in the Monterey Agreement EIR court decision, where Santa Barbara citizens merely put forward "the common sense notion," wrote the court, "that land use decisions are appropriately predicated in some large part on assumptions about available water supply. There is certainly the possibility that local decision makers are seduced by contractual entitlements and approve projects dependent on water worth little more than a wish and a prayer."⁸

Further the Newhall Ranch Court was asked to take judicial notice of a 41,000-acre-foot Monterey Agreement transfer that was consummated just days after the approval of the Newhall Ranch project.

The plaintiffs (of which I am a member) had no way of arguing to the court the myriad infrastructure problems associated with the acquisition of this transfer, the biggest of which is storage. Castaic Lake Water Agency has no storage

facility, no spreading grounds, no means of accumulating water locally to supply users in the event of a multi-year drought. And yet this state water transfer would be the primary, not the "supplemental" water source for thousands of homes and businesses. With only a "pass-through" 4,000 acre-feet of storage in Castaic Lake, and a "flex" agreement that allows only a modest increase in that amount that must be repaid in a five-year period, there is no way of assuring water to residents in a multi-year drought event.

We also had no means of bringing to light the shell game that Newhall Land and the water agencies were foisting on

"Paper water represents the unfulfilled dreams of those who created the expectation that 4.23 million acre-feet of water could be delivered by the State Water Project built to capacity."

the public. This same Monterey Agreement water transfer was promised to three different projects before three different agencies.

Castaic Lake Water Agency first presented data indicating that the transfer was needed for existing general plan land use approvals.⁹

Then, Newhall Land and their subsidiary, Valencia Water Company, obtained permission from the California Public Utilities Commission to annex the Westridge project to their water service territory based on this transfer.¹⁰

Finally, LA County Supervisor Antonovich clearly based his approval of the Newhall Ranch project in part upon this transfer.¹¹

Even the Santa Clarita area water agencies' recently released Urban Water Management Plan lists aquifers that are currently unusable due to ammonium perchlorate pollution, water bank availability for which they have no contracts and over-stated State Water Project entitlement availability, instead of reporting existing planned and available water supplies.¹²

How can local planners and commissioners be expected to make good planning decisions with such inaccurate and vague water information? It is time to put some teeth in the urban water management law that requires more accurate reporting if this tool is ever to be really useful to the communities and planning agencies it is supposed to serve.

Wishing and Praying

During the approval process for the Newhall Ranch project, Newhall Land and Farming argued that the houses would be built over a 25-year period and that by then they would find water.

But most proponents of good watershed management believe that destroying Northern fisheries to feed sprawl in Southern California is no longer an acceptable option. The

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Newhall Ranch

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only real water we will find is from conservation, better use of our local resources and careful use of reclaimed water.

In the meantime, the County deprived itself of the ability to incorporate new techniques into development in the Newhall Ranch area by granting development rights extending far into the future. They also deprive the next generation of its ability to protect their watershed and water resources.

And what about the downstream Ventura County water users in the unadjudicated Santa Clara River basin (with its two counties)? Ventura County concerns were not adequately addressed during the process. Newhall Land and Farming behaved as though its project's impacts stopped at the

**Southern California's water problem
is not just a problem of supply.
It is also a problem of concept.**

County line. Final LA County approval stated that future tracts would not be approved if supplying them with water would result in an overdraft of the local aquifers. But how could Ventura County believe such a statement knowing that water supplies were overstated and overdraft was already occurring?¹³

In April 1999, shortly after the approval by LA County, 11 downstream public agencies (including 4 cities, flood control and air pollution districts), a downstream water district, three environmental organizations, and a low-income housing group filed suit in Superior Court in Ventura County. After a short skirmish over venue, the case was heard in the neutral venue of Kern County by Judge Roger D. Randle. Volumes of briefings and several days of oral testimony led to a historic decision to set aside the Newhall Ranch approval "until Newhall Land could demonstrate that adequate water sources will be available for buildout of the project."¹⁴

The August 2000 decision suspends "all specific Project activity or activities that could result in an adverse change or alteration to the physical environment unless and until they comply with the provisions of the LA County General Plan related to the development monitoring system as it relates to water supplies and the General Plan policies of Los Angeles County requiring protection of natural resources in SEAs as they relate to [the Santa Clara River]."¹⁵

Momentous Water and Land Use Issues

How can we resolve such momentous issues before they arrive at the doorstep of the courts? Local watershed councils will help a great deal in this area. Although broad-based coalitions may not reach consensus, they do provide a forum for education and understanding of the wide array of impacts brought about by poor watershed conservation.

We need to strengthen Senator Costa's SB 901 effort of a

few years ago to get clear and plain analysis of water issues into the planning process. No, the water agencies shouldn't be in control of planning (who would want such a headache?), but they must provide planning agencies with accurate information and planning agencies, for the benefit of their communities must act on this information.

We must also strengthen California's urban water management planning law. At the moment, water agencies are determined to support the development industry to the detriment of existing communities and local businesses. They may mislead local planning agencies that depend on information presented in Urban Water Management Plans, freely and without fear of repercussion.

There must be some means to ensure accuracy of reported water supplies and verifiable methods of balancing demand with real supplies. Some public or agency oversight is needed to discourage overstating of State Water Project supplies, require clear disclosure of polluted basin water supplies, and timelines and financing mechanisms for bringing on capital projects needed to support any future supplies.

Southern California politics, particularly in the Santa Clarita Valley, is still controlled by the development industry. With huge sums of money at stake, it is difficult to make even very reasonable public concerns such as adequate water supply a meaningful and enforceable part of the public planning process. To continue supplying even our present population with good potable water, we must have political leaders willing to speak out and act to protect our local watersheds. This is just good common sense.

NOTES

1. County of Amador v. El Dorado County Water Agency, No. C027948, 99 C.D.O.S 9544 filed Nov. 3, 1999, certified for publication Dec. 3, 1999.
2. Application 99-12-025, filed December 17, 1999, Ruling JLN/BDP/abw 12/21/2000. Other aspects of the application are still pending.
3. Planning and Conservation League v. Department of Water Resources, Case no. C024576, Court of Appeal, 3rd District, decision filed 15 September 2000, footnote #7.
4. Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors of the County of Los Angeles, C366464, entered April 30, 1986, Judge Norman Epstein.
5. Commissioner Richard Wulliger.
6. PCL v. DWR, op. cit., note 3, above.
7. See Table 1-4 pg. 1-19, 2000 Urban Water Management Plan prepared for Castaic Lake Water Agency, Newhall County Water District, Santa Clarita Water Company, Valencia Water Co. by SA Associates, Reiter Lowry Consultants, Black and Veitch available on the CLWA web site at www.clwa.org.
8. Cal Reprtr 2d 2000WL 1342138 Cal. App 3 Dist, page 11.
9. Castaic Lake Water Agency, Draft Integrated Water Resource Plan, February 1998, see Table 2-3, p. 2-6.
10. See California Public Utilities Commission Resolution W-4154, 5 August 1999.
11. "...The Castaic Lake Water Agency believes that it will be able to provide the needed supplies on schedule through

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Diablo Grande

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cial realtor from Solano County. "This probably wasn't the first kind of arrangement like this," he adds, "and it probably won't be the last."²

If water ever makes it up the hill and Diablo Grande gets built, it would comprise six golf courses, 5,000 new homes, vineyards, a winery, commercial and industrial uses, and other luxury amenities typically enjoyed by the well-heeled.³

This huge project's water supply came under scrutiny by the courts the past 8 years, but an upcoming appellate court decision will help establish standards by which water transfers are reviewed under the California Environmental Quality Act (CEQA).⁴ As a result, this case draws attention from environmental, water, and developer interests.

The Land

Formerly the historic Oak Flat Ranch, Diablo Grande land is dry foothill country once used for cattle grazing on the east side of the Diablo Range here in central California. Spanning three watersheds — Del Puerto, Orestimba, and Salado creeks west of Interstate 5 — the area is wildlife habitat for several special status species, including the San Joaquin kit fox, the California red-legged frog, golden eagle, prairie falcon, western spadefoot toad, and the California tiger salamander. The land has remained habitat and open space owned by a single landowner for decades.

The Nature Conservancy owns and manages some 60,000 acres of preserved land adjacent to this project area, and Henry Coe State Park is just a few miles to the west in Santa Clara County. Currently, no roads traverse the Diablo Range in this area from west to east. Placing Diablo Grande so close to southern Santa Clara County heightens the pressure to connect the two regions with a road inducing urban growth, further fragmenting habitat, and straining central California's ecosystems still more.⁵

The Developer

Diablo Grande Partners (DGP), Diablo Grande's developer, includes many individuals and financial resources that created a resort similar to Diablo Grande in Braselton, Georgia: Don Panoz, chairman of Elan Pharmaceuticals, and J. Morton Davis, a New York-based investment banker, together with the previous landowner, Heber Perrot, among others.⁶

Willing to sacrifice nature to indulge the taste for luxury and spread it to northern San Joaquin Valley, DGP's web site says Diablo Grande "will feature championship golf on six courses, an elegant destination resort with hotel and European-style spa, an executive conference center, an equestrian center, swim and tennis center, a variety of residential neighborhoods, world-class recreational amenities, 40 acres

of vineyards....

"When Morty Davis and I first saw this valley," writes Panoz in California's grand booster tradition, "we saw an opportunity to create something remarkable....They say California is a place you can go to change your life and achieve your dreams....Come find yours today."⁷

In promoting, this "dream" (though it's better likened to a nightmare), DGP compiled a track record of disregard for legal process and an arrogance towards state and federal agencies that has continued to this day. Fortunately the courts provided a leveling of the playing field where this battle is fought, with substantial international financial power pitted against locals concerned for their quality of life and the integrity of land use law.

The Big Devil

This big devil is unsustainable.

A purely speculative project, Diablo Grande was officially initiated in 1990 as an application for an amendment to the Stanislaus County General Plan. DGP created the Western Hills Water District (WHWD) in 1992 as the entity to provide water to Diablo Grande. WHWD was formed under false pretenses, one of many manipulations by DGP.

They contended unwaveringly that WHWD was "solely for the benefit of agriculture," an obvious fabrication, as WHWD's boundaries clearly circumscribed the Diablo Grande project. Local officials turned a blind eye to the facts, however. With DGP in control of WHWD, Diablo Grande moved through the County's land use process. Objections to the project's many problems were raised during the review process by the public, including environmentalists and farmers.

The project would add more air pollution to the San Joaquin Valley air basin already designated as severe (the worst possible) by the US Environmental Protection Agency (EPA). The basin is under strict federal mandate to resolve

"When Morty Davis and I first saw this valley, we saw an opportunity to create something remarkable....They say California is a place you can go to change your life and achieve your dreams....Come find yours today."

meet federal Clean Air Act requirements for criteria pollutants, with draconian results if it fails (and it appears likely to). Its energy consumption would only worsen an already overwhelming crisis. And so on.

Water would have to be imported from somewhere else in a state that seemingly has no extra. Amazingly, for a project with a land area almost equal to that of nearby Modesto, the EIR offered neither a specified water source, nor a review of any associated impacts.

Steve Burke is an environmental activist in the Modesto area. He can be reached at 209/523-1391 or via email at sburke@ainet.com.

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Long enamored of the project's economic benefits, the Stanislaus County Board of Supervisors voted unanimously to move the project forward, neglecting their duties as protectors of the public trust.

The supervisors have never made any bones about their enthusiastic support for this project throughout the review process. They view it as an economic boon to the county, taking what is an all-too-common perspective of elected officials that all growth (i.e. urban expansion) is good and that environmental review requirements such as CEQA are nothing more than temporary hurdles to be circumvented and/or ignored.⁸

Tax dollars and one-time construction jobs are the major issues for our local leaders. The big devil will pay hand-some fees to local governments that will serve it, and to the Newman-Crow's Landing School District where some Diablo Grande students will go to school. Long term and big picture considerations are left unaddressed. The complex arenas of land use planning and environmental review are only rarely and grudgingly acknowledged by our local politicians, and Diablo Grande is no exception. They would prefer to ignore such irritants as CEQA, the National Environmental Policy Act, the Endangered Species Act, and the like.

Future economic costs are glossed over, looming as burdensome and uncompensated to the County, such as infrastructure maintenance and repair, and the costs protecting public health and safety. And there has been more than a little grease provided through DGP's campaign contributions to incumbent County supervisors over the last ten years.

Topping off this tragicomedy, the Supervisors certified Diablo Grande's first EIR in 1993.

The First Lawsuit

Since DGP and the County winked at CEQA's intent for fully disclosed, thorough, and comprehensive planning, the only recourse to ensure insure compliance with regulatory requirements was to sue. DGP ignores the fact that lawsuits are the most costly and time-consuming way to process development projects.

In November 1993, within 30 days of final environmental impact report certification, the Stanislaus Natural Heritage Project filed suit, later joined by Ecology Action, the Sierra Club, and the National Audubon Society. Given the local pro-development climate, it was no surprise the case was denied in Stanislaus County Superior Court, but on appeal to the 5th District Appellate Court the project was halted in February 1997.⁹ But by then, two golf courses had been constructed through manipulation of the land use process, contrary to good environmental planning.

The Appellate Court's 1997 decision voiding Diablo Grande's EIR directed DGP to identify sources of water supply and address the impacts of providing it to Diablo

Grande. A "Supplemental EIR" (SEIR) focused on water supply was prepared for public review.¹⁰ The SEIR identified eight potential sources of water, which in some combination could theoretically provide all of the water needs of the project at build-out. (The court did not say these sources had to be secured, only "feasible," and their impacts addressed through the CEQA process.)

Diablo's total water needs (at project buildout) are 12,800 acre feet per year (AFY). The eight possible sources include

DGP contended unwaveringly that Western Hills Water District was "solely for the benefit of agriculture," an obvious fabrication, as WHWD's boundaries clearly circumscribed Diablo Grande. Local officials turned a blind eye to the facts, however.

464 AFY from an on-site groundwater alternative to 12,000 AFY via treatment of Modesto sewage effluent. Some supply alternatives were clearly unrealistic and discarded during the SEIR process, including the reclamation of Modesto sewage effluent.

Of the remaining possible sources, two emerged as most promising from the proponents' perspective: Stanislaus County groundwater from the Turlock Irrigation District (TID) of 11,000 AFY; and a transfer from the Berrenda Mesa Water District in Kern County (8,000 AFY). The TID option proved infeasible when the city and county of San Francisco invoked its first right of refusal over any "extra" water from TID, as they stated emphatically in their comment letter on the draft SEIR.

Suing the Big Devil Again

This SEIR was finalized in July 1998 and like its predecessor received approval of the Board of Supervisors. But like its predecessor the SEIR was also substantively flawed and Modesto activists sued Diablo Grande again on August 26, 1998, this time by the group Protect Our Water (POW) and the author. The two main complaints were an inadequate cumulative impacts analysis, and failure to recirculate the EIR when new evidence was admitted into the record late in the process.

The Berrenda Mesa supply was only cursorily reviewed in the SEIR. DGP claimed that the review it received in the 1995 Monterey Agreement EIR was adequate.¹¹ The Monterey Agreement had made substantial changes in the allocation of SWP water and while it was implemented with amendments to all state water service contracts in 1996, its EIR was challenged under CEQA. At the time of our second Superior Court case, there had been no ruling on Monterey by the 3rd District Court of Appeals.

A separate suit was filed by the local and state Farm Bureau organizations, based primarily on concerns over

potential impacts to local agricultural water supply from the transfer of water from the Stanislaus County groundwater basin to urban development in the foothills. Such a transfer, from the Turlock Irrigation District to the Diablo Grande project, was one of the options approved in the EIR. The Farm Bureau also took issue with violations of CEQA similar to those of POW.

The Farm Bureau and POW suits were soon consolidated, meaning that, while maintaining distinct and separate legal status, they were processed at the same time by the court system. The Farm Bureau's suit is especially notable for two reasons:

First, they had never sued Stanislaus County and a developer in this area.

Second, in 1993 ("Round One") of the Diablo Grande project, the Farm Bureau obtained written assurances from the County and DGP that local groundwater would not be the water source for the project.

But in "Round 2," beginning in 1997, those agreements were simply deleted, despite numerous written concerns and protests expressed by Farm Bureau, an egregious violation of trust on the part of the County. It is remarkable that local supervisors in this fashion chose building interests over farming interests, given that agriculture is the economic base of Stanislaus County; without adequate imported water supplies, agriculture here is not viable.

For the first time ever in a local CEQA case, the Superior Court ruled in October 1999 for both POW and Farm Bureau on the majority of points. The judge ruled all proposed water sources were infeasible with the sole exception of Berrenda Mesa, the water transfer from Kern County. DGP was directed to redo the SEIR, this time also with adequate cumulative impacts analysis.

Once the court's initial ruling was made, proponents applied unrelenting pressure to persuade the court to allow for processing of "mini-projects" as part of the overall 29,500-acre master project, provided they were reviewed to CEQA standards.

DGP immediately made use of this exception to the courts denial of the EIR for the entire project (though it is in essence piecemealing, and contrary to CEQA). They presented the county with a "mini-project" of 236 lots known as Unit One of Phase One. Most of the lots are for residential units, but one is for a 7-story hotel.

Berrenda Mesa's Water

The County approved Unit One in December 1999, stipulating that before building permits were granted, proponents first had to receive all required state approvals for the supply of Berrenda Mesa water.

DGP soon appealed the Superior Court judge's ruling that the non-Berrenda Mesa sources were infeasible, as well as the requirement to recirculate the EIR and provide a thorough cumulative impact analysis. We (POW and I) cross-appealed, contesting the judge's finding of feasibility of Berrenda Mesa.

We did not realize at the time of the Superior Court's

proceedings, and therefore did not present to the court, that the Berrenda Mesa water transfer needed approval from the California Department of Water Resources (DWR), a daunting process which had not even begun at the time of the Superior Court decision.

Berrenda Mesa is a water service contractor of the State Water Project (SWP), the state's water utility owned and operated by DWR under a permit from the State Water Resources Control Board (SWRCB). There are 31 contractors of SWP water and a precisely defined service area within which the water is delivered.¹²

To approve the Berrenda Mesa transfer, the SWRCB would require of WHWD and Berrenda Mesa's permit two specific amendments to DWR's permit:

First, add an additional contractor to the SWP list, essentially cutting the SWP water "pie" into one more slice, and second, expand the SWP's service area to include Western Hills Water District (WHWD). For DWR's permit amendments to be approved the SWRCB would need to review the proposals, including a new and separate CEQA review for amending DWR's permit.

But more importantly, if any existing contractors (29 of whom had were the original contractors back in the '60s) objected to the amendment, the Berrenda Mesa transfer could not occur.

We believed that the Berrenda Mesa transfer would not survive this process. "There isn't enough water to go around now" in the State Water Project, Hannigan was quoted as saying recently.¹³

Had the Superior Court judge known the facts of the Berrenda Mesa water transfer permit process, it is likely he would not have found this proposed water source to be "feasible."

Because of these procedural hurdles, Berrenda Mesa's amendment to the SWP permit (which would have provided

Diablo Grande's implications and precedents may be as large as its footprint on the landscape.

for the transfer to Diablo Grande and expanded the State Water Project's service area to do so) was withdrawn after protest from existing SWP contractors (whom we surmised did not want to share SWP water).

Then the Monterey Agreement EIR legal challenge was upheld in September 2000, voiding that EIR as inadequate. The 3rd District Appeals Court decision voided the review for Berrenda Mesa on which the SEIR depended. We have filed for judicial notice to include this information in our appeal on Diablo Grande.

The Big Devil's Details

Tom Clark, general manager of the Kern County Water

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Agency, came up with a new water scheme for DGP.

Clark proposed that the Kern County Water Agency (KCWA) buy Berrenda Mesa's water that was to be transferred to Diablo Grande. As the *Bakersfield Californian* reports, "but instead of selling the water directly to Diablo Grande, the agency would store an equivalent amount of water from other sources other than the state project in one of its underground water banking areas in the Kern River Fan area west of Bakersfield." That water bank is called the Pioneer Water Bank project.

Diablo Grande would pay KCWA for that "banked" water what it would have originally paid to Berrenda Mesa. The big devil would then be allowed to divert from the California Aqueduct the 8,000 acre-feet it "bought" from Berrenda Mesa, water essentially "laundered" through the KCWA courtesy of the Pioneer Water Bank.¹⁴

"It is not a subterfuge," Clark told the *Californian*. "In terms of the actual molecules of water, it's not much different from the previous deal, but in terms of the legal precedent and the legal obligations, it's very different. There's no expansion of the [state project] service area."¹⁵

We claim the obvious: Tom Clark and the KCWA expose the utility of conjunctive use water schemes for keeping the spigot on for wasteful, destructive, and unneeded urban development in California. This legal and technical loophole in California water transfer law needs plugging, pronto. This would increase Californians' chances of more democratic control of the state's destiny.

Beating the Big Devil Yet?

So where do things stand?

The short answer is that the end of the story is a long way off. The oral hearing in DGP's appeal on the second decision before the 5th Appellate court in Fresno took place March 13th. The court is expected to decide within 90 days.

A ruling in POW's favor would mean that the 1998 Supplemental EIR on water supply would have to be redone, with a thorough treatment and analysis of cumulative impacts and additional sources of water identified. With the now infeasible Berrenda Mesa water transfer, *none* of the proposed sources listed in the previous SEIR would be valid.

This new environmental review on water supply issues would probably take up to a year. In the meantime, Diablo Grande's use of temporary well water from the Marshall-Davis properties east of Interstate 5 is scheduled to end at the end of May 2001. They would then be faced with supplies of less than 500 AFY and total needs of well over 1,000 AFY.

Even with approval of the Pioneer Water Bank transfer scheme by DWR and Kern County Water Agency, the Pioneer "water" was not part of the SEIR which the appellate court now has under submission. This water deal must be reviewed under CEQA in Stanislaus County before it can be legally valid, and before imported water could then run uphill to DGP's money.

In addition, Diablo has not received a 404 permit from the Corps of Engineers and faces obstacles with the Endangered Species Act and cultural resources review. While the Corps' Sacramento office announced in early March that the Corps "expects no problems with issuing a permit to let construction resume in June," this may be one of many DGP "done deal" assurances that have not come to fruition.¹⁶

Finally, a lawsuit recently filed against Diablo Grande in federal court by the California Sportfishing Protection Alliance over, among other things, 404 violations, has only begun its lengthy journey through the judicial process.

While Diablo Grande's many issues remain unresolved, the project's implications and precedents may be as large as its footprint on the landscape. It is assuredly a signature experience, a protracted battle to protect ecological resources, the regulatory process, and the public trust.

Tim Strohshane provided research assistance.

NOTES

1. Donald Panoz, *Managing Partner, Diablo Grande*, quoted on the home page of Diablo Grande's web site, www.diablogrande.com.
2. Tom Hannigan quoted in Vic Pollard, "Creative' water swap makes waves," *Bakersfield Californian* 18 March 2001.
3. Project description contained in *Diablo Grande Partners*, Draft Environmental Impact Report for the Diablo Grande Specific Plan, SCH#91032066, prepared by LSA Associates, Inc., Pt. Richmond, CA, 31 August 1992, FEIR produced 15 June 1993.
4. Protect Our Water and Steve Burke v. County of Stanislaus (respondents); and Diablo Grande Limited Partnership (Real Parties in Interest), Case No. 181472, decided 30 September 1999, Stanislaus County Superior Court. The case is now under submission at the 5th District Appellate Court. This case has been referred to as "Round 2," or *Diablo Grande II*.
5. Marla Cone, "Construction is a leading threat to California wildlife," *Los Angeles Times* 21 February 2001.
6. A search of Google.com revealed that Panoz also owns and operates Panoz Company, a firm specializing in the design, engineering, production, and importing of "fine cars."
7. *Diablo Grande web site home page*, op. cit., note 1.
8. A good example of one Supervisor's attitude toward environmental review of development projects is Nick Blom, "Diablo Grande under attack by feds," *Modesto Bee* 24 October 2000.
9. Stanislaus Natural Heritage Project, et al v. County of Stanislaus (Defendants), and Diablo Grande Limited Partnership (Real Parties in Interest), Case no. 301417, Stanislaus County Superior Court, Appellate Court decision 8 August 1996.
10. *Diablo Grande Partners*, Diablo Grande Water Resources Plan, SCH# 97032022, prepared by EMC Planning Group, Inc., Monterey, CA, 27 January 1998, FEIR produced 12 June 1998.
11. For more on the Monterey Agreement, see Tim Strohshane, "Monterey Agreement: A Bloodless Coup," and "Glimpsing California's Future: A History of the Monterey Agreement," SPILLWAY v1n2, Winter 2000.
12. *Berrenda Mesa Water District was dominated by*

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future acquisitions." Motion to approve the Newhall Ranch Project, LA County Board of Supervisors, 28 February 1999, and more specifically in correspondence to Karen Pearson dated 11 February 1999: "Finally, with respect to the issue of water, the Castaic Lake Water Agency has advised us of its intent to acquire 41,000 acre-feet of water from outside the Valley."

12. Castaic Lake Water Agency, Newhall County Water District, Santa Clarita Water Company, and Valencia Water Company, 2000 Urban Water Management Plan, prepared by SA Associates, Reiter Lowry Consultants, and Black and Veitch, 2000, Table 1-4, p. 1-19.

13. See comments and testimony by Ventura County and United Water Conservation District, Newhall Ranch Final Environmental Impact Report, 1999.

14. Kern County Case # 239324-RDR consolidated. Judgment entered August 3, 2000, p. 35.

15. Ibid.

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Blackwell Land Company (controlled by the family of the New York investment banking firm of Lazard Freres) and Berrenda Mesa Farming Company, which in the late 1980s farmed almonds and pistachios. These two companies controlled 73 percent of the total cultivated acreage and 90 percent of the total crop value within the district. When the farm crisis of the late 1980s hit California agriculture, and the 1987-92 drought struck, farms in Berrenda Mesa and other districts within Kern County went bankrupt. One asset Berrenda Mesa had was water and, with other districts in similar straits, sought to market their water. See Robert Gottlieb and Margaret

FitzSimmons, Thirst for Growth: Water Agencies as Hidden Government in California, Tucson, AZ: University of Arizona Press, 1991, Chapter 5, "The Search for Cheap Water," especially pp.100-104.

13. Quoted in Pollard, op. cit., note 2 above.

14. Ibid.

15. Ibid.

16. Editorial, "Diablo Grande off the ground," Modesto Bee 9 March 2001.

Power Crises

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Kuhn of the Edison Electric Institute, "Surging demand taxes the power grid: don't blame deregulation," San Jose Mercury News 7 September 2000.

8. Christian Berthelsen and Scott Winokur, "Soaring electric use more fiction than fact: Chronicle investigation finds power companies manipulate data to excuse their towering rates," San Francisco Chronicle 11 March 2001.

9. Spatt quoted in David Lazarus, "Energy earnings skyrocket: power suppliers cashing in on soaring prices," San Francisco Chronicle 15 December 2000.

10. The California Public Utilities Commission provided just such a huge advertisement on PG&E's 68 power plants published in the form of an environmental impact report detailing all their virtues, as well as the lands surrounding them. California Public Utilities Commission, Pacific Gas and Electric Company Hydrodivestiture Draft Environmental Impact Report, November 2000.

11. This fact is acknowledged by a "coalition representing consumer advocates, business, labor, agriculture, and water interests," and PG&E. The utility filed an agreement for approval with the CPUC that supersedes its plans to auction its hydropower plants and keeps the plants under PG&E's control. "The power produced by these hydroelectric facilities

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will now be committed to the market during periods when the market needs it the most, thereby reducing price volatility caused by supply shortages," reported Associated Press, quoting a PG&E press release, "Proposal uses hydroelectric power to help stabilize prices," Sacramento Bee 10 August 2000. See also Cyrus Noel, "Eminent domain: muddling through may not be enough," California Energy Markets No. 600, 12 January 2001.

12. Excerpts of the Governor's talk to Wall Street may be viewed at his web site at www.ca.gov/.

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