Testimony on
Water Availability Analysis
for Trinity, Sacramento, and San Joaquin River Basins
Tributary to the Bay-Delta Estuary

Submitted by
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and on behalf of
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for

Workshop #3
Analytical Tools for Evaluating the Water Supply,
Hydrodynamic, and Hydropower Effects of the Bay-Delta Plan
November 13 and 14, 2012

The State Water Resources Control Board called for workshops to receive information from and discuss with participating parties the scientific and technical bases for considering potential changes to the 2006 Water Quality Control Plan for the San Francisco/Sacramento-San Joaquin Delta Estuary for Phase II of the Board's comprehensive review of this plan.

According to the State Board's public notice for these workshops, the prompts for Workshop 3 testimony are:

1. What types of analyses should be completed to estimate the water supply, hydrodynamic, and hydropower effects of potential changes to the Bay-Delta Plan?

2. What analytical tools should be used to evaluate these effects? What are the advantages, disadvantages and limitations of these tools?

Water Availability Analysis
Workshop 3 Testimony, Bay Delta Plan
Submitted by California Water Impact Network,
California Sportfishing Protection Alliance, and AquAlliance

The California Water Impact Network, the California Sportfishing Protection Alliance, and AquAlliance (hereinafter, C-WIN) are pleased to submit this testimony to the State Water Resources Control Board. This testimony addresses the close linkage between the Board's public trust responsibilities on behalf of the State of California, its water quality control planning function, and its duty to regulate water rights in California. Water quality control planning efforts to date have led the Board to consider proportional tributary contributions needed to meet Delta inflow objectives from the Sacramento and San Joaquin River Basins to improve water quality and protect all beneficial uses, including fish and wildlife, in the Delta. The State Water Resources Control Board has authority over water rights in the Basins that would enable it to reallocate water usage and ensure compliance with the Board's new instream flow objectives.

Water availability analysis is an important method for modeling how the Board would implement new flow objectives. Our testimony illustrates the use of a planning-level water availability analysis for the Trinity River (much of whose flows are diverted to the Central Valley watershed of the Bay-Delta Estuary), and the major tributaries of the Sacramento and San Joaquin River Basins. We incorporate into the analysis the Basins' hydrologic variability, instream flow requirements based on the Board's 2010 public trust Delta flow determinations, and then operate publicly available water rights data and priorities on the divertable flows that remain in the system. We find that under public trust protective flow determinations, the promised water represented in water rights claims far exceed flow conditions available to these claims in most years.

We recommend for the Bay-Delta Plan's implementation program that the State Water Resources Control Board draw on its new flow determinations to increase the seasons during which rivers in the Bay-Delta Estuary's Central Valley watershed are fully appropriated, and push back the water rights priority date on which Term 91 curtailments are now based. Our water availability analysis suggests distinct parameters for both actions.

Finally, we conclude that the Board should use the Bay-Delta Plan process to tighten up its regulation of surplus water usage and export by the State Water Project and Central Valley Project to avoid permanently damaging Sacramento Valley groundwater resources. The Board's Delta flow determinations, coupled with comprehensive enforcement of water rights priorities, can help to protect both groundwater and surface water resources in the Sacramento Valley over the long term.

Government's Public Trust Responsibility

Governments have a permanent fiduciary responsibility and obligation to protect the public trust. In *National Audubon Society v. Superior Court* (1983) 33 Cal 3d 419, 441, the court held that "the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with the purposes of the trust." The act of appropriating water is an acquisition of a property right from the waters of the state, an act that is therefore subject to regulation under the state's public trust responsibilities.

The State Water Resources Control Board has invoked its public trust responsibilities in regulating the waters of California and now acknowledges that the public trust is one of its ongoing regulatory responsibilities. Its most publicly prominent instance came in Water Rights Decision 1631 (D-1631) in 1994. In D-1631, the Board balanced the needs of the City of Los Angeles for water supply from the tributaries of Mono Lake with the lake's own needs for water to sustain its ecosystem. It required Los Angeles to make releases from each of its tributaries that would sustain riparian ecosystems and help restore fish populations to the tributaries by prescribing lake level targets in a

specified time period. (State Water Resources Control Board 1994) The Board has also adopted regulations governing how it treats the public trust in matters of the appropriation of water in California. (State Water Resources Control Board 2011b: Article 14, Standard Permit Terms and Conditions)

The trial court in *United States v. State Water Resources Control Board* (1986, 182 Cal.App.3d 82) determined that the State Water Resources Control Board had the authority to modify an appropriative water right permit once it had been issued, and that it could reduce the US Bureau of Reclamation's Central Valley Project permits to gain compliance from the Bureau. But the trial court held new fish and wildlife objectives the Board had approved in Water Rights Decision 1485 (D-1485) in 1978 to be invalid because the Board failed to identify the *source* of its authority. Justice John Racanelli, the author of the subsequent appellate court decision cited above, stated that the source of the Board's authority to issue and enforce new fish and wildlife objectives such as those contained in Water Rights Decision 1485 (D-1485) was the Public Trust Doctrine:

> ...the state as trustee of the public trust retains supervisory control of the state's waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust. (182 Cal.App.3d 82, 149)

Stevens (2005) summarizes the present range of coverage that American and California law gives the public trust doctrine:

1. It applies to all navigable streams.
2. It applies to ecological preservation.
3. It applies to wetland areas.
4. It applies underground (citing the Waiahole decision from Hawai'i).
5. It applies to artificially enlarged waters.
6. It applies to wild animals, including fish.[1]

The Public Trust and Paper Water

In the next few years, the State Water Resources Control Board is expected to make several crucial decisions on California's water future. These decisions include:

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[1] The California Constitution also provides an absolute right to fish among the fundamental declared rights it accords all California citizens. Article I, Section 25 states:

> ARTICLE 1 DECLARATION OF RIGHTS
>
> Section 25. The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.

In combination with California Fish and Game Code Section 5937, which provides that owners of dams must preserve fish populations downstream in "good condition", preservation of this right logically should be construed as an important aspect of the public trust responsibilities of government. It retains meaning as a right only when there exist sufficient fish to catch sustainably.

- Determining how to provide sufficient flows from the Sacramento and San Joaquin River's major tributaries to the Bay-Delta Estuary.
- Updating its 2006 Bay-Delta Water Quality Control Plan to include those new Sacramento and San Joaquin River flow and South Delta salinity objectives.
- Deciding whether to extend the water rights *permits* of the California State Water Project and the federal Central Valley Project, or instead *license* them at levels that represent reasonable and public trust protective water usage.
- Deciding whether and/or how to permit a "north Delta diversion"—a diversion that is now more familiarly known as the Peripheral Tunnels Project.
- Deciding whether and/or how to permit new reservoirs on the San Joaquin River and in the southwestern Sacramento Valley (and/or to raise existing dams to increase storage elsewhere) that would be added to the storage capacities of the Central Valley Project and the State Water Project.

As a regulatory agency, the State Water Resources Control Board is not known for making and holding to courageous or visionary decisions that protect beneficial uses of water throughout California. Their record of delay and incrementalism has contributed to the poor condition of the Bay Delta Estuary and the great rivers of its watershed, the great Sacramento and San Joaquin Rivers.

The State Water Resources Control Board has authority to make bold decisions and hold to them. (Cahill 2008)

The State Water Resources Control Board will need to balance protection of the public trust with other competing beneficial uses of water reliant on the Delta. The Board has already determined the flows that fish and other aquatic species need. (State Water Resources Control Board 2010: 114-123) In completing and implementing the Bay-Delta Plan, the Board's next step is to evaluate the feasibility of measures needed to protect public trust resources fully. (California Supreme Court 1983; Kibel 2011: 6) These steps will need to include: determination of flow needs of public trust resources, water rights reallocation, flow modification, benefit-cost analysis, and habitat restoration. In the process. key questions must be answered:

1. How does the State Water Resources Control Board intend to prioritize water use in terms of coequal goals, of public trust balancing? How does its long-established water rights priority system fit into this policy framework?

2. What does water supply reliability mean in an arid state where we have granted rights to far more water than actually exists? Should water supply reliability be conditioned upon specific requirements to maximize reclamation, reuse, conservation and development of alternative local sources of water?

3. Is the standard by which we measure water supply reliability the same for junior and senior appropriators? Do uses of water that require vast public subsidies have the same priority as uses that don't require subsidy of public funds? Are uses that internalize adverse impacts equal in priority to uses that externalize them?

4. Should the worth of water be confined only to its economic value in use? Or does water supply reliability apply to both public trust resource needs as well as consumptive uses (i.e., is legislation needed for better protection of public resources through water rights)?

5. Are statutory requirements to protect water quality and listed species equivalent to water supply reliability for lawns or surplus, subsidized, and non-food crops? Are food crops more

important than non-food commodities when it comes to allocating water? Does health and safety take precedence over certain agricultural uses of water?

6. Does efficient use of water have higher priority over wasteful and inefficient use? Is protection of the Bay-Delta Estuary as a "national treasure" and one of the world's great estuaries more valuable to society than irrigating impaired soils, that by their nature when irrigated, discharge prodigious quantities of salt and toxic wastes back to our waterways and aquifers?

Answers to these questions are central to resolving California's water problems.

The California Legislature consolidated the State of California's water rights and water quality control responsibilities in the State Water Resources Control Board in 1967. Since that time, the Board has considerable authority to grapple with these questions and arrive at answers and solutions from them. The Board has authority to:

- Plan for water quality control.
- Receive, condition, and approve new water rights applications as permits.
- Regulate and license water rights permits specifying the point of diversion, diversion flows, place of use, and purpose of use for water.
- Investigate pre-1914 and riparian water rights to determine whether such claims to divert and use water are legal, including follow-up enforcement against illegal uses when determined (discussed below).
- Investigate and enforce the state's prohibition of waste and unreasonable use and wasteful and unreasonable method of diversion of water under the California Constitution, Article X, Section 2.
- Protect the public trust. As an agency of the state, the Board is charged with ensuring the state of California carries out its fiduciary responsibility to protect air, running water, the sea, and the seashore, "these things that are common to all," as stated originally in Roman law (the Institutes of Justinian).

California's constitution promises water rights only up to what is a reasonable use. No one has a right in California to use water unreasonably, not even the federal government. (California Constitution, Article X, Section 2) The Public Trust Doctrine provides that no one has a vested right to appropriate water in a manner harmful to the interests protected by the public trust. (*National Audubon Society v. Superior Court*, 33 Cal.3d 419, 189 Cal.Rptr 346, 658 P.2d 709) And the dictionary definition of usufructuary rights, of which both riparian and appropriative water rights are examples, indicates that a fundamental principle of usufruct is that it connotes only a right to *use* a resource like water, not to waste or use it unreasonably. The State Water Resources Control Board, in taking up all of the key questions we outline above, will be deciding whether and how California's abundant legal authorities apply to the Bay-Delta Estuary's Central Valley watershed.

The Public Trust and Proportional Delta Inflows

In mid-2009, the State Water Resources Control Board updated its review of the Water Quality Control Plan which its Water Right Decision 1641 (D-1641) implements. The Board took the position that to change its water quality and flow criteria it needed more scientific information about flows reasonably needed to protect fish and wildlife beneficial uses (State Water Resources Control Board, 2009: 17). Its impetus to consider making changes at that time included pronounced fisheries declines among both open water resident and migratory fish, and the still-unfolding impacts of climate change and its impacts on the Bay-Delta estuarine system (State Water

Resources Control Board, 2009: 9). The California Department of Fish and Game sought to build a salmon survival model to assist the Board's need for additional information. (California Department of Fish and Game 2010)

Later in 2009, the California Legislature directed the State Water Resources Control Board to prepare a report on Delta flow criteria that would "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources" and in so doing "use the best available scientific information." The Legislature directed the Board to gather the information as part of an "informational proceeding" rather than through an evidentiary hearing. And the Legislature charged the Board with including volume, quality and timing of water necessary for the Delta ecosystem under different conditions (California Water Code: Section 85086(c)).

The Board produced its Delta flow criteria report after taking detailed testimony on the best available science for key fish species and ecosystems. The report identified a set of broad flow regimes for upstream tributaries providing inflow to the Bay-Delta Estuary that fish need to survive and recover. They represent the Board's consideration of the best available fishery and hydrologic science it considered during 2010 addressing the question: what flows do fish need? The Board confirms this when it stated in a footnote, "...the flow criteria developed in this proceeding are intended to halt population decline and increase populations of certain species," and acknowledged that, "Recent Delta flows are insufficient to support native Delta fishes for today's habitats….Flow and physical habitat interact in many ways, but they are not interchangeable." (State Water Resources Control Board 2010: 5, 120)

The Board states that the flow criteria "must be considered" in context:

- The flow criteria do not consider any balancing of public trust resource protection with public interest needs for water.
- The State Water Board does not intend that the criteria should supersede requirements for health and safety such as the need to manage water for flood control.
- There is sufficient scientific information to support increased flows to protect public trust resources; ***while there is uncertainty regarding specific numeric criteria, scientific certainty is not the standard for agency decision making.*** (State Water Resources Control Board 2010: 4; emphasis added)

The Board's flow determinations are:

- 75 percent of unimpaired Delta outflow from January through June.
- 75 percent of unimpaired Sacramento River inflow from November through June.
- 60 percent of unimpaired San Joaquin River inflow from February through June.
- Increased fall Delta outflow in wet and above normal years.
- Fall pulse flows on the Sacramento and San Joaquin Rivers to stimulate migrating fish.
- Flow criteria in the Delta interior to help protect fish from mortality in the central and southern Delta caused by operations of the state and federal water export pumps.

In essence, these flow determinations represent the Board's answer to the question, "what flows do fish need in the Central Valley watershed and the Bay-Delta Estuary?" The State Water Resources Control Board's 2010 Delta flow criteria report acknowledged that protective Delta outflows start with protective tributary inflows to the Delta. The Board's Delta inflow criteria rely on a percentage of unimpaired flow measure, which enables the flow criteria on the Sacramento and San Joaquin rivers to more closely mimic their natural hydrographs than now occurs.

For the San Joaquin River, the State Water Resources Control Board approved its determination that 60 percent of unimpaired flow from February through June for the river basin would protect juvenile Chinook salmon during their peak emigration period. For the Sacramento River, the Board adopted the criterion of 75 percent of unimpaired flow from November through June. (This is because numerous runs of migratory salmon use the Sacramento River Basin for more of the year.) These constrained periods would also benefit the rearing period of juvenile salmon in the basin's major tributaries upstream. The Board also adopted in that report (2010) a fall season Delta inflow criterion calling for an average flow of 3,600 cubic feet per second for 10 days sometime during late October.

Nearly all scientists testifying to the Board in March 2010 agreed that mimicking the natural hydrograph (in shape if not in magnitude and volume of flow) is necessary to improve conditions for native fish species, and to counter invasive species in the Delta. Existing Board water quality and flow objectives intended to protect fish and wildlife beneficial uses in the south Delta are not working, as shown in abundant evidence presented to the Board at its hearings for the Delta Flow Criteria report. The Board includes much of that data in its report. (State Water Resources Control Board 2010) C-WIN provide a brief evaluation of the Vernalis Adaptive Management Plan to supplement this record of failure in Appendix A to this testimony.

In August 2010, the State Water Board approved these currently nonbinding Delta inflow determinations for the Sacramento and San Joaquin rivers. (State Water Resources Control Board 2010: 114-123) The State Water Resources Control Board observed that using such flow criteria would mean that "to achieve the attributes of a natural hydrograph, the criteria are advanced as a percentage of unimpaired flow on a 14-day average, *to be achieved on a proportional basis from the tributaries to the San Joaquin River.*" (State Water Resources Control Board, 2010: 120, emphasis added) The Board makes an important point that mimicking natural hydrograph and improving prospects for species recovery depends on achieving proportional flow allocations from all the major tributaries. Proportional tributary contributions would be needed to implement the Board's broader Delta inflow criteria. The Board will need to answer key questions including: what should those proportions be, how should responsibility for them be assigned, and who will be responsible for providing them? And: when will the upper San Joaquin River be included by the Board in making these determinations? (Right now, the Board excludes the upper San Joaquin River from its Bay-Delta Estuary planning deliberations. C-WIN evaluates the Board's stance in Appendix B.)

The question for the Board is how to do proportional flows *legally.* Proportional tributary contributions from Delta inflow are not new. In 1992, the California Department of Fish and Game proposed a method to identify tributary contributions to Delta inflows based on the pro rata share of unimpaired runoff each tributary generates to the Delta, as identified in the California Department of Water Resource's Bulletin 120 each year (California Department of Fish and Game, 1992). Other allocation methods could be devised as well, such as one based on reservoir storage on these same tributaries. The State Water Board in its Draft Water Right Decision 1630 presented such a method, but which excluded contributions from the San Joaquin River above Mendota Pool (State Water Resources Control Board, 1992: Tables IV and V).

Proportional tributary contributions needed to fulfill Delta inflow determinations from the Trinity River, and the major tributaries of the Sacramento and San Joaquin River Basins will require changes to the water rights of major water users in these Basins. The State Water Resources Control Board has authority over water rights to reallocate water usage and ensure compliance with the Board's Delta inflow objectives.

Paper Water Means Boundary Disputes and Clouded Titles

Property is often legally conceived as a bundle of rights representing "investment-backed expectations" of a future stream of benefits accruing to its owner, usually in the form of money. Water rights are a form of property, conveying to their owners rights to use water from a stream. Unlike real property in land, however, we have a situation in which far more in rights to use water have been granted by the state or claimed by right holders than Nature and reality actually provide.

California's modern water code and its body of water rights case law is the result of more than a hundred and sixty years of legislation and legal precedent. Riparian water rights are the most paramount rights, followed by pre-1914 appropriative rights and, lastly, post-1914 appropriative rights, as determined by the seniority requirements of first-in-time-and-use.

But despite this accumulated legal tradition, human promises of water exceed Nature's provisions. A shorthand description of this condition is "paper water." The paper water problem in the area of water and rivers in California has close analogies in concepts like "clouded title," and "boundary dispute" for a piece of real property (say, a house, or a plot of land) that has more than one owner claiming the same piece or portion of ground. Typically, boundary disputes are resolved by one or more disputants engaging the services of a surveyor to establish where the boundary is actually located. From there, the owners have a common set of facts on which they may agree to resolve their boundary dispute.

"Clouded title" has relevance here as well. A clouded title means the ownership of a title in water has some defect or potential defect arising from a competing claim for the same source of water.

One of the earliest recognitions of the problem of paper water in California occurred over a century ago and helps illustrate the clouded condition of paper water. In 1900, Frank Soulé, a professor of civil engineering at the University of California, was retained by the US Department of Agriculture's Office of Irrigation Investigations to study water rights claims in the San Joaquin River basin. Soulé found that the San Joaquin River's average winter and spring months' flows were approximately 5,000 to 6,000 cubic feet per second. In drier late summer and fall months, flows could get as low as 150 cubic feet per second. Soulé researched water rights claims to all tributaries of the San Joaquin River watershed to see how they matched up with flows in the river. Actual flows from the 1895-1909 period averaged about 2.02 million acre-feet, according to state records. (State Water Resources Board 1951: Table 62) He visited the recorders' offices for Stanislaus, Merced, and Fresno counties and itemized 315 claims to San Joaquin River waters totaling 36,571,471 miners inches of flow (there are 50 miners inches to a cubic foot per second). This converts to 731,429 cubic feet per second. Stretched out over a year (Soulé did not specify the seasons for which the claims were made), this translated into an annual claim of water rights of 529.9 million acre-feet of water, over 260 times greater than average flow of the San Joaquin River in that period. For an eight-month irrigation season of about 246 days, such flows would amount to 356.9 million acre-feet, nearly 180 times greater than San Joaquin River flows. These, Soulé contended, were the "definite claims," ones that had well-defined diversion points and amounts claimed. Six separate individuals claimed "all the water flowing in the San Joaquin River," a definite claim, if exaggerated. His summary for the San Joaquin did not include claims to the Fresno and Chowchilla rivers, which are much smaller watersheds, but the grandiosity continued there. On the Fresno River, some 670,799 miner's inches were the subject of 50 claims (about 13,416 cubic feet per second or 9.7 million acre-feet a year), and on the Chowchilla just 14 claims aggregated to 31,008 cubic feet per second (or about 22.5 million acre-feet annually). (Soulé 1901: 222, 232)

Clouded titles in water have been allowed to fester since before Professor Soulé began studying the problem in 1900. Failure by the State of California to quiet titles to water since assuming authority

for appropriative water rights in 1914 contributes untold expectations for benefit streams that fuel controversy in California water resources planning and development ever since.

C-WIN is not a lone contemporary voice on the problem of paper water. In September 2008, State Water Resources Control Board staff informed the Delta Vision Blue Ribbon Task Force about water rights, use, and flows in the Delta watershed. It stated in part:

- The "total face value of the approximately 6,300 active water right permits and licenses within the Delta managed by the State Water Board, including the already assigned portion of state filings, is approximately 245 million AFA [acre-feet annually]." Our organizations note that this 245 million acre-feet of face value in water rights was permitted by the Board and its predecessors in the Central Valley watershed (including imports from watersheds like that of the Trinity River). (State Water Resources Control Board 2008)

- Face value "does not include pre-1914 and riparian water rights." Riparian water rights, in the absence of some form of watershed adjudication, are usually unquantified but nonetheless require real, wet water. (State Water Resources Control Board 2008) And,

- That "the total face value of the unassigned portion of state filings for consumptive use (excluding state filings for the beneficial use of power) within the Delta watershed is approximately 60 million [acre-feet annually]." These are claims the State has filed to reserve water for further expansion of the State Water Project. (State Water Resources Control Board 2008; see also Appendix C.)

Other matters exacerbate the paper water problem:

- The SWRCB does not know how much water is actually used (and by whom) since state law has yet to require full accounting of either surface or ground water use.

- The SWRCB does not know the extent of paramount riparian or senior pre-1914 water rights either.

- Climate change is likely to alter the timing and reduce the volume of runoff into California's rim dams and overall state and federal water systems. (Knowles and Cayan 2002) It is also likely to decrease natural groundwater recharge as well, which would further reduce runoff volumes where river reaches benefit from groundwater inflows.

- Increased cold water pools and groundwater support from gaining streams will be needed to maintain water temperatures below rim dams according to estimates by the SWRCB and Department of Fish and Game of the increased inflow and outflow necessary to protect rivers and the Delta public trust resources. (California Department of Fish and Game 2010: 51, Table 5)

Given these constraints, the obligation to achieve a public trust balancing of water supply reliability with fish and ecosystem survival cannot rest on maintenance of existing levels of supply from either Delta exports or the rim dams on all major Central Valley tributaries in the Delta watershed. The State Water Resources Control Board must use its water rights authority in the service of meeting these water quality challenges on behalf of public trust resources.

The Delta Watermaster acknowledges the problem of paper water in a recent report on the State Water Resources Control Board's role in the Delta Stewardship Council's Delta Plan process (Wilson 2011). He expresses concern, however, that "the face value of water rights is not a sufficient

measure of water that can be used to determine the over-allocation of water in the [Delta] watershed." He cites four main reasons for his concern:

- The face value of many water rights are for nonconsumptive uses, such as hydropower.
    - **C-WIN Response:** As much as possible, water availability analysis should factor out water rights claims that are primarily devoted to nonconsumptive uses and hydropower generation in particular. C-WIN's analysis factors out all single-purpose hydropower generation water rights claims, whether pre- or post-1914. Where multiple purpose of use claims include hydropower generation, we assume these rights are still primarily consumptive use claims, especially when irrigation is one of the other purposes of use for which claims are made. Hydropower generation is considered incidental to the other consumptive uses.

- The face value represents a maximum possible water diversion, which is far greater than what is actually used;
    - **C-WIN Response:** We agree that face value often represents a maximum possible diversion (and/or storage amount). We also agree that it may be far greater than what is actually used in many cases. But C-WIN's review of water right claims shows that some rivers' claims far exceed maximum unimpaired flows and even reservoir capacity on that river. (The Trinity River is a good example of this.) This is less a criticism of face value than an acknowledgement of paper water by the Delta Watermaster. Nor does it justify continuation of the practice by the State Water Resources Control Board. Since the maximum possible flow (and use) can occur only relatively rarely in California's hydrology, C-WIN suggests that this extra increment of claims be eliminated because it will occur in the future with even less frequency than now occurs. Reliable rights are only meaningful when they can be exercised with relative frequency.

- Permit/license terms, such as those for protection of instream uses, further reduce below the face value the amount of water that can be diverted;
    - **C-WIN Response:** The State Water Resources Control Board needs to continue having some standard method for quantifying the value of water rights as property. This is the only way that increments of title to water as property can be described and titles cleared or quieted in the event of dispute. Moreover, quantified water rights are the only way to conduct reality-based water resources planning and development. This extends to employing a standard method for quantifying and measuring instream flows that benefit public trust resources. If the Board and Delta Watermaster are to enforce instream flows, they must quantify instream flow commitments and ensure that they are fulfilled *prior* to the exercise of permitted or licensed water rights claims.

- Water, when applied, is typically not consumed up to the full face value and the same water (return flow) is often used multiple times as it runs downstream.
    - **C-WIN Response:** While C-WIN acknowledges the reality of return flow in diversion of water for consumptive irrigation uses, there is no consistently available data that measures the volume and occurrence of return flow to rivers. Some estimates, both recent (California Department of Water Resources 2005: water balances for Sacramento and San Joaquin River Basins) and historical (Wiel 1928: 259) put return flow at between 60 and 65 percent of originally diverted volumes. Of course, the reality of return flow, however, means that river flow can decrease by as much as a third of diversion quantities each time it is applied; the more frequently water is diverted to consumptive use, the sooner surface flows are depleted in the immediate

> river reach downstream. Return flows do not reach the river from which they were diverted instantaneously. Once diverted there occurs a time lag between the diversion and its application, and when water actually returns to the river, and even then, it may only reach the river in small increments, depending on the surface return flow and/or subsurface transmissivity getting back to the river. Meanwhile, the diverted water is gone from the river, thereby depleting its flow until some later time and lower location. If return flow is truly important to determining water availability and avoiding boundary disputes and clouded water titles, then California needs to invest in getting data from each watershed that quantifies the volume, timing, and duration of return flow, instead of ignoring it. (State Water Resources Control Board 1983: 9-10)

C-WIN's methodology recognizes each of these facets of "face value" or face amount of water rights. Unfortunately, the Delta Watermaster's remarks do not clarify whatever else it is that face value quantities in water rights are supposed to positively describe. If the quantities in water rights are not relevant to face value, then on what basis can separable, stable, and reliable rights to water use be analyzed and judged? The Watermaster acknowledges that "while actual water use may be only a fraction of the face value of water rights, the state's water supplies have been over-allocated in many areas."[2] (Delta Watermaster 2011b: 5) C-WIN shows in this testimony that it is possible to use the "data" of water rights in combination with data on flows and diversions to generate a consistent and meaningful picture of the problem of overallocation of water supplies and rights in the San Joaquin River Basin. Our water availability analysis illustrates the usefulness of having *some idea* of the magnitude of the paper water problem as compared with having *no idea*. All of California needs better data on all facets of the problem of paper water.

Tables 1 and 2 provide static (snapshot) views of total water rights in the Trinity, San Joaquin River and Sacramento River Basins. Total water rights reported in these two tables are for consumptive uses. Hydropower generation water rights have been excluded from this analysis.

In Table 1, average annual unimpaired flow for the San Joaquin River Basin is about 6.2 million acre-feet compared with 32.7 million acre-feet of consumptive water rights claims. The ratio of total claims to average unimpaired flow for the San Joaquin Basin is 5.3 acre-feet of consumptive use claims to every acre-foot of unimpaired flow in the Basin. About 49 percent of total consumptive water claims are by riparian and pre-1914 claimants, while 51 percent is by post-1914 claimants (that is, permits and licenses) regulated by the State Water Resources Control Board.

Specifically on the major tributaries of the San Joaquin River Basin, the ratio of total consumptive use claims to unimpaired flow ranges from about 5.6 on the Stanislaus to 6.3 acre-feet of claims to every unimpaired acre-foot of flow on the San Joaquin River (including valley floor and upper watershed claims).

In Table 2, average annual unimpaired flow in the Sacramento Valley (essentially, average Sacramento River inflow to the Delta) is about 21.6 million acre-feet. Consumptive water rights claims are estimated at about 120.6 million acre-feet. The ratio of total consumptive use claims to averge unimpaired flow in the Sacramento River Basin is about 5.6 acre-feet of claims per acre-foot of unimpaired flow. Ratios of claims to unimpaired flow to range from 2.2 on the Yuba River to 6.8 on the Trinity River.

[2] The Delta Watermaster suggests that for the Delta the process for determination of fully appropriated streams from the Water Code Sections 1205 through 1207 be used (p. 5).

Table 1
Consumptive (Irrigation) Water Rights Summary for San Joaquin River Basin

Flows and Consumptive Water Rights	Thousands of Acre-Feet				
	Stanislaus River	Tuolumne River	Merced River	San Joaquin	Basin Total
Average Annual Unimpaired Flow	957	1,851	956	1,728	6,181
Total Consumptive Water Right Claims	5,318	11,015	5,495	10,828	32,656
Ratio of Total Claims to Unimpaired Flow	5.56	5.95	5.75	6.27	5.28
Total Riparian & Pre-1914 Claims	1,401	8,185	4,525	2,014	16,125
Ratio of Riparian & Pre-1914 Claims to Unimpaired Flow	1.46	4.42	4.73	1.17	2.61
Total Post-1914 Claims	3,917	2,831	970	8,814	16,532
Ratio of Post-1914 Claims to Unimpaired Flow	4.09	1.53	1.01	5.10	2.67

Sources: State Water Resources Control Board (e-WRIMS); Public Record Act responses from various public water and irrigation districts; California Water Impact Network. Sum of major tributaries' unimpaired flow does not equal Valley total due to omission of other watersheds from the table.

Table 2
Consumptive (Irrigation) Water Rights Summary for Trinity and Sacramento River Basins

Flows and Consumptive Water Rights	Thousands of Acre-Feet				
	Trinity River	Feather River	Yuba River	American River	Sacramento Valley Total
Average Annual Unimpaired Flow	1,283	4,370	2,287	2,621	21,619
Total Consumptive Water Right Claims	8,725	15,717	5,093	9,847	120,571
Ratio of Total Claims to Unimpaired Flow	6.80	3.60	2.23	3.76	5.58
Total Riparian & Pre-1914 Claims	134	3,855	92	286	47,883
Ratio of Riparian & Pre-1914 Claims to Unimpaired Flow	0.10	0.88	0.04	0.11	2.21
Total Post-1914 Claims	8,591	11,863	3,596	9,561	72,688
Ratio of Post-1914 Claims to Unimpaired Flow	6.70	2.71	1.57	3.65	3.36

Sources: California Department of Water Resources, 2007; State Water Resources Control Board (e-WRIMS); Public Record Act responses from various public water and irrigation districts; California Water Impact Network. Sum of major tributaries' unimpaired flow does not equal Valley total due to omission of other watersheds from the table. Trinity River is included because a large portion of its runoff is exported to the Sacramento River via federal Central Valley Project facilities.

On a basin-wide basis, riparian and pre-1914 water claims account for about 40 percent of total consumptive use claims of 120.7 million acre-feet, and post-1914 claims (permits and licenses) in the Sacramento River Basin amount to about 60 percent of total consumptive use claims.

The largest water claims on Sacramento River Basin tributaries belong to the Feather River and the American River. The mainstem Sacramento (which is incorporated into the total for the Valley) includes the Pit and McCloud rivers and numerous small creeks that enter it from the east and west. C-WIN estimate that the largest component of pre-1914 water rights claims is held by the Glenn-Colusa Irrigation District. This District claims 26 million acre-feet in rights to divert directly from the Sacramento, as well as another 12 million acre-feet in rights from west side creeks.

On the Trinity River, the US Bureau of Reclamation is a significant claimant of post-1914 water rights, and given the small amount of riparian and pre-1914 water rights claims on the Trinity, the Bureau's Trinity River rights are reliable, as conditioned and limited by the Trinity River Record of Decision. (US Department of the Interior 2000) The Trinity's ratio of total consumptive claims to average unimpaired flow is 6.8 acre-feet of claims to every acre-foot of unimpaired flow.

There is another, more dynamic approach that we also include in this testimony to characterize excess claims to water use relative to flows. This planning-level analysis of water availability incorporates into the model hydrologic variability, instream flow requirements and publicly available water rights priorities on the divertable flows that remain in the system.

Applying Water Availability Analysis

In Tables 3A and 3B and accompanying charts, we present results of applying both a diversion cap (derived from the State Board's 2010 Delta flow determinations) and the water rights priority system in the manner that the State Water Resources Control Board is legally authorized to proceed. The unimpaired flow hydrology for this analysis was obtained from the California Department of Water Resources (2007). This analysis proceeds from the basic water rights premises that:

1) Instream flows needed to meet water quality and flow objectives have top priority.
2) When applying water rights, riparian rights are paramount, followed by—
3) Pre-1914 water rights claim water based on seniority date, followed by—
4) Any water left over is provided to junior water rights holders, in order of priority date (whether pre-1914 rights or post-1914 permits and licenses).

Detailed model results, water rights, and flow data employed in the analysis are found in Appendix D. Assumptions embedded in the method are itemized in Appendix E of this report.

To apply the water rights priority system in the context of providing new Delta inflows from the major tributaries, C-WIN's analysis builds in a range of flows from the 10^{th} through 90^{th} percentiles of the 82-year unimpaired flow hydrology available from the California Department of Water Resources (2007). 25^{th}, 50^{th} (median), and 75^{th} percentile (quartile) flows are also considered. C-WIN's analysis summarizes total regulated period unimpaired flow, the Delta inflow contribution, and calculates a "diversion cap." (See Appendices D.1, D.2, and E.)

Water rights priorities are then assigned to allocate the diversion cap flows for the regulation period to paramount riparian and senior water right holders first. Detailed tables of our model results are provided in Appendix D.1 for the Trinity and the major Sacramento and San Joaquin River Basin tributaries. On the major tributaries, there are generally few significant water rights holders, and relatively small blocs of riparians may be known and allocated flows prior to pre-1914

Table 3A
Summary of Water Availability Analysis Results Incorporating Water Rights Claims for Major Tributaries of the San Joaquin River Basin

River/ Instream Flow Objective	Annual Total		
	Riparians and Senior Pre-1914 Right Holders	**Major Water Right Claimants**	**Other Junior Major Claimants**
Stanislaus	**Various, including Tuolumne Utilities District**	**Oakdale & South San Joaquin Irrigation Districts**	**US Bureau of Reclamation**
40% Diversion Cap	29 TAF in all percentile flows.	198 to 758 TAF in all percentile flows.	81 to 250 TAF in the 50th to 90th percentile flows.
Tuolumne	**Various, including Tuolumne Utilities District**	**Turlock Irrigation District, Modesto Irrigation District**	**City & County of San Francisco**
40% Diversion Cap	23 TAF across all percentile flows.	408 to 1,662 TAF across all percentile flows.	95 TAF in only the 90th percentile flows.
Merced	**Various, including Gallo interests**	**Merced Irrigation District**	**Not applicable**
40% Diversion Cap	218 to 283 TAF across all percentile flows.	5 to 594 TAF from 40th to 90th percentile flows, about 14% of all claims.	Not applicable
San Joaquin	**Below Friant Dam, and along Fresno Slough**	**San Joaquin River Exchange Contractors**	**US Bureau of Reclamation**
40% Diversion Cap	172 TAF in all percentile flows.	248 to 817 TAF in all percentile flows.	89 to 413 TAF in 75th to 90th percentile flows.

Sources: California Department of Water Resources, 2007; State Water Resources Control Board, 2010, 2012; other primary and secondary sources compiled by the California Water Impact Network. See Appendix D for details of data and supporting model results.

right holders. Pre-1914 water right claims tend to comprise the majority, or in most cases exceed the unimpaired flows in most (and in some cases, all) decile flows reported in the analysis.

Table 3B
Summary of Water Availability Analysis Results Incorporating Water Rights Claims for the Trinity River and the Major Tributaries of the Sacramento River Basin

River/ Instream Flow Objective	Annual Total		
	Riparians and Senior Pre-1914 Right Holders	**Major Water Right Claimants**	**Other Junior Major Claimants**
Trinity	**Various, small claimants**	**US Bureau of Reclamation**	**Not applicable**
25% Diversion Cap	134 TAF in all percentile flows.	77 to 454 TAF across all percentile flows.	Not applicable.
Sacramento River above Feather River Confluence	**Various, including Anderson-Cottonwood ID and Glenn Colusa ID**	**Early Post-1914 to early 1927 claimants**	**CVP and Feather River Project Filings from 1927 through 1961**
25% Diversion Cap	2,094 to 5,983 TAF ranging across all percentile flows.	0 TAF across range of all percentile flows.	0 TAF across range of all percentile flows.
Feather River	**Western Canal WD and Joint Water Districts, adjudication decrees**	**South Feather and Thermalito 1920s Rights**	**DWR 1927, 1951, and 1956 Claims**
25% Diversion Cap	729 to 1,972 TAF ranging across all percentile flows.	4 to 34 TAF from 20th to 90th percentile flows.	7 to 236 TAF in all percentile flows.
Yuba River	**Various, including Nevada ID, City of Nevada City**	**Nevada ID and Yuba Co WD 1920s Rights**	**Yuba County Water Agency 1927 Claims**
25% Diversion Cap	258 to 1,004 TAF ranging across all percentile flows.	10 to 12 TAF only at 25th to 80th percentile flows.	20 to 81 TAF among 50th to 80th percentile flows.
Bear River	**Various, including Nevada ID**	**Camp Far West and Nevada ID Claims**	**South Sutter Water District Claims**
25% Diversion Cap	26 to 92 TAF ranging across all percentile flows.	1 to 54 TAF across all percentile flows.	4 to 9 TAF from 50th to 90th percentile flows.
American River	**Various, including San Juan Water District, Nevada ID and City of Sacramento Post-1914 Claims**	**Georgetown Divide PUD and Placer County Water Agency**	**US Bureau of Reclamation**
25% Diversion Cap	291 to 1,006 TAF ranging across all percentile flows.	8 to 183 TAF from 50th from all percentile flows.	9 to 139 TAF in all percentile flows.

Sources: California Department of Water Resources 2007; State Water Resources Control Board 2010 and 2012; other primary and secondary sources compiled by the California Water Impact Network. See Appendix D for details of data and supporting model results.

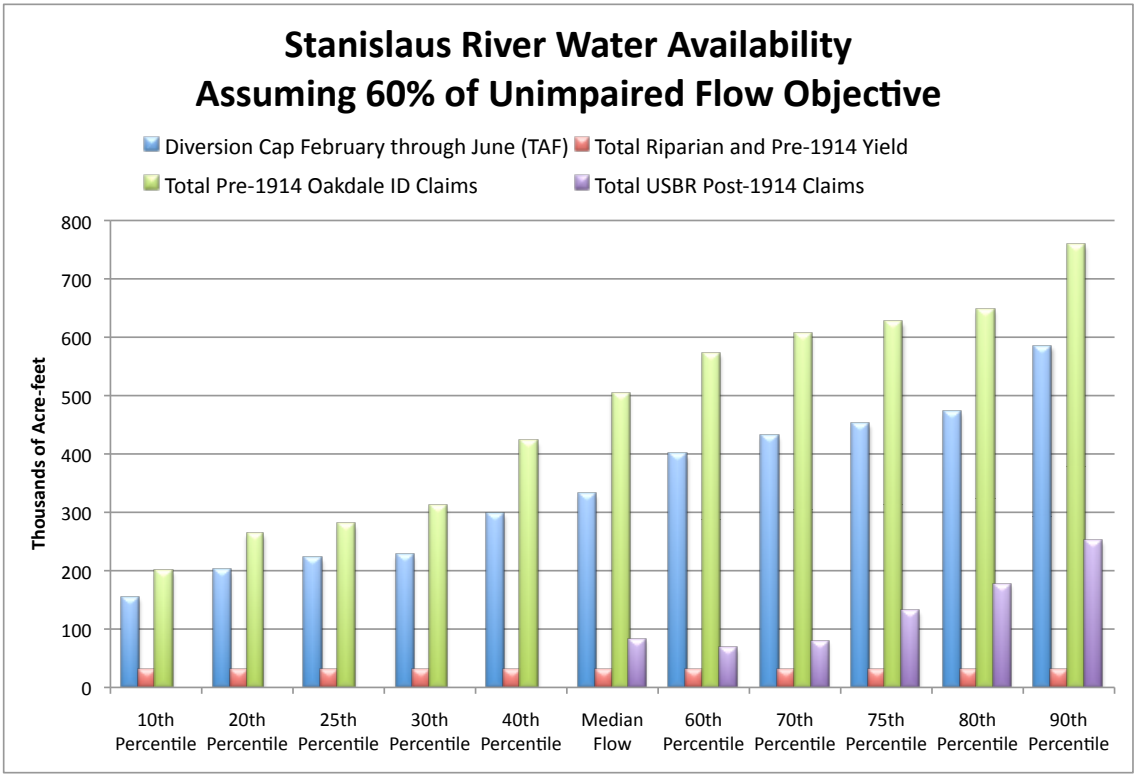
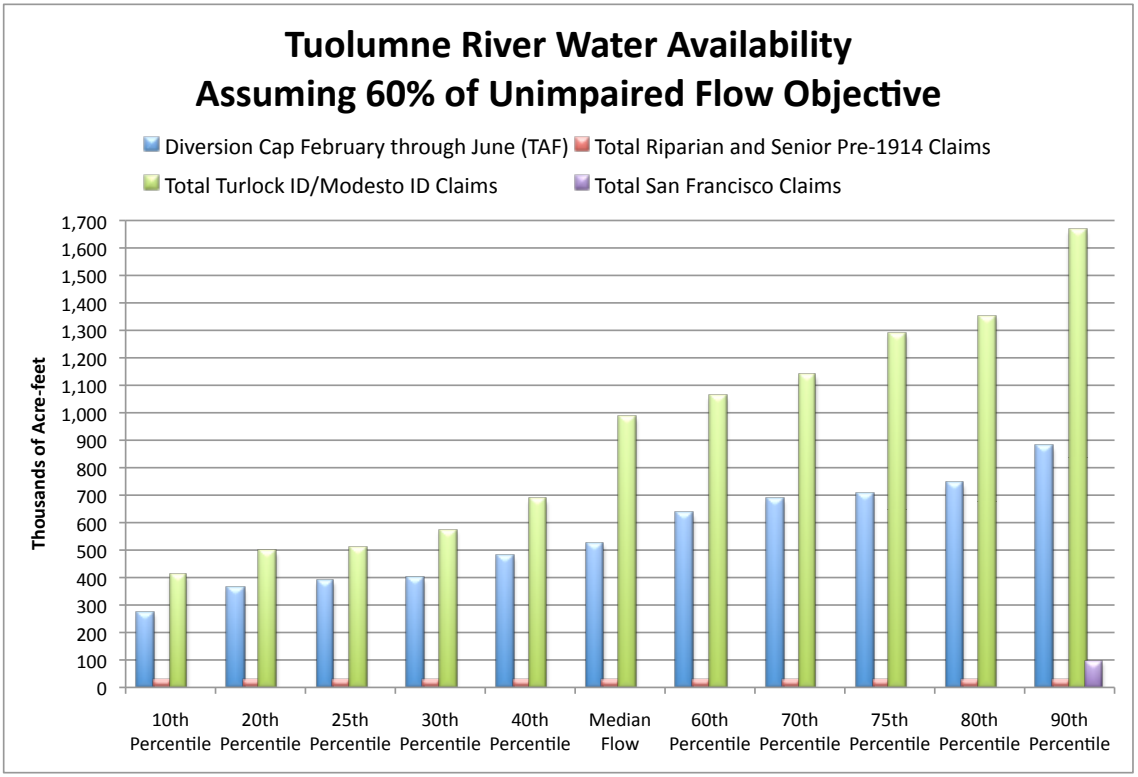


Figure 1, above. Figure 2, below.



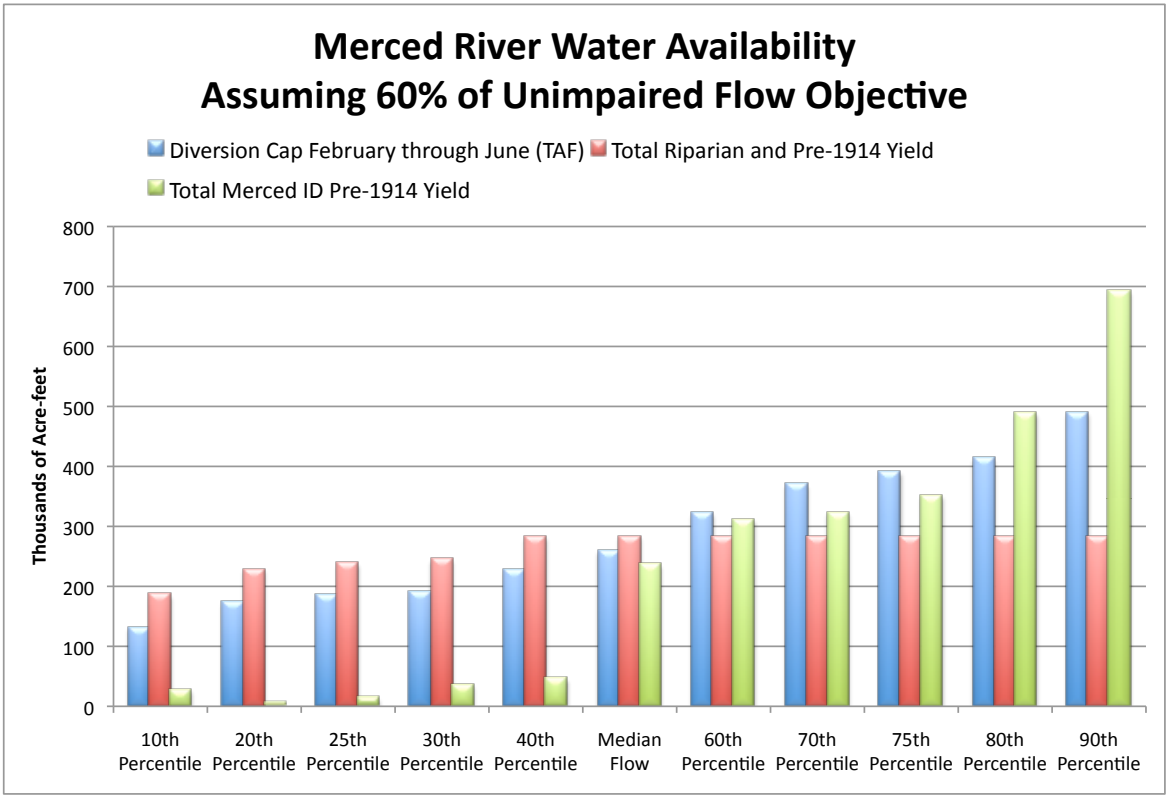
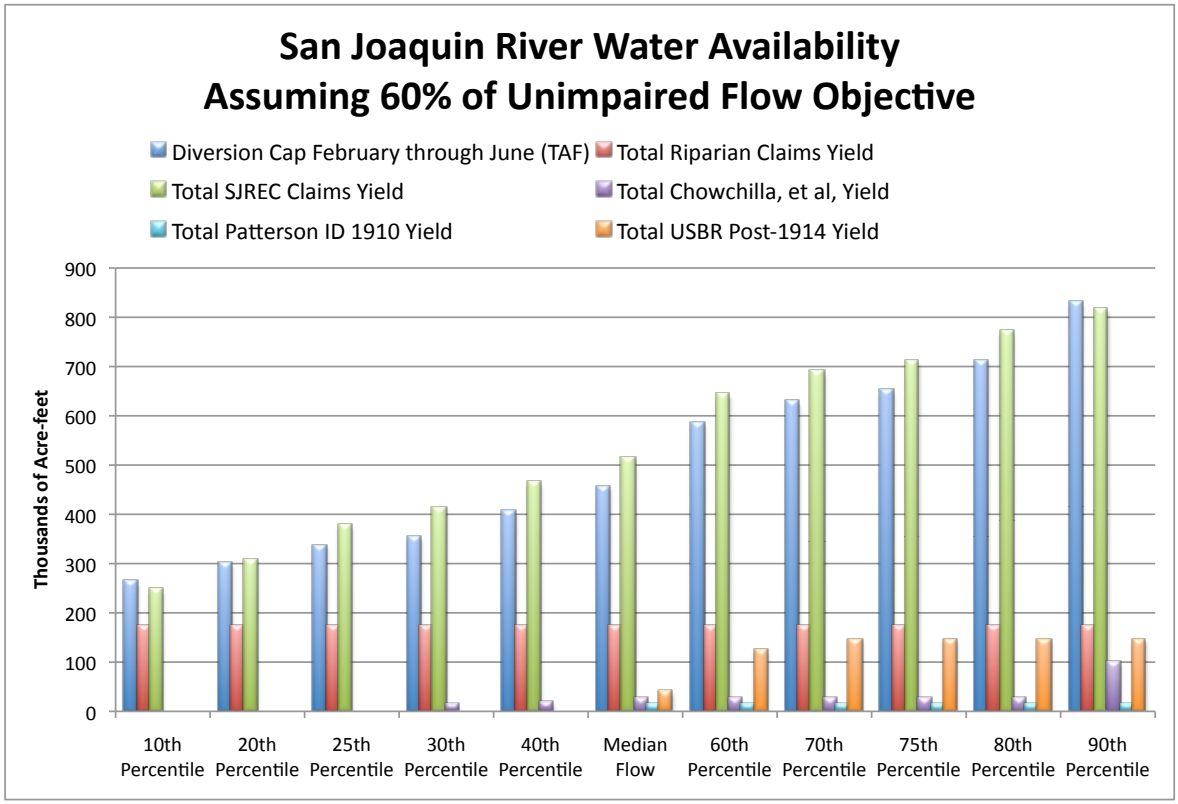


Figure 3, above. Figure 4, below.



Stanislaus River (Figure 1)

Implications: Under strict application of both the 40 percent diversion cap and the water rights priority system in the Stanislaus River watershed, the US Bureau of Reclamation's water rights for New Melones Reservoir yields only a small fraction of Bureau claims in actual supplies.

Tuolumne River (Figure 2)

Implications: Under strict application of both the 40 percent diversion cap and the water rights priority system, the City and County of San Francisco would have reliable rights to water only in the wettest 10 percent of flows.

Merced River (Figure 3)

Implications: Under strict application of the water rights priority system to the 40 percent diversion cap, Merced Irrigation District's pre-1914 water rights exceed its post-1914 claims significantly, but are junior to a large amount of riparian and senior pre-1914 right holders.

San Joaquin River (Figure 4)

Implications: Only the small riparian allocations along the upper San Joaquin River would have fully reliable flows. The Exchange Contractors would have full claims on flows about 30 percent of the time (at the 70th percentile flows and above). The Bureau of Reclamation would not receive allocations except in the wettest 30 percent of years at all, and would receive its full allocation no more than about 10 percent of the time.

Trinity River (Figure 5)

Implications: Riparian and pre-1914 water right holders on this river system are few. The Bureau's post-1914 water rights to develop Trinity Reservoir and Lewiston Dam, and the hydropower complex linked to Keswick Dam along Clear Creek are the dominant water rights on the Trinity River. As noted in Table 2, however, the consumptive use rights alone appear to be quite excessive relative to Trinity River's unimpaired flow hydrology.[3]

Sacramento River Above Feather River Confluence (Figure 6)

Implications: Because of large pre-1914 water rights claims by Glenn-Colusa Irrigation District along the Sacramento River, no water would be available to the US Bureau of Reclamation, except from Trinity River exports. Strict application of this pattern of water rights claims would dramatically reduce water available for export from the Sacramento River Basin and potentially undermine the San Joaquin River Exchange Contract.

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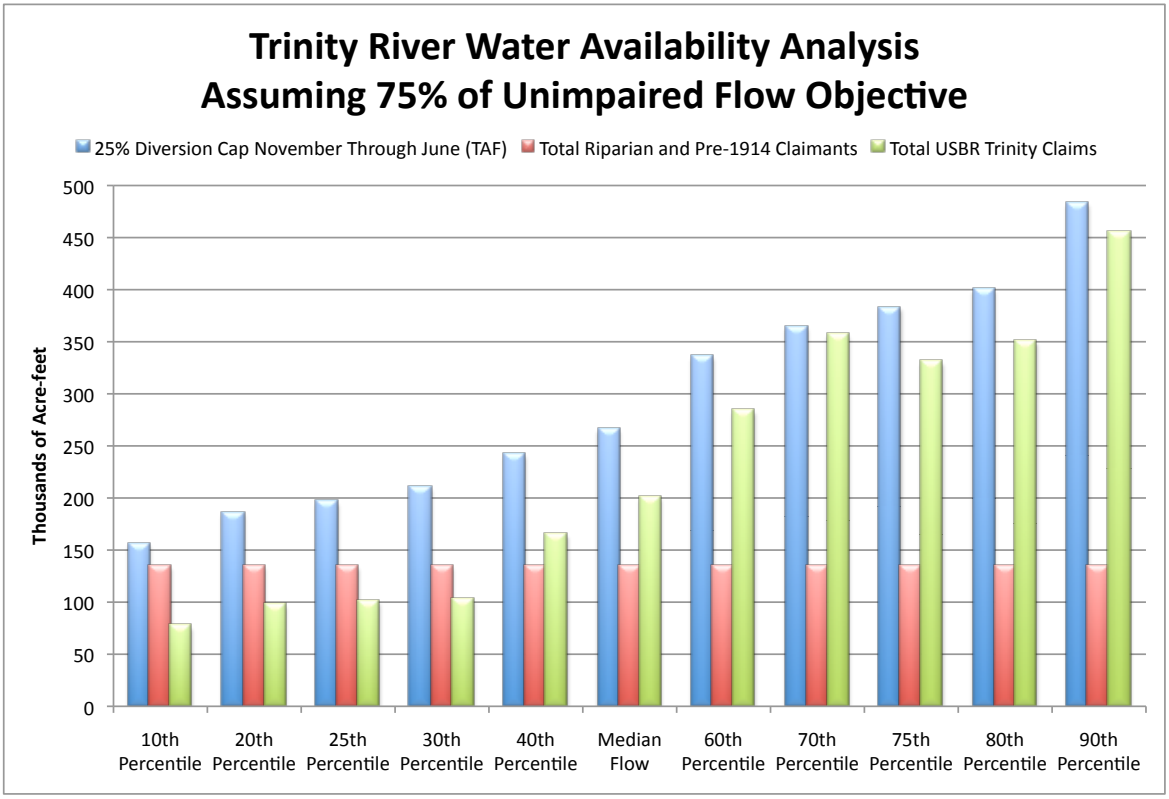
[3] Our analysis applies to the Trinity the Board's 75 percent of unimpaired flow determination for November through June. This flow determination exceeds those of the 2000 Trinity Restoration Record of Decision. (US Department of the Interior 2000)



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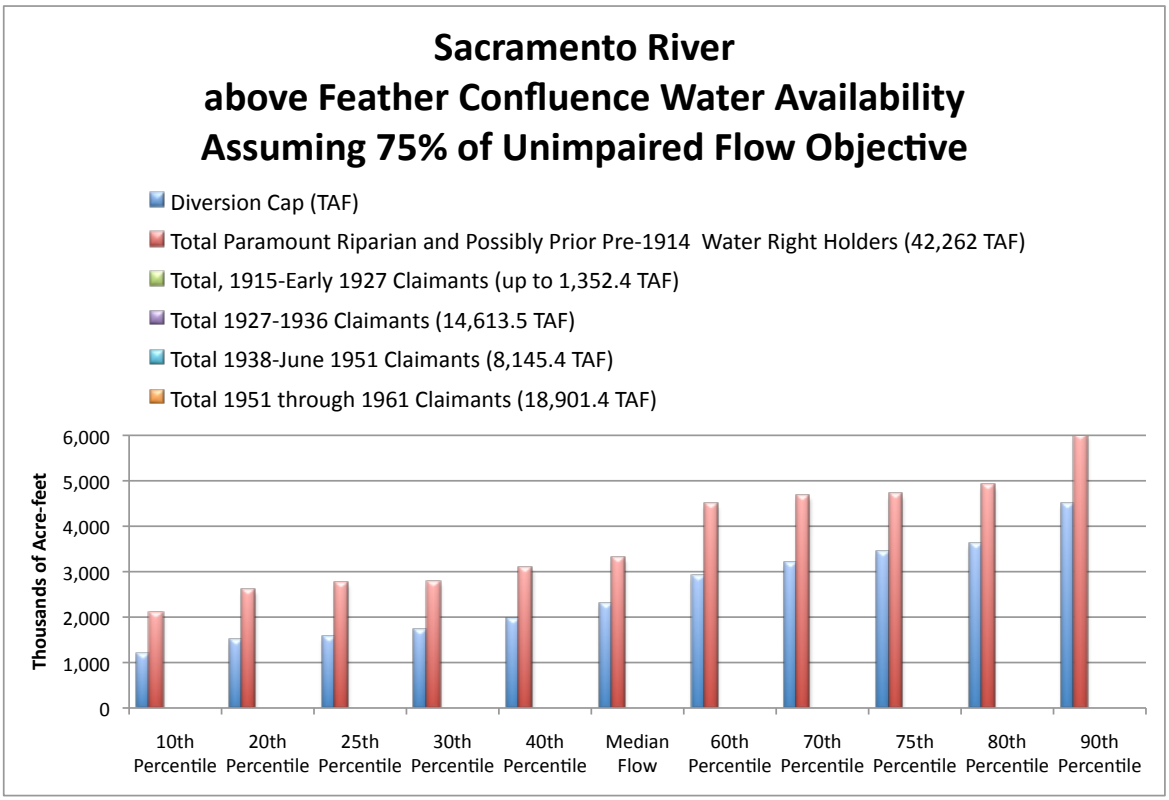

Feather River (Figure 7)

Implications: The Department of Water Resources' 1927, 1951, and 1956 water rights claims for the Feather River Project (now the State Water Project) would receive almost no water under a 25 percent diversion cap scenario. In drier years, even at relaxed diversion cap scenarios, DWR would receive only very small amounts. This is due to senior pre-1914 water rights claimants such as the Joint Water Districts[4] and Western Canal Water District, whose rights predate the cultivation of rice in the Butte County region, and were adjudicated in 1923. DWR's claims amount to about 10.4 million acre-feet (MAF) on the Feather River alone for consumptive uses.

Yuba River (Figure 8)

Implications: Nevada Irrigation District and Yuba County Water District, through their pre-1914 claims and 1920s water rights claims, would have senior claims to Yuba River flows. Full operation of these claims would nearly eliminate Yuba County Water Agency diversions under a 25 percent diversion cap scenario.

Bear River (Figure 9)

Implications: Because of senior water rights claims by Nevada Irrigation District and Camp Far West Irrigation District, South Sutter Water District would see its supplies reduced significantly relative to its claimed rights under a 25 percent diversion cap scenario.

American River (Figure 10)

Implications: The US Bureau of Reclamation's Central Valley Project facilities along the American River would receive very little water supplies from operation of the water rights priority system under a 25 percent diversion cap, despite having claimed up to 5.35 million acre-feet.

Discussion

Assuming that the State Water Board adopts the 75 percent unimpaired flow determination for the upstream tributaries of the Sacramento River Basin, the 60 percent of unimpaired flow determination for the San Joaquin River Basin, and that the water rights priority system is applied, it becomes evident that several significant water rights claimants that are junior in priority contribute dramatically to the problem of paper water: They have been promised water far in excess of flow conditions available to them in most years.

Table 4 summarizes the major water rights claimants whose titles to water in the Central Valley watershed tributaries should be considered clouded, whose property "boundaries" are in dispute.

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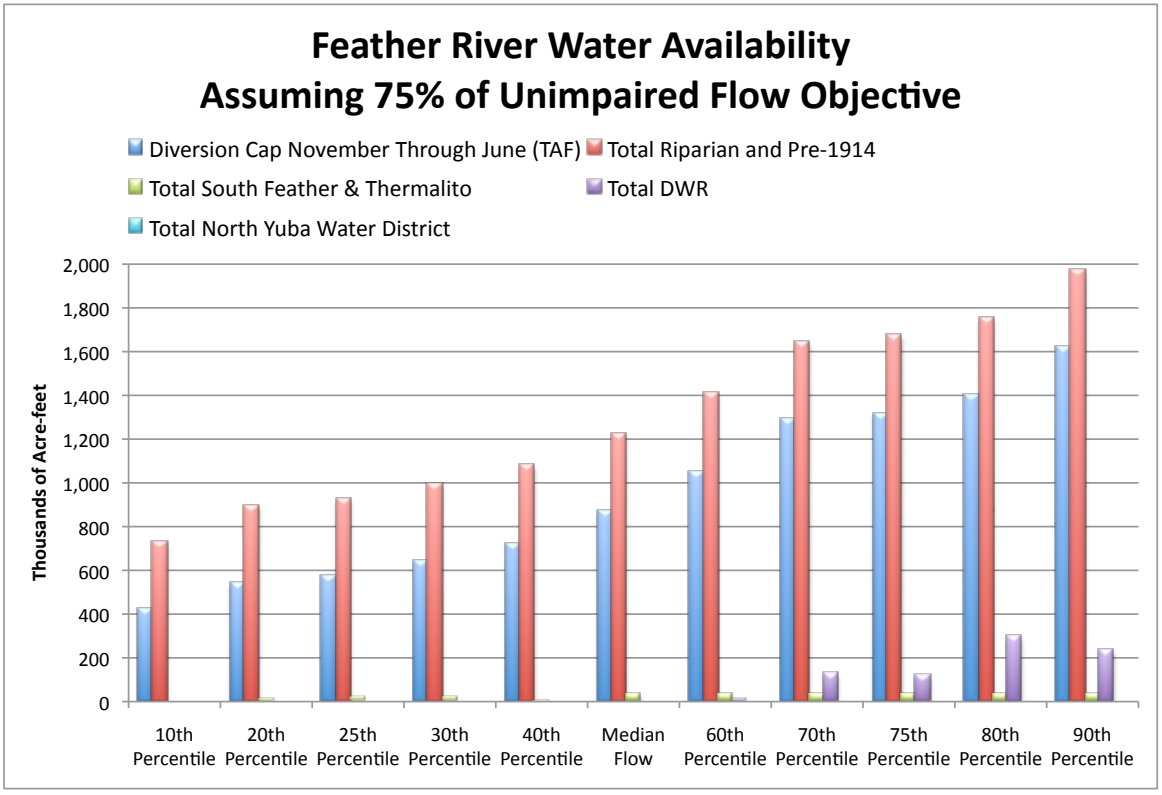
[4] The Joint Water Districts include Butte Water District, Biggs-West Gridley Water District, Richvale Irrigation District, and Sutter Extension Water District, the successors to pre-1914 water rights accumulated by the Sutter Butte Canal Company.



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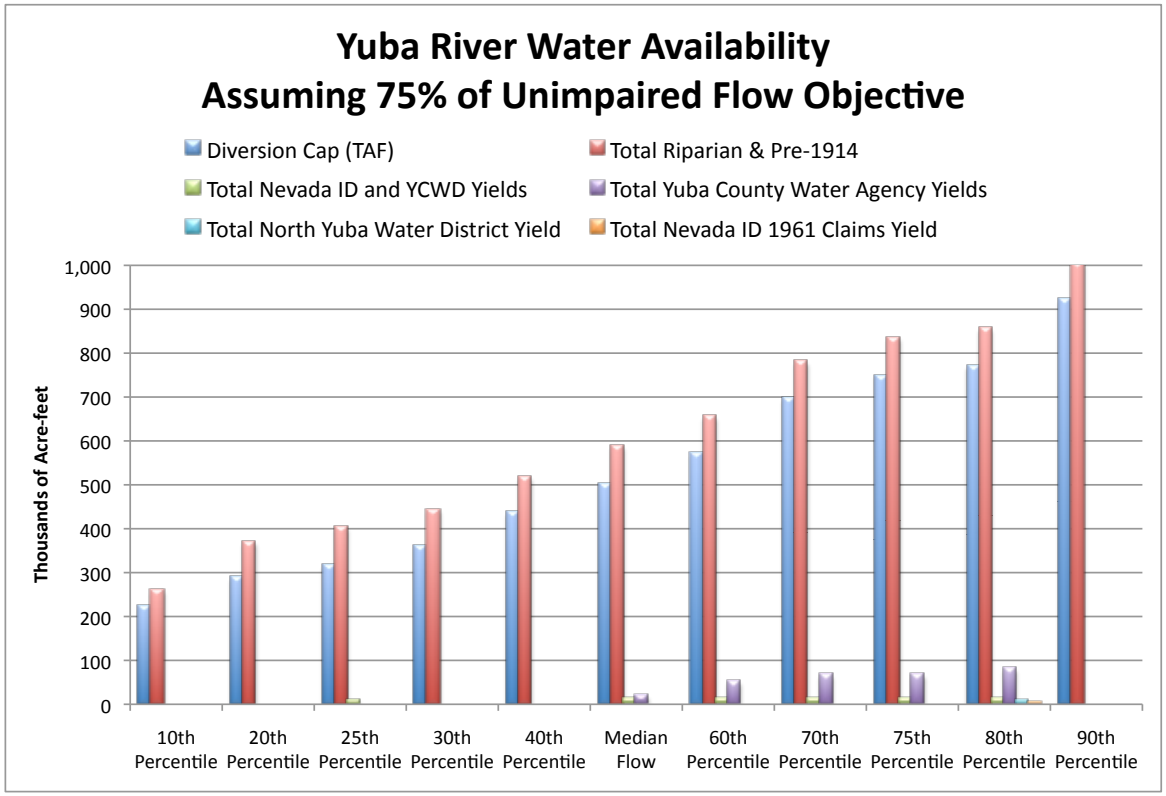

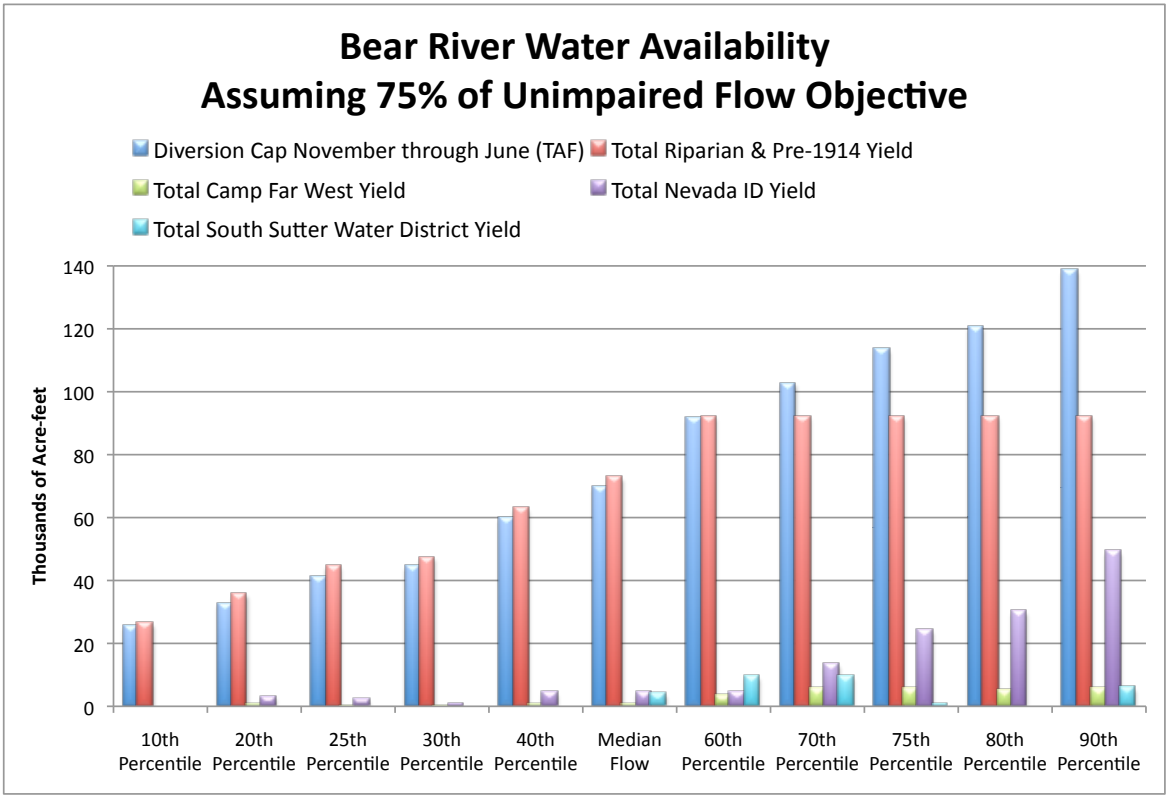

Figure 9, above. Figure 10, below.

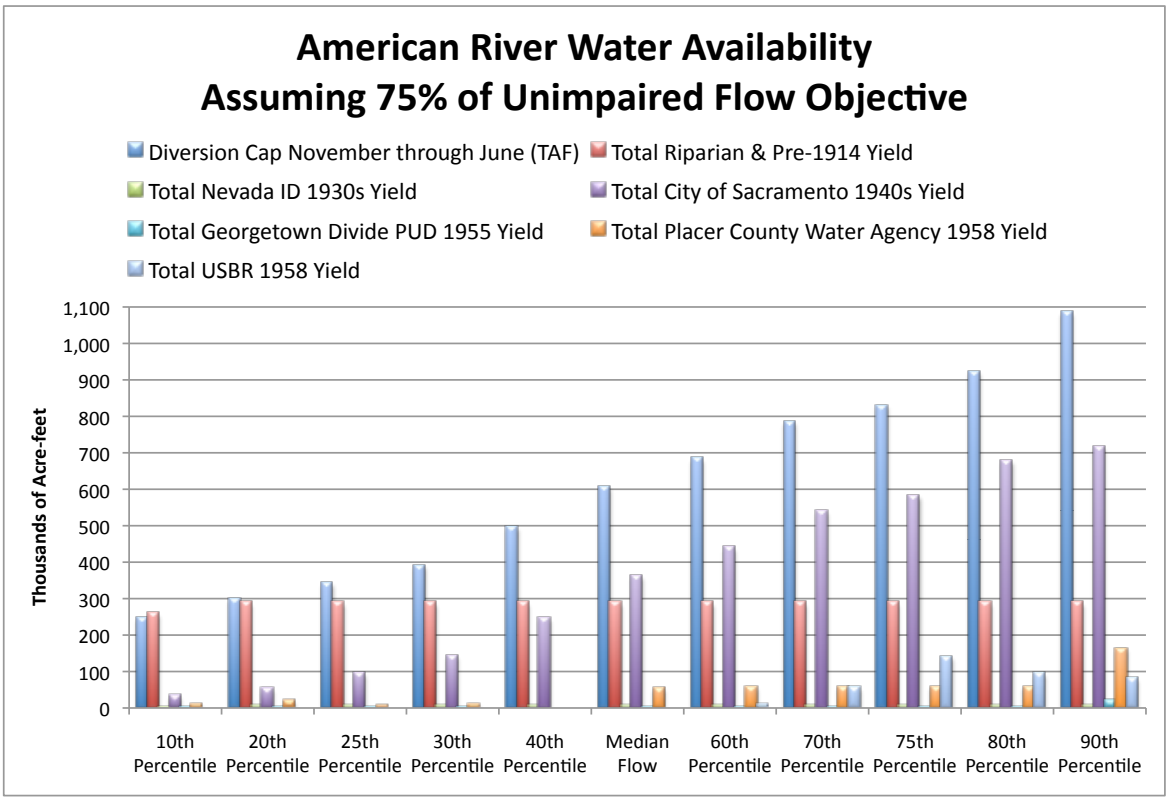

Table 4
Summary of Watershed Consumptive Water Rights Claimants by Reliability (Based on Legal Priority) of Claims

Watershed	Claimants with Highly Reliable Rights	Claimants with Potentially Clouded Titles to Water
Stanislaus River	Various claimants covered by Stanislaus River decree of 1929; Oakdale ID, South San Joaquin ID	US Bureau of Reclamation (New Melones)
Tuolumne River	Tuolumne Utilities District, Turlock Irrigation District, Modesto Irrigation District	City and County of San Francisco (1901 through 1911 rights)
Merced River	Gallo, various riparian and pre-1914 parties to early Merced River decrees	Merced Irrigation District (post-1914 rights)
San Joaquin River	Paramount riparian claimants, San Joaquin River Exchange Contractors, Chowcilla WD, Tranquillity & James IDs, Patterson ID	US Bureau of Reclamation (post-1916 rights)
Trinity River	Various small riparian and pre-1914 claimants, US Bureau of Reclamation	US Bureau of Reclamation (has overstated water claims compared with actual basin hydrology)
Sacramento River (including west and east creeks, Pit and McCloud Rivers)	Various small riparian and pre-1914 claimants, claimants among adjudicated watersheds in Pit River region, Anderson-Cottonwood Irrigation District, Glenn-Colusa Irrigation District	US Bureau of Reclamation (Shasta Lake)
Feather River	Upper watershed adjudicated claimants, Joint Water Districts, Western Canal WD	California Department of Water Resources (Lake Oroville)
Yuba River	Browns Valley ID, Nevada ID, Yuba County WD	Yuba County Water Agency (1927 rights), Nevada ID (1930s rights), and North Yuba Water District (1958 rights)
Bear River	Nevada ID, Camp Far West ID	South Sutter Water District (1952 and 1981 rights)
American River	City of Folsom, San Juan WD, Georgetown Divide PUD, El Dorado ID, Nevada ID, Placer County Water Agency, City of Sacramento	US Bureau of Reclamation (Folsom Lake), Foresthill PUD

Sources: California Department of Water Resources; State Water Resources Control Board; California Water Impact Network.

By adopting its public trust Delta inflow determinations as flow objectives in the Bay-Delta Plan for each major tributary, and applying water rights priorities—in that order—the State Water Resources Control Board can use its authority to eliminate paper water (water claims that do not have a basis in water rights law) in the Bay-Delta Estuary's Central Valley watershed. The California Constitution reminds us that no one in California has a right to use or divert water wastefully or unreasonably. The state's public trust responsibility requires protection of the waters of the state for the benefit of all beneficial users, not just water rights holders. The state's water quality control planning obligations carry out this responsibility. It also helps the state meet its public trust

obligations as well. The doctrine of prior appropriation requires that senior water right holders be served before junior water right holders. The water quality control planning process and the water rights priority system on the major tributaries of the Sacramento and San Joaquin River Basins should be used as tools for eliminating paper water—that is, for quieting water titles, and ending trespasses and boundary disputes that compromise public trust resources—from the Bay-Delta Estuary's Central Valley watershed.

Paths for Aligning Water Rights with All Other Beneficial Uses and River Flows

We see three primary paths by which the State Water Resources Control Board can align water rights with all other beneficial uses and river flows:

- Water quality control plan implementation,
- Fully-appropriated streams declaration and Term 91, and
- Court adjudication.

Water Quality Control Plan Implementation. The State Water Resources Control Board has approved a Delta inflow determination for the San Joaquin River at Vernalis of 60 percent of unimpaired flow during the February through June period. For the Sacramento the Board approved a 75 percent of unimpaired flow determination for the November through June period. In doing so, the Board would implicitly place a cap on total diversions for each major tributary of 40 percent of unimpaired flow for the San Joaquin River and 25 percent of unimpaired flow for the Sacramento River Basin. These objectives would result in instream flows that are substantially greater in most years than current instream flow requirements now provide. In our water availability analysis, we also apply the Sacramento River Basin 75 percent objective rather than the Trinity Record of Decision flow objectives to the water availability analysis for the Trinity River. (US Department of the Interior 2000: 12)

Key water rights holders in these basins possess riparian and pre-1914 water rights that exist prior to the regulatory powers of the State Water Resources Control Board. On the question of implementing water quality control plans and adhering to state water rights law, the issue has arisen of the Board's jurisdiction over those water rights that the Board did not originally consent to.

Attorney Tim O'Laughlin, representing the San Joaquin River Group Authority (SJRGA), has asked the State Water Resources Control Board to "identify the legal theory or approach it will use at the implementation proceeding in order to obtain the necessary flows to meet the additional flow requirements identified" in the Board's flow studies. Without that legal theory or approach, O'Laughlin argues, the State Water Resources Control Board will be unable to complete economic or other impacts analysis in its Substitute Environmental Document on the San Joaquin River Flow and South Delta salinity objectives. He further contended in February 2011 that the Board is operating according to *some* kind of theory since it

> blatantly **suggests** that additional flows will come from the Stanislaus, Tuolumne, and Merced Rivers. [State Water Resources Control Board 2011c, pp. 78, 81, and 85-89] This foreshadowing demonstrates that the SWRCB not only believes that, regardless of the Vernalis flow alternative eventually adopted, it will be able to obtain flow from all the tributaries, but that it intends to do so. That approach, however, completely ignores the existence of the water right priority system. (See, e.g., *Pleasant Valley Canal Company v. Borror* (1998) 61 Cal.App.4th 742, 770; *City of*

> *Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1243; see also *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal. App.4th 937, 961). As the SJRGA has pointed out to the SWRCB on numerous occasions, any approach to allocating responsibility for new Vernalis flow requirements must incorporate the water rights priority system. That said, the SJRGA recognizes that strict application of the water right priority system does not produce straightforward results such that the water required to meet the selected Vernalis flow alternative would come from a particular waterway or tributary, or that such water would roughly be divided equally or proportionally among such waterways and tributaries. (O'Laughlin 2011a: 1-2; emphasis in original)

O'Laughlin, on behalf of SJRGA, asserts that the Board has no jurisdiction to regulate pre-1914 appropriative water rights or riparian rights, regardless of any legal theory the Board intends to use in the implementation phase. If responsibility for new Vernalis flow requirements is determined solely based on the water rights priority system, writes O'Laughlin, "junior water right holders will be required to reduce or completely cease their water use before senior appropriators will be required to reduce theirs" as required in California's doctrine of prior appropriation. (O'Laughlin 2011a)

He wrote to the Board subsequently in June 2011 about its jurisdiction in the Bay-Delta proceedings. There he stated, "It now appears that the [Substitute Environmental Document] is being prepared solely on the basis of percentage of natural flow, without regard to the nature or priority of the water rights affected, and will therefore be the subject of immediate litigation." (He is here apparently referring to the Board's proposed use of a percentage of unimpaired flow as the basis for limiting diversions.) O'Laughlin also reiterated in this letter to the Board that it

> does not have jurisdiction over pre-1914 appropriative water rights for any reason, including the implementation of water quality objectives adopted pursuant to the State Water Resources Control Board's authority under Porter-Cologne. Given the prevalence of pre-1914 appropriative rights held in the San Joaquin River Basin, and the scope of the percentage of natural flow that the [Board] is considering, it is almost certain that there will be times and conditions where the [Board] will not be able to implement a percentage of natural flow. It is arbitrary and capricious for the [Board] to continue to consider a percentage of natural flow as one of its objectives without knowing how often, if ever, it will be able to require such percentages be met. (O'Laughlin 2011b)

O'Laughlin argues that the Board's flow objective results may not be achievable if, for example, flow is 100 cfs and the Board applies a 60 percent instream flow criterion to this waterway while pre-1914 water right holders may claim 80 percent of the flow in the stream. In that case, the Board, contends O'Laughlin, "would not be able to obtain the full 60 percent flow it desired." O'Laughlin contends that this not only renders the Delta flow criterion infeasible, it means that evaluation of criterion alternatives under the California Environmental Quality Act in the Substitute Environmental Document will also be infeasible and the SED thus inadequate.

Of course, contrary to the Racanelli decision, O'Laughlin elevates the water rights priority system to paramount status in California water and environmental law. It is plain from a review of state water case law that water rights priorities, while important, are not paramount considerations when the Board takes up the protection of beneficial uses of water. As Justice Racanelli stated, water quality control planning must concern itself with the regulation of *beneficial uses*, not water rights strictly speaking. Beneficial uses include, and go well beyond, water rights and their relative priorities. (See sidebar, page 26.) The Racanelli decision made clear that the State Water Resources Control Board has authority to implement its water quality control plan by regulating all beneficial uses. Adjusting quantities in water rights is within its authority.

Beneficial Uses Served in the Bay-Delta Water Quality Control Plan:

- **Municipal and Domestic Supply**
- **Industrial Service Supply**
- **Industrial Process Supply**
- **Agricultural Supply**
- **Ground Water Recharge**
- **Navigation**
- **Water Contact Recreation**
- **Non-Contact Water Recreation**
- **Shellfish Harvesting**
- **Commercial and Sport Fishing**
- **Warm Freshwater Habitat**
- **Cold Freshwater Habitat**
- **Migration of Aquatic Organisms**
- **Spawning, Reproduction, and/or Early Development**
- **Estuarine Habitat**
- **Wildlife Habitat**
- **Rare, Threatened, or Endangered Species**

Source: State Water Resources Control Board 2006: 8-9.

Moreover, the Board retains authority to regulate pre-1914 water rights under its constitutional authority to prohibit waste and unreasonable use of water. The Legislature provided in the California Water Code key sections that do not limit the Board's authority to investigate rivers and streams in the service of the state's constitutional provisions (emphases added).

275. *The department and board shall take all appropriate proceedings or actions* before executive, legislative, or judicial agencies *to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state*.

...

1050. This division is hereby declared to be in furtherance of the policy contained in Section 2 of Article X of the California Constitution and in all respects for the welfare and benefit of the people of the state, for the improvement of their prosperity and their living conditions, and *the board and the department shall be regarded as performing a governmental function in carrying out the provisions of this division*.

1051. The board for the purpose of this division may:

(a) *Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water*.

(b) Take testimony in regard to the rights to water or the use of water thereon or therein.

(c) *Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State*.

...

1052. (a) The *diversion or use of water subject to this division other than as authorized in this division is a trespass*.

(b) Civil liability may be administratively imposed by the board pursuant to Section 1055 for a trespass as defined in this section in an amount not to exceed five hundred dollars ($500) for each day in which the trespass occurs.

(c) The Attorney General, upon request of the board, shall institute in the superior court in and for any county wherein the diversion or use is threatened, is occurring, or has occurred appropriate action for the issuance of injunctive relief as may be warranted by way of temporary restraining order, preliminary injunction, or permanent injunction.

(d) Any person or entity committing a trespass as defined in this section may be liable for a sum not to exceed five hundred dollars ($500) for each day in which the trespass occurs. The Attorney General, upon request of the board, shall petition the superior court to impose, assess, and recover any sums pursuant to this subdivision. In determining the appropriate amount, the court shall take into consideration all relevant circumstances, including, but not limited to, the

extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator.

(e) All funds recovered pursuant to this section shall be deposited in the Water Rights Fund established pursuant to Section 1550.

(f) The remedies prescribed in this section are cumulative and not alternative.

...

1825. It is the intent of the Legislature that *the state should take vigorous action* to enforce the terms and conditions of permits licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and *to prevent the unlawful diversion of water.*

...

2501. The board may determine, in the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right.

Nothing in these sections of the Water Code prevents the Board from investigating pre-1914 water rights and eliminating illegal diversions should they be found. Water Code Section 275, appears to extend this authority of the Board to determining whether any water use is wasteful or unreasonable, or any method of use, or method of diversion is wasteful or unreasonable.

These sections provided authority for the Board to investigate pre-1914 and riparian water rights in the Delta recently. In these investigations, the Board has issued water rights orders that in at least one instance adjusted the rights of a riparian water right holder. (Wilson 2012) Mr. O'Laughlin is surely aware of this authority. On behalf of the San Joaquin River Group Authority, his comments on the Board's 2008-2012 strategic work plan helped initiate the Delta water rights investigations in 2008. He cited California Water Code Section 1825 to support the San Joaquin River Group Authority's recommendation that the Board investigate Delta riparian and pre-1914 water rights. (San Joaquin River Group Authority 2008: 64)

When the Board moves to adjust diversion amounts in the Delta's major tributaries. The Board should apply a diversion cap during the regulated period applicable to each tributary (including the Upper San Joaquin River; see Appendix B) and then allocate diversions according to water rights priority. C-WIN analyzes operation of the water rights priority system in the following river profiles.

Our testimony analyzes water availability using water rights priorities as a way of identifying the legal method for allocating responsibility for Delta inflows that are fully protective of public trust resources in the Delta.

The Board announced in two notices (dated February 13, 2009, and April 1, 2011, the latter containing revisions to the earlier Notice) its intent to revise the Bay Delta Water Quality Control Plan of 2006. This plan traces its lineage to the 1995 Bay Delta Water Quality Control Plan and the Bay-Delta Accord. The San Joaquin River flow and South Delta salinity objective process is likely to be a step in the right direction away from these failed plans. The well-documented failures of this misguided loyalty include:

- Anadromous fishery declines throughout the Central Valley watershed of the Delta estuary.
- Declines of pelagic (open water) aquatic ecosystem regimes throughout the Delta
- Continued listing of endangered species, including salmon, steelhead, Delta smelt, longfin smelt, Sacramento splittail, and green sturgeon.
- Chronic violations from 2005 through 2009 of south Delta salinity objectives in both the Bay-Delta Water Quality Control Plan and Water Rights Decision 1641 that are intended to protect agricultural beneficial uses in this part of the Delta.

- Historic record Delta pumped exports between 2000 and 2006, peaking at nearly 6.4 million acre-feet. (More recently, 2011 exports reached 6.7 million acre-feet.)

From the two NOPs, it appears the Board prepares to incorporate flow objectives for major tributaries of the San Joaquin River: the Stanislaus, the Tuolumne, and the Merced rivers. It appears to us the Board intends to require fair share flow contributions from each of these important rivers to flows of the mainstem San Joaquin as inflow to the Delta as measured at Vernalis. Our organizations welcome this prospect in concept, and support the Board's efforts toward this goal, despite legal, ecological, and engineering challenges ahead.

The 1986 Delta Water Cases decision (also named as the "Racanelli decision" for its author, presiding Justice John Racanelli of the Third District Court of Appeals in California) bears review because it defines the Board's water quality planning duties for the Delta and its watershed. (California Appeals Court, Third District 1986) When it comes to the Board's role in undertaking its duty to fulfill its water quality planning function, the Racanelli court stated:

> In its *water quality* role of setting the level of water quality protection, the Board's task is not to protect water rights, but to protect 'beneficial uses.' The Board is obligated to adopt a water quality control plan consistent with the overall statewide interest in water quality [citation to California Water Code §13240] which will ensure 'the reasonable protection of *beneficial uses*' (§13241, emphasis added). Its legislated mission is to protect the 'quality of all the waters of the state...for use and enjoyment by the people of the state." (§ 13000, 1st para., emphasis added.) (California Appeals Court, Third District 1986: 178)

Thus, protection of beneficial uses must be the Board's paramount goal in this process. Beneficial uses make up "all competing demands for water" which must receive Board attention during public trust balancing and analysis. Water rights are among the Board's implementation tools for achieving the protection of beneficial uses in California's Central Valley watershed and Delta estuary, not strictly ends in themselves in this context.

Justice Racanelli wrote that the State Water Resources Control Board has a dual role of regulating both water quality and adjudicating water rights. The Racanelli court stated:

> In performing its dual role, including development of water quality objectives, the Board is directed to consider not only the availability of unappropriated water...but also *all* competing demands for water in determining what is a reasonable level of water quality protection. (California Appeals Court, Third District 1986: 179-180)

The Delta Water Cases came about because the Board construed its scope for water quality planning too narrowly, focusing on the major stakeholders in the Delta: the Bureau, the Department of Water Resources, and their respective contractors. The Board erred in doing so, the Racanelli court stated.

> ...the Board must consider 'past, present, and probable future beneficial uses of water'...as well as 'water quality conditions that could reasonably be achieved through the coordinated control of *all* factors which affect water quality in the area'. Unfortunately, the Board neglected to do so. (California Appeals Court, Third District 1986: 180)

That was 26 years ago. As we will indicate below, C-WIN is deeply concerned that the Board may still neglect significant, realistic alternatives that will be essential to fulfilling its water quality planning role for solving problems in the Bay-Delta estuary and the larger Central Valley watershed.

Fortunately, the Board can avoid such neglect. Justice Racanelli wrote that the Board "need only take *the larger view of the water resources* in arriving at a reasonable estimate of all water uses, an activity well within its water rights function to determine the availability of unappropriated water." And he added, "We think a similar *global perspective* is essential to fulfill the Board's water quality planning obligations." (California Appeals Court, Third District 1986, emphasis added) Justice Racanelli stated later that the Board compromised its role in previous water quality control plans when it defined its scope for action too narrowly "in terms of enforceable water rights. In fact," the judge wrote, "the Board's water quality obligations are not so limited."

> ...in order to fulfill adequately its water quality planning obligations, we believe the Board cannot ignore other actions which could be taken to achieve Delta water quality, such as remedial actions to curtail excess diversions and pollution by other water users. (California Appeals Court, Third District 1986: 182)

The Board's "paramount duty" remains to "provide 'reasonable protection' to beneficial uses, considering all the demands made upon the water." Finally, Justice Racanelli concludes about the Board's water quality planning powers:

> Thus, we do not believe that difficulty in enforcement justifies a bypass of the legislative imperative to establish water quality objectives which in the judgment of the Board will ensure reasonable protection of beneficial uses. (California Appeals Court, Third District 1986: 182)

C-WIN believes that a credible water quality control plan for the Bay Delta estuary must take what Racanelli deemed the "global perspective" in order to redress the ecological collapse and cumulative salinization and pollution resulting from the Board's water quality planning efforts to date. The 1994 Bay-Delta Accord's water quality control planning pendulum swung too far in favor of water right holders and water contractors, and their respective beneficial uses. The Board's duty now is to credibly balance all of the beneficial uses of water in the estuary so that public trust resources are protected, and so that reasonable uses and methods of diversion of water are employed by all water users.

In addition to the water quality planning obligations that Justice Racanelli eloquently addressed, recent state legislation provides additional authority to the State Water Resources Control Board. Using this added authority, the Board can better protect water quality and beneficial uses in the Bay-Delta Estuary and the Central Valley watershed. We point to two new laws enacted in 2009.

The State Water Resources Control Board has already fulfilled its obligation under California Water Code Section 85086(c) and (e) to prepare a public trust assessment of the Bay-Delta flow criteria needed to protect fish and wildlife beneficial uses. While not a "balancing" analysis required under public trust doctrine, the Board's *Delta Flow Criteria Report* provides valuable scientific analysis and findings that must be used to help the Board fulfill its water quality planning responsibilities and achieve protective public trust resource outcomes in the Bay-Delta estuary. The report employed the best available science in arriving at its findings. (State Water Resources Control Board 2010b)

The same legislative package also changed the California Water Code to recognize the need to reduce reliance on the Delta as a source of water for California:

> 85021. The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment

in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.[5]

These new laws provide the Board with additional legal and political tools aiding the protection of all beneficial uses, particularly fish and wildlife beneficial uses whose protection has been neglected for decades.

The Water Code's Fully Appropriated Stream Provisions and Term 91. The Board will need to revise its 1998 water rights order concerning fully appropriated streams, and revisit its application of Term 91 curtailment of post-1978 water rights permittees. Our water availability analysis helps show where key seasonal and priority thresholds may occur under the Board's new Delta inflow objectives.

California's Water Code implicitly acknowledges the potential for over-appropriation to occur and provides a process by which the State Water Resources Control Board may take steps to avoid or prevent excessive water promises. The Board can declare streams to be fully-appropriated on a month by month basis in every watershed of California under Sections 1205 through 1207. Its statutory language is reproduced in Appendix F to this testimony.

Section 1205(b) provides that a declaration that a stream system is fully appropriated shall contain a finding that the supply of water in the stream system is fully applied to beneficial uses where the Board finds that previous water rights decisions have determined that no water remains available for appropriation. According to Section 1206(a) once a stream system is declared fully appropriated by the Board, the Board shall not accept for filing any application for a permit to appropriate water from the stream system described in the declaration, and may cancel an application pending on that date. Section 1206(b) states that the the Board may provide for exceptions to application filings under specified conditions, which may limit the purpose of use, the instantaneous rate of diversion, the season of diversion or the amount of water diverted annually.

Past State Water Resources Control Boards have declared fully-appropriated streams in California. (State Water Resources Control Board 1989; 1991; and 1998) The Board's most recent 1998 declaration included major reaches of all tributaries to the Sacramento and San Joaquin River Basins as fully appropriated, including the Trinity River. (State Water Resources Control Board 1998: Exhibit A)

The Board has also designated as fully appropriated some rivers and streams that are adjudicated or have reaches designated for protection under state and federal wild and scenic river legislation. Major portions of the Trinity, Middle Fork of the Feather, the Tuolumne, and the Merced are designated as wild and scenic rivers. Wild and scenic rivers are off-limits to appropriations year-round. Other rivers and streams are fully-appropriated primarily during irrigation season. Appendix G summarizes selected critical reaches of the Bay-Delta Estuary's Central Valley Watershed that are designated as fully-appropriated by the State Water Resources Control Board.

The Board's Full Appropriation Declaration blurs the distinction between water rights claims and water usage by claimants. Commendably, the Board has identified reaches of streams that are off-limits to new permanent applications to appropriate water. C-WIN identified several streams where it appears that the Board has excluded riparian and pre-1914 water rights in formulating its declaration. This appears to be the case on the Sacramento mainstem, the Tuolumne, the Merced, and the Yuba. On these rivers, substantial periods of the year are still officially open under the

[5] California Water Code §85021, passed November 2009.

Board's declaration to applications to appropriate. Substantial amounts of pre-1914 water rights do not appear to be considered in the Board's determination that a stream is fully appropriated.

Section 1205(b) does require that the Board's declaration "shall contain a finding that the supply of water in the stream system is being fully applied to *beneficial uses* where the board finds that previous water rights decisions have determined that no water remains available for appropriation." (For a list of all Bay-Delta beneficial uses, see sidebar, page 26, above.) Note that the full-appropriation declaration legislation states that the supply of water is "being fully applied to beneficial uses" and not merely to the claims of water right holders.

There is no explicit analysis in the 1998 declaration by the State Water Resources Control Board of full application of water to beneficial uses as a direct consequence of citing its water rights decisions. This means that the full appropriation declarations are likely incomplete, albeit from a different standpoint. The Board may have construed Water Code Section 1205(b) as requiring the Board to rely on its archive of water rights decision, appropriately enough. But Water Code Section 1205(b) does not expressly limit the Board to use only water rights decisions, adjudications, and other determinative documents to justify these findings as evidenced by the Board's additional reliance on wild and scenic river designations. Its approved 2010 flow objectives for the Sacramento and San Joaquin River basin (while legislated to be informational and predecisional in Water Code Section 85086(c)(1)), could also be used to support findings of full appropriation for the Sacramento River, the San Joaquin River, and their other major tributaries. Instream flows serve natural beneficial uses as surely as water rights claims serve economic uses. Accounting for these instream flows as part of full appropriation declarations would increase the periods of full appropriation to include November through June throughout the Sacramento Basin, and February through June in the San Joaquin Basin, given the magnitude of water rights claims we have identified.

Moreover, Board decisions like Water Rights Decision 1594 (D-1594) acknowledge the Board's duty to account for all beneficial uses, such as those protected by the Board's Delta water quality and flow objectives.

C-WIN's planning-level water availability analysis allocates unimpaired flow hydrology, among instream flow objectives first, followed by water rights in order of priority status for the Sacramento and San Joaquin River basins. This planning-level method of water availability analysis demonstrates that the waters of the Sacramento and San Joaquin River Basin, from a planning standpoint, should indeed be declared fully appropriated. The full spectrum of beneficial uses is fully accounted for in allocating the Basins' flows to full protection of instream beneficial uses as well as those of all water rights claimants in California's water rights priority system. Moreover, this water availability analysis uses instream flow determinations that the Board itself endorsed in 2010 as Delta protective of public trust resources. It also indicates which major claimants have either poorly reliable or no water rights once all beneficial uses are accounted for.

A problem with the State Water Resources Control Board's fully-appropriated declaration involves its reliance on Water Right Decision 1594 (D-1594) from 1984. D-1594 authorizes the Board to place into permits (whose priority dates come after August 16, 1978) a new permit condition (called Term 91) notifying all permittees of its intent to curtail diversions of water right permittees. Curtailment occurs when flow and water quality conditions in the Delta demand that reservoir releases are needed to enable the California Department of Water Resources and the US Bureau of Reclamation to meet Delta water quality standards established by the Board. August 16, 1978, is significant as the date on which the Board adopted Water Right Decision 1485. This decision made the Bureau and the Department responsible for meeting water quality objectives in the Delta.

D-1594 expressly addresses water availability for appropriation (diversion) in the Bay-Delta Estuary's Central Valley watershed by subordinating junior appropriative water rights to adherence to Delta water quality objectives. D-1594 is cited by the State Water Board as the water right decision authority for including the Sacramento-San Joaquin Delta in the 1998 fully-appropriated streams water right order. This decision reaffirms the Board's reserved jurisdiction to revisit the season of diversion of water right permittees in the Bay-Delta Estuary watershed, and it establishes with standard permit Term 91 its authority to curtail diversions by post-1978 diverters so that storage releases by the Bureau and the Department can meet Delta water quality objectives.

In this decision, the Board states:

> The availability of water for appropriative water right permittees is affected by the quantity needed to satisfy holders of prior rights and the quantity necessary for protection of other beneficial uses. (State Water Resources Control Board 1983: 2)

In the process leading up to D-1594, the Board initiated a process to conduct a planning-level water availability analysis. Unfortunately, it abandoned that analysis:

> Staff had originally proposed a comprehensive analysis of water supply and demand which attempted to identify and quantify water usage by all diverters below the foothill reservoirs within the Delta watershed. [SWRCB Exhibit. 1, pp. 19-20] This approach was discontinued [apparently in April 1983, according to reporter's transcript dated April 11, 1983, p. 14, lines 16-20] due to the lack of adequate data for factors such as return flow, groundwater accretions, unmeasured tributary inflow, riparian use, appropriative use, and Delta consumptive use. (State Water Resources Control Board 1983: 9-10)

D-1594 states at least twice that application of Term 91 to post-1978 permittees is an "interim solution" or an "interim measure." Nearly 30 years later, the Board still employs Term 91's method of calculating water availability. D-1594 commits the Board to occasionally requiring the post-1978 permittees in the Delta's extensive watershed to curtail deliveries when flows are insufficient to meet Delta water quality objectives and protect the Delta's beneficial uses.

Our planning-level water availability analysis focuses on water rights claims compared to historical hydrology. As we earlier showed, it finds there are far more water right diversion claims than there are flows in the Bay-Delta Estuary's Central Valley watershed (including the Trinity River claims of the Bureau). Our water availability analysis incorporates Board-approved instream flow determination the Board approved as fully protective of public trust resources in the Bay-Delta Estuary and its watershed. Its results suggest that *making Delta water quality and flow objectives fully protective of public trust resources will require moving the priority date of Term 80 permittees far earlier than 1978 for determining when and for whom Term 91 diversion curtailments would occur*. This is necessary because the State Water Resources Control Board (2010) found that current Delta flow objectives on the mainstem and tributaries of the two basins, including the Vernalis Adaptive Management Plan on the San Joaquin River, are insufficiently protective of the Delta's fish and wildlife beneficial uses. (State Water Resources Control Board 2010: 9-10) Conversely, this means that Term 91 *currently* applies Delta water quality objectives that are well known to be ineffective at protecting public trust resources in the Delta.

C-WIN believes it will be necessary for the State Water Resources Control Board to revisit Term 91 and D-1594's method of estimating water availability in the Bay-Delta Estuary's Central Valley watershed when implementing new Delta inflow (instream flow) objectives for the Sacramento and San Joaquin River Basins and their major tributaries upstream of the Delta. For the same reason, the Board's 1998 water rights order must also be revisited to update and expand the seasons where

appropriations would be prohibited as a matter of protecting all beneficial uses in compliance with Water Code Section 1205 through 1207. The Board should include these actions in the Bay-Delta Plan's implementation program.

In sum: the Board has acknowledged that existing Delta water quality and flow objectives for the Bay-Delta Estuary are inadequate. (State Water Resources Control Board 2000: 5) However, the Board *assumes* these water quality and flow objectives when it enforces Term 91 on post-1978 water rights permittees. Improving these objectives will mean the Board must curtail diversions by water right permittees (also probably licensees) with priority dates *earlier* than August 16, 1978, in order for Board-required Delta water quality and flow objectives to perform their functions protecting Delta watershed public trust resources. As part of its Phase III process to implement the Bay-Delta Plan, the Board must take testimony on how to determine this earlier priority date.

In all types of hydrology and using the Sacramento River Basin flow determination of 75 percent of unimpaired flow from November through June, C-WIN's water availability analysis suggests that for the Sacramento River Basin above the Feather River confluence, and the Feather River basin itself, the earliest date for curtailment should be December 19, 1914. On the Yuba and the Bear Rivers, the date of curtailment could be somewhat later, ranging from 1924 on the Yuba to 1941 on the Bear. On the American River, the earliest date should coincide with the priority date of Placer County Water Agency's 1958 water rights.

In all types of hydrology and applying the San Joaquin River Basin flow determination of 60 percent of unimpaired flow from February through June, C-WIN's water availability analysis suggests that for the Stanislaus and Merced Rivers, the Term 91 curtailment date should be December 19, 1914. On the Tuolumne River, the Term 91 curtailment date should be 1871. On the upper San Joaquin River, our analysis suggests that Term 91 curtailment dates should be on or before the dates of the Bureau of Reclamation's permits for Friant Dam and Millerton Lake in 1916. (See Appendix D.1 for Water Availability Analysis model results.)

The Board has acknowledged that current Delta water quality and flow objectives do not protect Delta fish and wildlife beneficial uses adequately. The Board must decrease the seasons of diversion for the Delta and its major tributaries of the Sacramento and San Joaquin River Basin watersheds, because the Board is obligated under the Public Trust Doctrine to protect all beneficial uses in the Delta. To implement this obligation, the Board must also revisit its Fully-Appropriated Streams Declaration and push back the priority date used to conduct diversion curtailments under Term 91.

Court Adjudication. Still another path that may be used is that of adjudication by a court of competing water rights claims in a watershed. It may take years of painstaking testimony and argumentation by attorneys and (usually) engineers. But the present situation of extreme uncertainty and unreliability, clouded water titles, trespassing on the public trust, and related boundary disputes of many surface and groundwater water rights throughout the Bay-Delta Estuary's Central Valley watershed argues for its consideration.

In the 1930s and 1940s, staff within the Department of the Interior and the old State Water Rights Board advocated an adjudication of water rights prior to construction of the Central Valley Project. Both Governor Earl Warren and State Water Rights Board Chairman Henry Holsinger testified during the Clair Engle's Congressional hearings in 1951 that a complete adjudication of water rights on the Sacramento River should have occurred prior to the completion of the Central Valley Project. In fact, the Engle committee concluded that, "[t]hat for all practical purposes, the developed water supplies of the Sacramento River are overcommitted and oversubscribed." This was prior to approval and construction of the State Water Project. That project was predicated on obtaining some 5,000,000 acre- feet of water annually from north coastal streams (Figure 11). With the

exception of about 1 million acre-feet of Trinity River flows to the Central Valley Project service area, this "surplus" of surface water to the Delta system never arrived. Adjustments to the State Water Project should have been made earlier, but were not. The logical result is that the Delta's native aquatic ecosystems have collapsed.

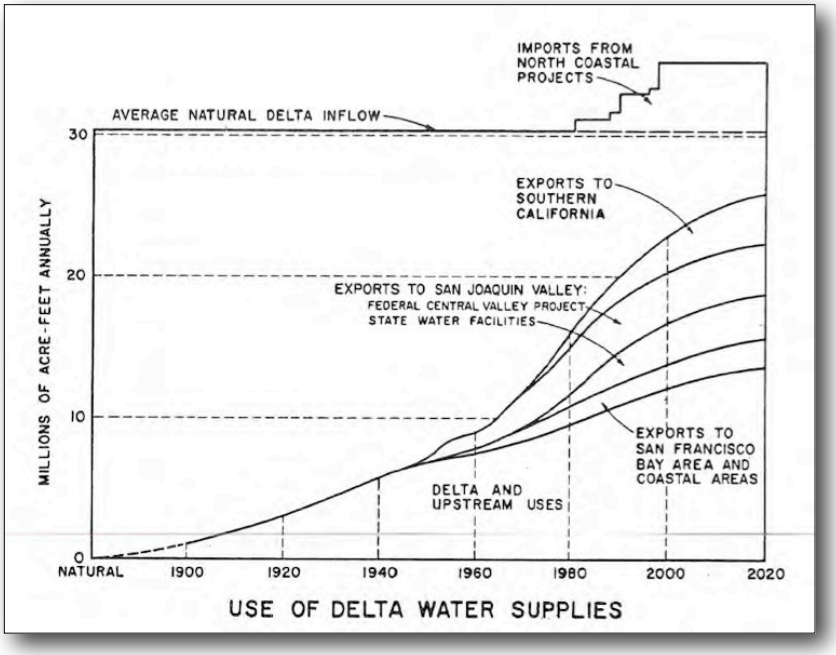

Figure 11
Source: California Department of Water Resources, 1960: 13.

A reliable source of surplus water for the State Water Project and the Central Valley Project eludes the Department and the Bureau, so far. Because surface water imports from north coast watersheds were precluded by wild and scenic river designations the Department and the Bureau have instead tried to establish a "water market" to transfer water from northern California across the Delta as an interim strategy for increasing water supplies in dry years for low-priority water service contractors south of the Delta. C-WIN, CSPA and AquAlliance see this as a grave threat to the regional aquifers of the Sacramento Valley from the Delta to Redding.

This threat is manifest in "groundwater substitution transfers." In such water transfers, surface water rights are transferred by "willing sellers" to the Department or the Bureau. The agencies facilitate the transportation of the water in the deal to the buyer south of the Delta using their export pumps near Tracy. To continue producing their crop however, the seller replaces or substitutes the surface water supply with water pumped from underground. The seller is thus able to achieve a net profit from the gross revenues from selling surface water rights, less the cost of pumping water from below ground, and still can sell a crop after harvest.

Such transactions however assume that groundwater may be treated simply as an individual's property under their land. Such a legal theory runs straight into the reality of groundwater in the Central Valley watershed being a regional commons, a shared resource, particularly among all individual landowners of the Sacramento Valley who overlie its extensive aquifers. One landowner or a set of landowners in one general location may cause a region-wide cone of depression by pumping a lot of groundwater to replace surface water they sold to someone south of the Delta. Such intensive pumping can damage the wells of neighbors near to and far from the scene of the original pumping. Many of the Valley's rivers are well known as "gaining" streams—that is, surface flows are actually enhanced upslope by accretions from groundwater sources. Too much groundwater pumping lower down in the aquifers for the "surplus" benefitting only the State Water Project and the Central Valley Project could drastically lower water tables upslope and reduce river flow permanently if allowed to become "the new normal." Potentially permanent injuries to many beneficial users of water in the Sacramento Valley would result.

A glimpse of this prospect occurred in 1994 when the Department sponsored a drought water bank program. The program resulted in damage to a municipal well and to individual wells in Durham and Cherokee areas of Butte County. More recently, the Department and the Bureau have since 2002 repeatedly sought "willing sellers" to offer surface water among the numerous public and private Sacramento Valley water right holders in Sacramento, Yolo, Sutter, Butte, Glenn, and Colusa counties. The State Water Resources Control Board in 1996 engaged in proceedings to determine the responsibility of Sacramento River Basin diverters to meet water quality standards in the Bay-Delta Estuary. The Board had completed phases 1 through 7 of the proceeding that led in 2000 to adoption of Water Rights Decision 1641 (D-1641). Phase 8 of that proceeding was to focus on the Sacramento River and its tributaries. In Phase 8, the Department of Water Resources and the Bureau of Reclamation, as operators of the state and federal export projects, claimed that certain water right holders in the Sacramento Valley must cease diversions or release water from storage to help meet water quality standards in the Delta. Sacramento Valley water users claimed that their water use has not contributed to any water quality problems in the delta, and, as senior water right holders and water users within the watershed and counties of origin, they are not responsible for meeting these standards. To avoid both litigation and independent regulatory action by the State Water Resources Control Board, water diverters throughout the Sacramento River Basin executed an agreement in April 2001. (Northern California Water Association, 2001) As a result of the Sacramento Valley Water Management Agreement, the Phase 8 process was dismissed by the State Water Resources Control Board. (State Water Resources Control Board 2001)

The Department and the Bureau have encouraged planning approaches to regional water management to facilitate water transfers, such as those in this partial list:

- The Department of Water Resources undertook a draft and final Program Environmental Impact Report in 1993 on a drought water bank, but to our knowledge has never certified this document.
- The Sacramento Valley Water Management Agreement, signed in 2002, but which ten years on still lacks a programmatic environmental review document. It expired December 31, 2010.
- The 2000 Governor's Advisory Drought Planning Panel Report, Critical Water Shortage Contingency Plan, which also promised a program environmental document on a drought response water transfer program, but was never undertaken.
- The Sacramento Valley Integrated Regional Water Management Plan of 2006, overseen by a joint powers authority of numerous water agencies in the Valley.
- DWR's last Drought Water Bank in 2009 sought authorization for over 100,000 acre-feet of temporary transfers of water, though only 16,000 acre-feet were eventually supplied to Southern California buyers.
- The Northern Sacramento Valley Integrated Regional Water Management Plan, now in development.
- The Delta Stewardship Council's Delta Plan, whose planning scope includes the entire Sacramento Valley and assumes a groundwater surplus is necessary for meeting Delta export water demands. The Council has also expressed support for water transfers using groundwater substitution.
- The Bay Delta Conservation Plan, which would provide coverage from a 50-year habitat conservation plan for Governor Brown's recently announced Peripheral Tunnels Project. This project has no identified water source, other than acknowledgement by the Bureau of Reclamation that it would reroute existing surface flows around the Delta from the Sacramento River Basin. (Vlamis et al 2012)

C-WIN, CSPA, AquAlliance, and other knowledgeable experts are concerned that long term impacts of regional use of groundwater to substitute for transferred surface supplies will accelerate the depletion of the Valley's groundwater supplies. There are significant gaps in scientists' grasp of how

the aquifer system recharges; how surface flows and groundwater systems interact in the Valley's creeks and rivers; how supplies contained within upper and lower aquifers interact; how the aquifers respond in the long-term to increasingly intense demands on them, even during wetter years. And the regional effect of declines in groundwater levels on river and creek flows and riparian corridor species and wetland ecosystems has never been adequately explored. These are beneficial uses upstream along the major tributaries of the Sacramento River Basin that must also be considered part of the public trust responsibilities of the State Water Resources Control Board in its Bay-Delta Plan. (Vlamis et al 2012)

State and federal water planners assume that surface and groundwater flows will always be there to support this hoped-for surplus. Based on that assumption they continue each winter and spring to plan the next water transfer program that relies on and encourages groundwater substitution transfers. This assumption has been built into the Department and the Bureau's chief water supply and operations planning tool, CalSIM II. When surface water supplies for riparian and appropriative water right holders are exhausted in model runs through CalSIM II, the model's automatic response is to add pumped groundwater to make up for any deficit to water demands in the model. (Draper and Bourez 2004: slide 20; Close et al 2003: 26-27; California Department of Water Resources and US Bureau of Reclamation 2004: Appendix A) Sacramento Valley groundwater activity is explicitly modeled to include "minimum groundwater pumping" for those land uses that rely exclusively on groundwater in the Valley. (California Department of Water Resources and US Bureau of Reclamation et al 2004: Appendix A) San Joaquin Valley groundwater is not modeled. (Close et al 2003) This can result in low estimates of salinity reaching the south Delta. (San Joaquin Valley CalSIM II External Review 2006: 45) Upper bounds on potential pumping from aquifers in the Sacramento Valley are undefined. According to Close et al:

> This does not represent reality, since, if CalSIM II is used for statewide planning, it would allow pumping of vast quantities of water for export to southern parts of the state, something which agency staff [i.e. California Bay-Delta Authority Science Program and the Association of Bay Area Governments] claim is unrealistic. Realistic upper bounds to pumping from any of the aquifers represented in the model need to be developed and implemented. (Close et al 2003: 26-27)

The Department and the Bureau responded that CalSIM II does explicitly model the "impact on groundwater storage of each sub-basin." They state that CalSIM II runs that result in groundwater pumping over and above the natural and artificial recharge and which causes depletion of the basin will cause CalSIM II to no longer run. They also state, however, that CalSIM II "does not include local ground water inventories" but instead relies on a historically-modeled calibration of approximated inventories. They state further that "no groundwater is exported from the overlying watershed (except in the form of surface water return flow or tailwater that results from irrigation using groundwater)." (California Department of Water Resources and US Bureau of Reclamation 2004: A-1) Thus, CalSIM II assumes that groundwater "backstops"surface water rights holders and their needs for supplies, when in reality groundwater now backstops river flows (and all associated beneficial uses associated with those flows). It is small comfort that CalSIM II ceases to work when a basin is depleted from the program's operations; more to the point, it fails to assume, let alone build in a rational groundwater management strategy of sustained yield.

CalSIM II's reliance on groundwater to meet overall water demand when surface supplies must not be the de facto water supply development strategy for the state of California when supplies run low. When supplies run low—as they are forecasted to as climate change affects the American West—the state and its responsible and lead agencies must increase other means of stretching water supplies. This can be done through water recycling, reuse, conservation, and a range of urban, industrial, and agricultural efficiency measures.

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