

The Monterey Plus Amendments to State Contracts: “Paper Water” and the Kern Water Bank Giveaway A C-WIN Policy Brief

*It is the policy
of the California Water Impact Network to:*

- **Overturn the Monterey Plus amendments to the State Water Project contracts**
- **Return the state mandated “Urban Preference”**
- **Remove “Paper Water” from State Water Project contracts**
- **Stop the abusive pumping of water that is not surplus**
- **Return the Kern Water Bank to public control**

Changes secretly made to the State Water Project by water contractors and the California Department of Water Resources in the 1990s, known as the Monterey Plus Amendments, caused ecological destruction in the Delta and made water supplies for State Water Project customers much more expensive and less reliable.

And those secret changes raised water rates for urban customers of the State Water Project, especially during drought years, as California had from 2007 through 2009.

By overturning the Monterey Plus Amendments to the State Water Project contracts, California can restore and recover the Delta and keep urban public water supplies more affordable during droughts.

After 17 years, few Californians know about the Monterey Plus Amendments. C-WIN believes that one of the best ways to solve the state’s water problems is to overturn these amendments. Overturning them is vital to the Delta’s future and to the pocketbooks of ratepayers throughout California. This action would reduce pressure on the Delta (which recent state legislation requires), restore a legal preference for supplying urban areas with drought-period water supplies, return an asset to the state that it originally purchased for drought security, and increase the real wet water that urban contractors could count on from the State Water Project contracts.

The State Water Project

The State Water Project (SWP) stores, transports, and delivers water to benefit the 22 million urban water users of southern California as well as Kern County agribusinesses. To help get the project approved in 1960, the State of California promised that urban customers of the Project would get priority over irrigated agribusiness in times of drought as state law requires.

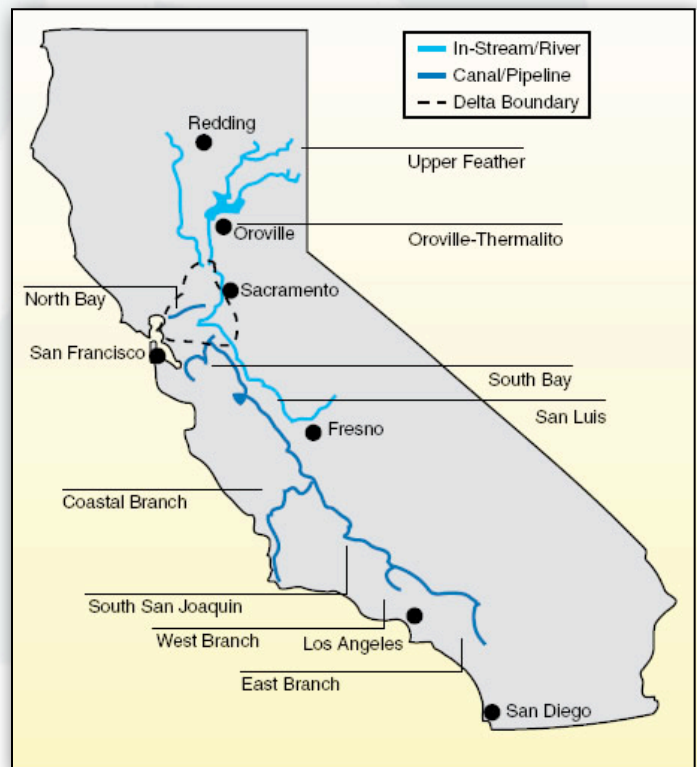
Drought from 1987 to 1992 was so severe that SWP deliveries to agricultural contracts—consistent with the principles in place in the original SWP contracts—were zero, while their share of the SWP construction costs continued to be due. This was foreseen by the contractors when the contracts were originally written in 1960

and is known as the “**Urban Preference.**” The urban preference was set in place because in times of drought, urban water users need to get the first call on the water available; you can fallow crops but you can’t fallow people.

Water projects are well known for subsidizing agribusiness. And subsidies are part of the California State Water Project, with a twist: In December 1994, a secret deal was struck in Monterey between five State Water Project contractors and the California Department of Water Resources (DWR). Water for cities during drought was traded away to corporate agribusiness. The result of their meeting was the [Monterey Amendments to the State Water Project contracts](#).

The Monterey Amendments removed several key safeguards from the State Water Project contracts that deregulated and privatized key parts of the Project.

This backroom deal was challenged in court, and Carolee Krieger, now C-WIN’s President and Executive Director, was among those who worked on the case in 1995. The suits C-WIN filed in 2010 (online at <http://www.c-win.org/c-win-press-rooms.html>)



The State Water Project, courtesy of California Legislative Analyst.

C-WIN Policy Brief: Removing “Paper Water” from the State Water Project

continue the effort to reinstate important ratepayer protections and taxpayer investments in the State Water Project that were gutted by the Monterey Plus Amendments.

Removing Safeguards

The Monterey Plus Amendments deeded part of the State Water Project known as the Kern Water Bank to private agribusiness interests in Kern County, and removed protections for all urban ratepayers supplied by the State Water Project. Another change repealed the “Urban Preference” which prioritized water deliveries to the State Water Project’s municipal and domestic customers during drought periods. This change worsens water shortages for cities, and local water purveyors raise rates to buy water in California’s water market. Meanwhile as rates rise, consumers use less, so water agencies try to make up for revenues lost because of curtailed deliveries.

Another Monterey Plus change increased availability of “surplus water” in a system where real supplies are vastly over-committed; there is no “surplus water.” The State Water Project and the Kern Water Bank were developed by the state, at ratepayer expense, to benefit all of California—our cities, our farms, and our fish. But because of the Monterey Plus negotiations the Kern Water Bank was given to private corporate interests who now use it for their own profits. These for-profit corporate agriculturalists buy taxpayer water, misnamed “surplus,” for just the cost of pumping it, stockpile it in their privatized Kern Water Bank, and then resell it to us for our taps at exorbitant rates or to developers for speculative projects. All in the name of private profit.

The Monterey Plus Amendments must be overturned to stop these egregious practices. And C-WIN is asking the courts right now to do that. In the meantime, the state and its contractors are allowed to operate the project according to the Amendments. **This is like taxation without representation—there was no statewide or legislative vote to repeal the urban preference during drought, but about two-thirds of all Californians pay higher rates for water without having consented!** C-WIN estimates that in the last three-year drought (2007 through 2009) between 22 and 25 million California residents paid significantly higher water bills because of this stealth change to state water policy, about 3.3 million of them in the Bay Area.

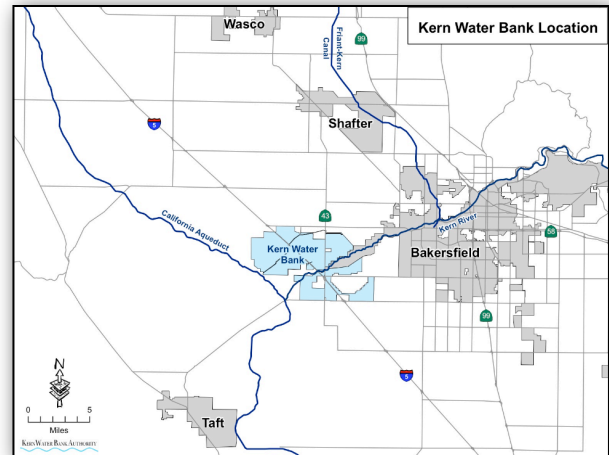
These four state water contract amendments changed the course of California water history without legislative or voter approval:

1. Monterey Plus eliminated Article 18(b), The “Paper Water” safeguard. We need it back!

The State Water Project was originally intended by state law to have the capacity to deliver as much as 4.23 million acre-feet of water in a year. If it turned out to be impossible to build all of its facilities, however, Article 18(b) was put in the original contracts to make sure that the Project would deliver what it could and the total promised amount would be reduced to reflect that reality, and no more. In fact, not all State Water Project facilities were built because then-[Governor Ronald Reagan signed the state’s Wild and Scenic Rivers Act](#), which removed the Eel, Klamath, Smith, Salmon, Scott and Van Duzen rivers as sources for the State Water Project. As a result, the average actually delivered by the Project during the 1990s was just 1.86 million acre-feet per year, just 44 percent of the Project’s planned deliveries. Yet state agribusiness water contractors and speculative real estate developers continue to claim that the State Water Project’s originally planned deliveries represent real supplies on which future crops, and new subdivisions and towns can plan; even when they know it is impossible.

The difference between the 4.23 MAFY and the actual delivered average of 1.86 MAFY is “[Paper Water](#)” in the State Water Project. The Third District Court of Appeal, in its 2000 decision invalidating the first Monterey Amendments environmental report, called this “Paper Water,” the reality of which is little more than “a wish and a prayer.” Moreover, dry or drought years typically occur in California three out of every ten years.

Eliminating Article 18(b) created an instant demand for subprime water supplies that are unreliable for permanent crops and urban development. Developers in southern California did not want the State Water Project to reduce its supposed 4.23 MAFY delivery amount because they would not be able to show local planners there was enough water for their developments. This is



Kern Water Bank located near Bakersfield. Courtesy of Kern Water Bank Authority.

still one of the most dangerous problems with “[Paper Water](#)” in California today, and has been controversial in many northern and southern California suburban development proposals from Dougherty Valley in Alameda County to Tejon Ranch in Kern County. It is irresponsible to build houses and new towns based on water supplies that don’t exist.

Article 18(b) was eliminated in the Monterey negotiations with virtually no environmental review of the consequences of creating a market for subprime water.

2. Monterey Plus eliminated Article 18(a), The “Urban Preference”. We need it back!

Monterey Plus removed the “**Urban Preference**,” the safeguard put in the contract in 1960 to make sure that agricultural allocations would be cut first in times of prolonged dry weather, which occur in over one-third of years in California. The California Water Code requires this, then and now.

3. Kern Water Bank Given Away by the State.

Water to supply the urban preference was to be stored in the **Kern Water Bank**, a state-owned 20,000-acre underground reservoir capable of holding a million acre-feet of water. As a state asset, the water bank was planned by DWR in the 1960s to help firm up drought year supplies for urban state water contractors, especially for the 22 million urban water users south of the Delta. But as part of the Monterey Agreement, the Department of Water Resources turned over the [Kern Water Bank](#) to the Kern County Water Agency. In exchange, Kern agreed to retire a mere 45,000 acre-feet of water allocation from its State Water Project contract total of 1,153,400 acre-feet of water allocation. This is water that Kern never had and never would receive, hardly a fair trade for a million acre-foot reservoir.

C-WIN Policy Brief: Ending Subprime Water Supplies

To make matters worse, the day after DWR turned over the water bank to the Kern County Water Agency, the Agency then gave it to the Kern Water Bank Authority. Under state law, this joint powers authority is allowed to have private corporations participate in ownership of public assets. This authority is controlled by [Paramount Farms, a subsidiary of Roll Corporation, owned by Stewart and Lynda Resnick](#), a private, for-profit corporation.

Privatization of the Kern Water Bank allowed its corporate owners to buy cheap so-called “surplus” water (Article 21 water, see below) from the Delta for just the cost of pumping it. The water is then stored underground in their “Bank.” When inevitable dry years come, the corporate Bank owners then sell it for large profits to the government and to cities who must raise their local rates to cover the high cost of this water. Since taking over the water bank, Paramount Farming and Roll Corporation have skimmed millions of dollars in profits off of millions of water rate-payers throughout California.

4. Article 21, So-called “Surplus Water”

In the early years of the State Water Project, when not all contractors were using their full contract allocations, there was “surplus water” available in the State Water Project system. Article 21 of the contracts made that water available to other contractors requesting it. Today, however, all Table A Allocations are fully requested, and because the State Water Project was never completed, its facilities can never deliver the contract amounts that were originally promised. From the standpoint of the Delta on ecological life-support, there is no longer any surplus water. Yet, there are more demands on the State Water Project than the Project can fulfill in any year.

The Monterey Plus Amendments changed the way Article 21 water could be distributed within the State Water Project. According to the Amendments, a surplus could be declared even if the total contractual amounts had not been delivered; this is contrary to the original contracts, which required all of the contract amounts to be delivered before any “surplus” was declared. And under the Amendments, this so-called surplus could be used by speculative urban developers; also contrary to the original contracts, which clearly stated that this “surplus” water could not be used for anything permanent like houses or fruit trees. Permanent tree crops like almonds and pomegranates would become vulnerable to interruptible supplies. Contractors still are not supposed to count on these supplies year-to-year, but the privately-controlled Kern Water Bank hoards these itinerant supplies and re-sells them as a “dependable” year-round source for new suburban development. This is a very dangerous way to operate and has already caused serious problems for surrounding land owners.

Together, the Metropolitan Water District of Southern California (50 percent) and the Kern County Water Agency (25 percent) account for 75 percent of the annual yield of the State Water Project. In 2006, Metropolitan and Kern received nearly 490,000 acre-feet of Article 21 water, nearly 81 percent of total Article 21 deliveries that year. The Monterey Plus Amendments enable state water contractors—particularly those in Kern County and those under the umbrella of the Metropolitan Water District of Southern California—to make much greater use of this so called “surplus” water. This had disastrous consequences for land use planning and for Central Valley migratory sport and commercial fisheries. The *original* Article 21(g)(1) of the original State Water Project contracts stated that deliveries of any surplus water would be refused if the delivery “would tend to encourage the development of an economy...which would be dependent upon” the surplus

water. ***Egregiously, the Monterey Amendment eliminated this provision, exposing many communities to the risk of “subprime” water supplies.***

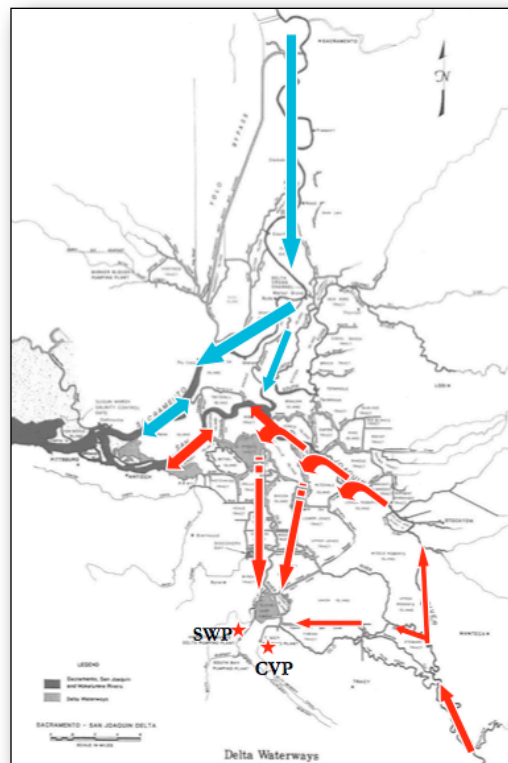
State Water Project contractors obtain delivery of “surplus water” for just the cost of pumping it within the State Water Project system. The private corporate interests in the Kern Water Bank Authority, including Stewart Resnick, were allowed to purchase this cheap Article 21 water too...for just the cost of pumping it. They bought it and started selling the water back—at a profit—to the State for the Environmental Water Account ([described in detail by journalist Mike Taugher in his series on water sales for the Contra Costa Times in May 2009.](#)) They declared huge quantities of the stockpiled water as a “supply” in order to satisfy water and environmental regulations and obtain development permits as was done recently at Tejon Mountain Village in Kern County.

Exporting the Article 21 water from the Delta has devastating fishery impacts, particularly on migratory salmon and steelhead trout. The California Department of Water Resources and the State Water Project contractors export Article 21 water from the Delta in coordination with reservoir releases between November and April. This did not occur before the Monterey changes to the State Water Project. This is the same time of year when adult salmon and steelhead return from the ocean to spawn in cold Central Valley streams.

Unfortunately, heavy export pumping from 2000 through 2006 of this Article 21 water helped cause the closure of the commercial salmon fisheries in 2007, 2008, and 2009. Since that time, restrictions imposed by federal judge Oliver Wanger and the new biological opinions covering Delta smelt and the salmon and steelhead fisheries sharply reduced these wintertime exports under the federal Endangered Species Act. Nonetheless, efforts continue to undermine the ESA restrictions on Delta exports.

Ending “Paper Water”

C-WIN has filed suit in California courts to overturn the Monterey Plus contract



Flows through the Delta: Blue arrows show Sacramento River flows; red arrows show San Joaquin River flows. Stars are state (SWP) and federal (CVP) water project pumping plants. Two-way arrows show tidal influence. Courtesy of National Marine Fisheries Service.

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	J	F	M	A	M	J	J	A	S	O	N	D
Adult migration												
Spawning												
Incubation and emergence												
Rearing												
Juvenile emigration												

Central Valley steelhead trout are present in the Delta from November through April, when Article 21 (so-called “surplus”) water has historically been pumped. Courtesy of California Department of Fish and Game, Bulletin 179, Volume 1.

amendments. But the State Water Resources Control Board, the state’s guardian of the Public Trust Doctrine and the state’s water rights system, also has a role to play in ending the Project’s “Paper Water.” The Board issues permits to applicants who must diligently build and operate projects. After projects are operated for a few years, they are then licensed to use a certain amount of water based on previous actual water use.

The State Water Project permits contain 7.6 million acre-feet of claims to use water consumptively. The Project’s contracts amount

to 4.23 million acre-feet, while its actual use of water historically involves annual average deliveries of just over 2 million acre-feet in the last decade. Its last major facility was completed in the 1990s. The State Water Resources Control Board is long overdue to license the Project’s permits.

In 2010, the Department of Water Resources asked the State Water Resources Control Board for a five-year time extension for its State Water Project permits until the end of 2014. [C-WIN protested this request](#) because the Department does foresee no changes either to Project deliveries or facilities during that time. For water rights purposes, the Project has no important new construction it is trying to complete. The Department simply wants to delay a Board decision hoping that a Delta canal system can be included under existing permits. Such a Delta canal has no application or permit at this time. Moreover, the Department will likely need even more time should a canal decision be made by 2014. The Board usually regards delays like this as grounds for denying a time extension, after which the Board proceeds to license a project. Actual water use of the Project means there is no additional water for the Peripheral Canal. The Board can act to eliminate “Paper Water” from the State Water Project water rights by licensing Project permits. The fate of “Paper Water” from the State Water Project hangs in the balance.



SOLUTIONS:

OVERTURN THE MONTEREY PLUS AMENDMENTS TO THE STATE WATER PROJECT CONTRACTS:

- **“Paper Water”**—water promised that the State Water Project cannot deliver—must be eliminated. New contract terms must be based on real water supplies. We cannot plan for California’s future based on water that exists nowhere but on paper as a “wish and a prayer.”
- The **“Urban Preference”** must be reinstated in the State Water Project contracts and here is why. The “Urban Preference” means that urban water users have priority over agriculture based on California Water Code law that during shortages, people take precedence over agriculture. This was arbitrarily removed from the State Water Project contracts by the Monterey Plus Amendments and needs to be reinstated. The “Urban Preference” combined with getting the Kern Water Bank back as a public asset, will assure that there will be less pressure on the Delta for water as the 2009 legislation requires.
- The **Kern Water Bank** is south of the Delta and can store the “Urban Preference” south of the Delta for times of drought for the 22 million urban users south of the Delta. Urban ratepayers need the Kern Water Bank back as a public asset.
- Delta pumping to fulfill **Article 21** (“surplus”) water must stop. There is no surplus water flowing through the Delta, period. Delta farmers with senior water rights, migratory fish, and the Delta ecosystem need that water. The current abusive practice of over-pumping Article 21 water must stop.
- The **State Water Resources Control Board** should license the permits for all existing State Water Project facilities immediately based on the yields they have delivered. Yields are all well below the Project’s planned capacity. If the Department of Water Resources wants new facilities, like a Peripheral Canal or Tunnel, it should have to file new applications and obtain new permits from the State Board. Licensing SWP permits would redefine what the Project is licensed to divert and store, and would thus eliminate Paper Water.

TO LEARN MORE:

- Visit www.c-win.org at its Press Rooms and its Rights and Wrongs menus.
- Read about the history of Monterey amendments at <http://www.spillwaynews.net/BackIssues/index.html>
- View C-WIN’s [State Water Project permits protest](#).

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