

### **3. HISTORY AND BACKGROUND**

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### 3.1 BACKGROUND AND OVERVIEW

As described in Chapter 2, the multi-purpose SWP facilities deliver water supply under long-term water supply contracts to 29 public water agencies throughout the state, provide flood control, generate power, provide recreational opportunities, and enhance habitat for fish and wildlife. The original 1960's plan for the SWP was to build storage dams and reservoirs upstream of the Sacramento-San Joaquin Delta that, in conjunction with facilities to transport water across the Delta, could develop sufficient water to deliver a "minimum SWP yield" to all contractors, year-in and year-out. Only during certain few and infrequent critically dry years did the original plan expect deliveries to be less than the combined minimum SWP yield of approximately 4.2 million AF, in which case agricultural contractors would see some supply reductions. During the 1950's and 1960's when the SWP was in the formulation stage, the California Department of Water Resources (Department) conducted operations studies to determine drought-period supplies of SWP facilities, utilizing at that time the historical water supply to the Delta for the critical drought period of record, 1928-1934. By projecting future watershed uses and utilizing maximum Table A amounts, the Department determined that reductions to agricultural deliveries would aggregate 100 percent over a seven-year period.

As contractor demand increased, the expectation was that additional facilities would be built to meet the projected demand. SWP development unfolded substantially as planned through the 1960's and early 1970's. Major components of the SWP were built and put into service and the contractors took increasing quantities of water.

Circumstances began to change in the 1970's. Various concerns, including environmental, political and financial, prevented the development of some controversial components of the SWP, including the original plan for additional dams and reservoirs on north coast streams, and a Delta conveyance facility which included a canal (known as the Peripheral Canal) that would convey water around the eastern perimeter of the Sacramento-San Joaquin River Delta to the Banks Pumping Plant. In addition, more stringent environmental standards in the Delta to address the federal Endangered Species Act (FESA) listing of Delta smelt and winter-run Chinook salmon as well as more stringent water quality standards, limited the amount of water that could be diverted at the Banks Pumping Plant and reduced the capability to deliver the maximum water supply for which the SWP conveyance facilities had been designed and constructed to deliver.

Since the mid-1970s, the Department has added or modified conveyance facilities to the SWP (e.g. the Coastal Branch Aqueduct and the California Aqueduct East Branch enlargement and extension), and increased Banks Pumping Plant capacity, but otherwise the SWP's facilities have remained essentially unchanged.

Through the mid-1980's, declining prices for agricultural commodities and increasing costs, including water costs, made farming uneconomical in parts of the SWP service area. Two member units of the KCWA, the largest of the SWP's agricultural contractors, indicated that they might not be able to pay their shares of KCWA's SWP charges after 1986. Some member units of KCWA wanted to permanently reduce their Table A amounts to decrease their payment

obligations. The Department and the contractors discussed possible solutions including exchanges of Table A amounts with other agricultural users within the KCWA or permanent transfers to other SWP contractors. Several M&I contractors including Desert WA, Coachella Valley WD, and Castaic Lake WA expressed an interest in acquiring additional Table A amounts. A hearing before the California Water Commission was held in 1987 to discuss Table A transfers, but no action was taken.

Through the 1980's, with rising contractor demands and increased environmental needs, it became more difficult for the SWP to deliver the maximum contract water supplies. In addition, the drought of 1987–1992 sharply reduced SWP water supplies. During 1987, 1988, and 1989, supplies remained low through the early part of the year, and the Department initially applied the shortage provision (Article 18(a)) of the water supply contracts and imposed allocation reductions on deliveries for agricultural use. However, in each of these years, the water supply situation improved and the Department was eventually able to meet all contractors' requests, due to a combination of spring storms, reductions by some contractors of their requests, and the Department's purchase of water from Yuba County WA to supplement SWP water supplies. By November 12, 1987, the Department recognized the need for discussion with the contractors to address the reduction of water supplies and issued Water Service Contractors Council Memorandum No. 1878. In this memorandum, the Department compared the merits of four interpretations to the allocation procedure and then met with the SWP contractors to try to resolve the issue.

In 1990, SWP water supplies in the early part of the year were inadequate to meet contractors' requests and remained that way throughout the year. The Department imposed reductions in contractors' allocations in accordance with the provisions of Article 18(a), reducing allocations to agricultural contractors by 50 percent, before the M&I contractors' deliveries were reduced. In 1991, SWP supplies were extremely low and additional reductions beyond the initial cuts for agricultural contractors were required, with the agricultural contractors allocated no water from the SWP and the M&I contractors allocated 30 percent of their requests. Contractors are contractually required to make payments for water based on annual amounts listed in Table A of their water supply contracts, whether or not they receive water, so agricultural contractors had to make their full SWP payments during the drought even though they received reduced or no SWP water supply. Due to Department water purchases and programs, no SWP contractor went without any water deliveries from the SWP (see Table 2-3). In 1992 the Department reduced allocations to both agricultural and M&I contractors to 45 percent of their requests.

Additionally during this time frame, M&I contractors also recognized that the SWP supplies were not as dependable from year to year as they had expected, and began developing new local water supplies and projects that could more effectively use available SWP water when it was abundant, primarily in wet periods, to place in local groundwater storage. However, opportunities for such projects at that time were beginning to reach their limits within each contractor's service area and M&I contractors were seeking opportunities to store SWP water outside their service area.

The limited supplies available during the drought highlighted the differences between the views of the Department, M&I contractors, and agricultural contractors on interpretation and application of SWP contract shortage provisions. Contractors who suffered large reductions in their water deliveries for agricultural use felt that they were receiving an unfair share of the drought-related allocation reductions partly because all planned components of the SWP had not been completed. Their argument was that if the Department had built all originally planned components of the SWP, the minimum yield would have been greater, and their share of

drought-related allocation reductions would be less. In addition, M&I contractors disagreed with the Department's approach to Article 18(a)'s shortage allocations which allocated supply shortages on the basis of contractors' requests (see Chapter 2). The M&I contractors believed that the State should allocate supplies on the basis of Table A amounts; they argued that their interpretation was consistent with the language of the contract. They also felt that since SWP supply facility costs are allocated among contractors on the basis of Table A amounts, the Department should allocate their fair share of any supplies from those facilities based on Table A amounts.

Some agricultural contractors argued that the Department's invocation of Article 18(b) would protect their interests (see Chapter 2 for a description of Article 18(b)). They insisted that the Department must invoke Article 18(b) to eliminate the SWP allocation disparities or face the possibility of judicially mandated Article 18(b) invocation. The M&I contractors argued that Article 18(b) was only applicable after all of the originally planned SWP facilities were built and the SWP could still not achieve its planned minimum yield. In addition, M&I contractors emphasized that invocation of Article 18(b) was unnecessary due to CALFED's likely future supply improvements and other actions that would increase minimum SWP yield. Both the agricultural and M&I contractors threatened lawsuits over this issue.

In order to resolve these disagreements, the Department and representatives of both the agricultural and the M&I contractors, including the Central Coast WA (a joint powers authority representing two contractors, San Luis Obispo County FC&WCD and Santa Barbara County FC&WCD), began mediated negotiations. Soon after negotiations began, the parties determined that the water allocation problem could not be addressed as a single issue. The parties adopted a broader approach to address water allocation and a number of other interrelated issues pertaining to the management and financing of the SWP. The broader issues that the negotiators addressed included development of measures to allow the contractors to more effectively manage the more limited SWP water supplies anticipated to be available to them in the future, development and use of the Kern Water Bank and issues pertaining to restructuring rates.

In 1994, the Department and SWP contractor representatives agreed to a set of 14 principles to modify the long-term water supply contracts. The principles became known as the Monterey Agreement because the final negotiations occurred in Monterey, and were released to the public on December 16, 1994. The principles fell into three general categories that matched the following goals of the negotiations:

**Goal 1- Increase reliability of existing water supplies.** The agreement called for the Department to adopt new rules to allocate water and allow contractors to turn back allocated water into an annual pool for purchase by other SWP contractors.

**Goal 2 - Provide stronger financial management.** The agreement satisfied this goal by creating a general operating fund-consistent with utility practices-and, after SWP repayment of the California Water Fund, adjusting contractor billings to eliminate certain excess collections of revenues. The adjusted contractor billings would be accomplished through rate reductions to M&I contractors and would allow creation of a trust fund for agricultural contractors to stabilize payments in water-short years.

**Goal 3 - Increase water management flexibility, providing more tools to local water agencies to maximize existing facilities and supplies.** To accomplish this goal, the Department would:

- transfer control of the Kern Fan Element property to agricultural contractors,
- provide for permanent sales of Table A amounts to M&I contractors,
- provide more flexibility in using certain reservoirs for local use,
- implement a simpler program for interruptible water supplies,
- provide new administrative rules for transportation of non-SWP water to contractors, and
- provide rules for storing water outside a contractor's service area.

CEQA requires that lead agencies disclose the potential environmental impacts of a proposed project to decision-makers before approving a project. The Department and the SWP contractors who participated in the Monterey negotiations determined that implementation of the Monterey Agreement could potentially cause significant environmental impacts, and therefore, the proposed project should be analyzed in an EIR. The Central Coast WA (CCWA) served as the Lead Agency for CEQA compliance purposes. A program EIR was completed and certified by the CCWA in October of 1995. Following certification of the EIR in 1995, the Department and the contractors incorporated most of the principles into a contract amendment named the Monterey Amendment. All SWP contractors except Plumas County FC&WCD and the Empire West Side ID signed the Monterey Amendment. These two contractors continue to receive SWP water from the Department in accordance with the SWP contracts in effect before the Monterey Amendment.

After completion and certification of the EIR, the Planning and Conservation League (PCL) filed a lawsuit challenging the adequacy of the EIR. It also argued that the Department should be Lead Agency for the preparation and certification of the EIR. The Citizen's Planning Association of Santa Barbara and Plumas County FC&WCD later joined the action as plaintiffs. The trial court ruled that the CCWA improperly served as the Lead Agency, but that the EIR was adequate and the CEQA violation was not prejudicial.

The plaintiffs appealed to the California State Court of Appeal. In September 2000, the court ruled that the Department should have served as Lead Agency and that the EIR was inadequate because it failed to analyze invocation of Article 18(b) of the then-existing SWP contracts as a no-project alternative in *Planning and Conservation League v. Department of Water Resources (2000) 83 Cal.App.4<sup>th</sup> 892 (PCL v DWR)*. Having ordered the Department to prepare a new EIR, the court found it unnecessary to adjudicate the plaintiffs' other CEQA objections to the EIR. The Court of Appeal remanded the case to the trial court, ordering it to issue a writ of mandate vacating the certification of the 1995 EIR and to retain jurisdiction over the action until the Department, as the CEQA Lead Agency, certifies an EIR in accordance with CEQA standards and procedures, and the Superior Court determines that the EIR meets the substantive requirements of CEQA.

Following the PCL v DWR ruling, the Department, the SWP contractors, and the plaintiffs engaged in settlement negotiations. The parties executed a Settlement Agreement in May 2003 (see Appendix D).

The Settlement Agreement set forth a process for including the plaintiffs and contractors in the development of the new EIR and set forth some specific items that should be included in the content of the new EIR. It also established a process for mediation of CEQA issues raised by either the plaintiffs or contractors and limited the issues that plaintiffs could appeal based on the mediation. The Settlement Agreement also dealt with a number of other issues discussed below.

Environmental documentation had been prepared on a number of Table A transfers before PCL v. DWR determined that the Monterey Agreement EIR was inadequate and required decertification of the EIR. This environmental documentation for the Table A transfers relied upon the Monterey Agreement EIR. There were no challenges within the statutory time period to all of the transfers except a transfer to Castaic Lake WA. At the time of the Settlement Agreement negotiations, the Castaic Lake WA transfer was the subject of litigation in the Los Angeles County Superior Court pending a remand from the District Court of Appeal.<sup>1</sup> The plaintiffs and the contractors had differing opinions on whether this transfer was valid or final.

The Department transferred ownership of the Kern Fan Element property to the KCWA as part of the Monterey Amendment. In 1995, Dudley Ridge WD, KCWA on behalf of Improvement District No. 4, Semitropic WSD, Tejon-Castac WD, Westside Mutual Water Company, and Wheeler Ridge-Maricopa WSD joined to form the Kern Water Bank Authority (KWBA). Subsequently, the KCWA transferred ownership of the property to the KWBA. Plaintiffs were concerned that there might be environmental impacts caused by the transfer of the Kern Fan Element property that had not been identified. They were also concerned that the Kern Fan Element lands could be used or transferred for purposes other than a water bank and wanted to place restrictions on use or transfer of these lands. The contractors wanted assurance that the effectiveness or validity of the Kern Fan Element property transfer would not be challenged.

Plumas County argued that the county's share of the benefits of the SWP was disproportionate with its monetary and environmental costs. It argued that water supplied to Plumas and its shortages should be based on water supply from Lake Davis. It also argued that watershed restoration projects could indirectly result in benefits to the SWP water supply.

Plaintiffs wanted the Department to formalize its process for reviewing transfers of Table A amounts in order to assist the contractors in developing transfer proposals and the public in participating in the review of such transfers. They wanted to make sure that such reviews would include consideration of environmental impacts in the service areas of the seller and buyer, on the SWP and on the Delta and areas of origin. They also wanted to provide for public participation in SWP-wide amendments and contract amendments to transfer entitlements between SWP contractors.

Plaintiffs argued that the use of the term "entitlements" in the SWP contracts was misleading because it implied that the SWP could deliver its full minimum yield. They argued this could lead cities and counties that obtained water from the SWP to overestimate the amount of water available to support urban growth. The plaintiffs' were also concerned that "entitlement" would be misinterpreted to mean that the SWP could and was legally required to deliver full Table A amounts. They also wanted improved dissemination of information on the SWP's delivery reliability.

### ENDNOTES

1. Since that time, CLWA has prepared and certified a new EIR on its transfer of 41,000 AF of Table A amount, which became the subject of new litigation brought by PCL and the California Water Impact Network (CWIN) in Los Angeles County Superior Court.