



January 15, 2025

Sent via electronic mail to edcwa@edcgov.us

Subject: **EDWRP DEIR Comments**

El Dorado County Water Agency
1107 Investment Blvd, Suite 240
El Dorado Hills, California 95762

Re: DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE EL DORADO WATER RELIABILITY PROJECT

This letter is submitted as the comments of Friends of the River, California Sportfishing Protection Alliance, Sierra Club Mother Lode Chapter, American River Recreation Association, American River Outfitters Association, and American Whitewater, California Outdoors and Hilde Schweitzer regarding the El Dorado Water Reliability Project Draft Environmental Impact Report (“DEIR”).

The DEIR requires the adoption of the No Project alternative. To the extent El Dorado County Water Agency (EDCWA) intends to adopt the action alternatives, the DEIR fails to comply with the California Environmental Quality Act (CEQA) and must be substantially revised and recirculated in order to provide the public and decisionmakers with accurate information regarding the potential environmental impacts of the proposed project and alternatives due to the following:

- I. The Proposed Project does not meet Water Code requirements**
- II. The DEIR fails to consider the proper significance threshold for injury to other legal users of water that would attach to proposed changes in the proposed project from the underlying state filed application**
- III. The DEIR retains inaccuracies regarding the wild and scenic status of the Lower American River, which causes the DEIR to understate impacts that attach to that status**
- IV. The DEIR fails to determine the effects of the Project on Tribal Beneficial Uses and Tribal Cultural Resources**
- V. Selected resource topics require further analysis**
- VI. The DEIR’s approach to modeling impacts to surface water is flawed and understates the impacts of the Proposed Project**
- VII. The DEIR ignores crucial issues regarding both Project impacts and cumulative impacts and lacks data to adequately analyze the cumulative impacts resulting from the Project**

More details are provided below regarding these assertions. We appreciate the extension allowing for additional time for public comment. Robust public engagement is vital to truly assess the environmental impacts of this project to public trust resources and the full scope of the project impacts to the American River watershed.

I. The Proposed Project does not meet Water Code Requirements

A. The Proposed Project is to acquire rights but not the required infrastructure to serve hypothetical future General Plan water demand

Chapter 2.1 describes the need for the proposed El Dorado County Water Agency (EDCWA) El Dorado Water Reliability Project (Proposed Project) succinctly—to support the proposed land uses in the El Dorado County general plan:

The need for the Proposed Project (Section 2.3) is based on a rigorous, detailed assessment of the long-term water supply needed to serve the land uses and economic development that will occur on the western slope of El Dorado County that extends from the Sierra Nevada crest at Echo Summit west to the Sacramento County line (referred to herein as the “West Slope”), as envisioned in the adopted 2004 El Dorado County General Plan, as amended (adopted General Plan). (p. 2-1)

The chapter describes long-term (2070 “build out) land-use water demands in the adopted County General Plan, available water supplies, and the calculated modeled supply shortfalls to serve this potential expanded demand:

With these data and results, as discussed in the 2019 WRDMP [Water Resources and Development Management Plan], future water demand in 2070 for both M&I [Municipal and Industrial] and agricultural uses as set forth in the adopted General Plan could increase to 155,000 afy under the 2070 Central Tendency climate scenario, or could be as high as 158,000 afy under the range of considered future climate change hydrological conditions. As discussed above, water demand is expected to increase by 2070, when land use capacity in urban development and agricultural growth on the West Slope will be achieved through implementation of the policies in the adopted General Plan. As presented in the 2019 WRDMP, the water supply/demand imbalance estimates a supply deficit of 60,000–86,000 afy under the range of 2070 climate change scenarios considered. (p. 2-8)

The results also show that water imbalance in drought periods could be up to 94,000 afy and supply shortages in individual years could be higher. (p. 2-3)

The 2019 WRDMP is said to use a consistent methodology for urban and agricultural water needs on the West Slope that supports the adopted General Plan. Some of this demand is not served by existing water suppliers:

A critical finding in the 2019 WRDMP was that about 53 percent of the land on the West Slope identified in the adopted General Plan for economic development is not served by water purveyors for the intended land use.

These areas are outside of the delivery boundaries of existing water providers (i.e., El Dorado Irrigation District, City of Placerville, and Georgetown Divide Public Utilities District), and as shown in the 2019 WRDMP, they further contribute to the water supply/demand imbalance on the West Slope. (pp. 2-2, 2-3)

The Proposed Project can only meet a portion of these identified needs:

The diversion of 40,000 afy under the Proposed Project would help meet some, but not all, of the projected water demand associated with planned M&I and irrigated agriculture uses identified for the West Slope in the adopted General Plan.” (p. 2-9)

The project description in Chapter 3 is simple:

El Dorado County Water Agency (Agency) proposes to implement the El Dorado Water Reliability Project (Proposed Project) to secure the partial assignment of surface water rights of up to 40,000 acre-feet per year (afy) from the upper American River and its tributaries. (p. 3-1)

The DEIR project description makes clear that the project is to acquire consumptive water rights to supply the acquired waters to one Sacramento Municipal Utility District (SMUD) turnout¹ and a downstream point of rediversion in Folsom Reservoir:

Consistent with the 2005 El Dorado–SMUD Cooperation Agreement (2005 Cooperation Agreement), the surface water would be stored, directly diverted, and re-diverted at the existing Sacramento Municipal Utility District (SMUD) Upper American River Project (UARP) facilities and delivered for consumptive use to two locations: SMUD’s White Rock Powerhouse Penstock and the El Dorado County area of Folsom Reservoir, where the South Fork American River meets the upper reach of the reservoir. (p. 3-1)

Without identifying by what means, by whom, or by how, the Proposed Project includes putting this water to beneficial use:

This surface water would be put to reasonable and beneficial use to help meet projected water demand associated with the anticipated land use capacity identified in the adopted 2004 El Dorado County General Plan, as amended. (p. 3-1)

The EDCWA does not deliver water to retail customers. The Proposed Project DEIR readily concedes that the El Dorado County Water Agency “cannot function as a retail water entity selling water directly to customers...” (p. 2-1)

Consistent with those constraints, the Proposed Project does not include any project works to distribute water from the proposed delivery locations.

No new diversion, storage, treatment, or distribution facilities would be built or operated as part of the Proposed Project. (p. 3-1)

Instead, EDCWA sees its responsibility as being, in large part, to acquire water rights for future customers within the county but implemented by others:

¹ “Consistent with the 2005 Cooperation Agreement (Section 5.2.2.2), surface water for the Proposed Project would be diverted from the South Fork American River at an existing blind flange located near the inlet of the White Rock Powerhouse Penstock.” (p. 3-12)

The Agency is authorized to pursue and to protect existing uses of water rights on which water purveyors and their customers depend and develop additional water rights as needed for the beneficial use of future customers across the entire county. (p. ES-3)

The Proposed Project does not describe any plans by EDCWA or plans or projects by others to build distribution infrastructure from the proposed points of diversion to the actual places of use. Perhaps recognizing that the Water Code requires that rights be put to use, the project description does include a vague third element to use the proposed assignment but without describing the required water infrastructure or institutional planning and capability to implement:

Using this surface water to help meet some of the projected water demand associated with the anticipated development and economic activity for the West Slope identified in, and up to the capacity allowed by, the County's adopted General Plan. (p. 3-5)

The project objectives in Chapter 3.3 do include the use of the proposed assignment:

- Secure water rights available from the upper American River system through State Filed Applications 5644 and 5645 to make as much progress as possible toward meeting the long-term water demands associated with the land use and economic development on the West Slope, consistent with the County's adopted General Plan.
- Maximize the use of existing UARP facilities to store and deliver new water supply from the South Fork American River at the White Rock Powerhouse and/or at Folsom Reservoir, consistent with the 2005 Cooperation Agreement. (p. 3-2)

The Proposed Project is described to include three elements:

- Securing the partial assignment of State Filed Applications for surface water rights for the direct diversion and diversion to storage for the beneficial use of up to 40,000 afy from the upper American River and its tributaries.
- Diverting surface water through and storage in SMUD's existing UARP facilities pursuant to the 2005 Cooperation Agreement to support deliveries at two existing points of re-diversion (White Rock Powerhouse Penstock and the El Dorado County area of Folsom Reservoir where the South Fork American River meets the upper reach of the reservoir).
- Using this surface water to help meet some of the projected water demand associated with the anticipated development and economic activity for the West Slope identified in, and up to the capacity allowed by, the County's adopted General Plan. (p. 3-5)

The third element is an essential step for the EDCWA to put these proposed consumptive water rights to beneficial use by unknown others and unknown schedules. To utilize water from the

blind flange near the inlet of the White Rock Powerhouse Penstock, the Proposed Project DEIR concludes the following:

Allowing for the water to be delivered from the White Rock Powerhouse Penstock to the El Dorado Parties would require the installation of interconnection facilities. In addition, to deliver the Proposed Project water to uses on the West Slope, new infrastructure would likely be needed to store, treat, or distribute the water on the West Slope. The location, design, construction, and operation of this future new water supply infrastructure are not known at this time and would be the responsibility of other retail water agencies that would deliver to their customers the water provided by the Agency through the Proposed Project. (p. 13)

The Proposed Project does not propose the construction of interconnection, storage, treatment, or distribution facilities. Neither does EDCWA own or propose to own access rights to such hypothetical facilities.

To utilize water from the Proposed Project Folsom Reservoir point of diversion, the Proposed Project DEIR implies that El Dorado Irrigation District might provide use of its Folsom Reservoir facilities to serve unconstructed delivery infrastructure to meet contemplated General Plan demands:

As an alternate point of re-diversion, water would be made available in the El Dorado County area of Folsom Reservoir, where the South Fork American River meets the upper reach of Folsom Reservoir. Diversions from Folsom Lake require pumping, can only meet demands in El Dorado Hills, and would be taken only if no other source is available. These diversion facilities are owned and operated by EID. (p. 3-12)

Again, the Proposed Project does not propose the construction of interconnection, storage, treatment, or distribution or access rights to hypothetical facilities to serve future County customers from Folsom Reservoir.

B. EDCWA has no authority or schedule to put the water to beneficial use and thus no ability to acquire and hold water rights for the Proposed Project

The EDCWA Proposed Project DEIR notes that “the Agency is responsible for long-term water resources planning for the benefit of the communities in El Dorado County.” (p. 3-12) The Proposed Project is being approached as a planner might undertake to acquire and hold water rights to serve future General Plan water demand.

Nevertheless, the EDCWA freely concedes that it has no authority to put the Proposed Project water rights to beneficial use nor any schedule by it or others to do so.

The Agency does not decide when, where, and how development and economic activity would occur on the West Slope. Decisions regarding specific development and land uses would be made by individual landowners in coordination with, and as regulated by, land use agencies such as the County and the City of Placerville. In addition, the Agency would not construct or operate new storage, treatment, or distribution facilities to deliver the Proposed Project water to uses on the West Slope. (p. 3-12)

From the representations in the Proposed Project DEIR, it does not appear that the Proposed Project, which includes acquiring and holding state filings to supply expanded water use contemplated—at some indefinite time and manner—in the County General Plan, is consistent with the requirements of the California Water Code.

This should hardly surprise EDCWA. In 1958, the largest and most consequential water rights decision within the American River watershed rejected similar water rights applications. In Decision 893 (D-893), the Board denied the applications of fifteen aspiring water rights holders who had no right of access for their proposed projects:

The point or points of diversion under each of those applications is Folsom Dam and/or Nimbus Dam to which right of access has not been acquired by the applicants. Accordingly, issuance of permits to those applicants would be meaningless in view of the obvious necessity of contracting with the United States for a supply of water from the Federal facilities. (D-893, pp. 53–54)

EDCWA has no authority or intention to acquire access rights to interconnection, storage, treatment, and distribution of the hypothetical facilities to put the proposed assigned water rights to beneficial use. The Proposed Project DEIR provides little more than speculation that others could construct the necessary facilities to put the proposed assignments in the Proposed Project DEIR to beneficial use. D-893 also rejected applications from parties who had no immediate plans to proceed with the construction or arrangements to put the proposed assignments to beneficial use.

The record is also abundantly clear in regard to the applications by...that the applicants have no immediate plan or purpose to proceed promptly with construction and/or with the application to beneficial use of the water sought. In such cases the Board has little choice in the action to be taken since it is a settled principle that an application to appropriate is not a proper instrument to make a reservation of water for a development at an indefinite and uncertain time in the future. (D-893, p. 54)

“[A]n attempt to reserve water for future use where there is no intent to proceed promptly cannot be countenanced.” (D-893, p. 57)

D-893 was issued in 1958, but the recent cancellation of A029657, San Joaquin County’s application for 322,000 afy (original application) of South Fork American River water, occurred on July 19, 2022. The Board noted that the preparation of an Environmental Impact Report in order to maintain an application, while necessary, is not enough:

[n]or has the County committed to any reasonable timeline or plan to satisfy these requirements and move its application towards resolution. The County also has failed to demonstrate that it would exercise diligence in putting the water it seeks to appropriate to beneficial use if the Board were to approve the County’s application and issue a water-right permit. Based on all indications from the evidence presented during the hearing, we conclude that the County intends to continue to defer any development of this project. The County’s attempt to maintain its application in reserve without any definite plan of action while exploring other water-supply projects is prohibited by the Water Code and the general principles of diligence that pervade California’s system of water rights. (Water Rights Order WR 2022, 0165, Section 4.2, p. 24.)

The Order discusses the need for diligence before obtaining the sought-after permit:

California law requires potential water-right appropriators to act with diligence even before obtaining a permit to appropriate water. By filing an application for a water-right permit, the applicant secures a priority date, essentially reserving a place in line for future water use. (See Wat. Code, § 1450.) To maintain that priority date, the applicant must “have a definite project in mind and display not only the ability but also the intent to proceed with reasonable diligence with the construction work and application of the water to the proposed uses.” (Decision 918 (1958), p. 4 [citing Decisions 884 (1958), 893 (1958), and 907 (1958)].) (Water Rights Order WR 2022-0165, §4.2, p. 26)

Indeed, the Board felt it had an affirmative duty to cancel San Joaquin County’s application:

California Code of Regulations, title 23, section 840, applies the principle of diligence to applicants by providing that the Water Board must deny an application if the Board finds that the applicant is not prepared to begin construction of any necessary works within a reasonable time or is unable to proceed towards perfection of the appropriation within a reasonable time due to lack of planning, finances, or another cause. California Code of Regulations, title 23, section 840, states:

An application will be denied when it appears after hearing or a proceeding in lieu of hearing that (a) the applicant does not intend to initiate construction of the works required for the contemplated use of water within a reasonable time and thereafter diligently prosecute the construction and use of water to completion, or (b) the applicant will not be able to proceed within a reasonable time, either because of absence of a feasible plan, lack of the required financial resources, or other cause. (Water Rights Order WR 2022-0165, Section 4.2, pp. 26.)

Just as important, water rights can be revoked for lack of diligence, something that the United States of America Bureau of Reclamation discovered when the Water Board revoked Reclamation's Auburn dam water rights permits:

The State Water Board may revoke a water right permit if the permittee fails to appropriate water under the permit with due diligence by promptly constructing the necessary water diversion facilities and applying the water to beneficial use. The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law intended to protect the public interest by preventing the "cold storage" of water rights. By "cold storage" we mean a situation in which an appropriation is initiated, so that the water that is subject to appropriation is not available to other parties who could potentially put it to beneficial use, but the appropriator is not diligently pursuing development of that water supply, so the water remains unused, contrary to the public interest. (Water Rights Order WR 2008-0045, pp. 1-2)

The cancellation order of A029657 discusses diligence requirements from pages 24 to 36, and none of the discussion suggests that the project description, purposes, objective, or the Proposed Project meets the expectations in the Water Code and or California Code of Regulations.

EDCWA has no authority or intention to construct the necessary interconnection, storage, treatment, and distribution facilities to put the proposed assigned water rights to beneficial use for future customers contemplated in the General Plan. Just as consequentially, the Proposed Project DEIR provides little more than speculation that others could construct the necessary facilities to put the proposed assignments in the Proposed Project DEIR EDCWA to beneficial use.

The Proposed Project is heading for a rocky shore in stormy water-rights seas.

C. EID does not need Proposed Project water rights and would need new and unaffordable infrastructure to deliver the water to beneficial use

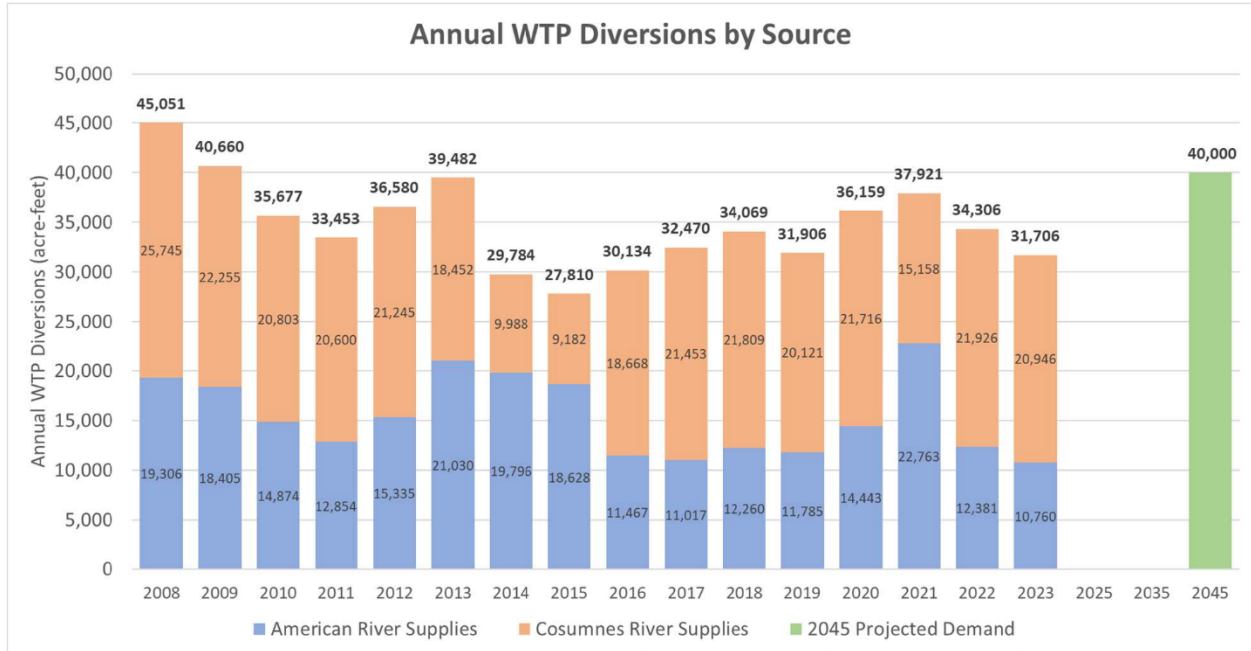
If the rights are assigned, the ability to use the proposed partial assignment would almost certainly fall on the El Dorado Irrigation District (EID). Unlike the El Dorado County Water Agency, EID is the major supplier of agricultural and municipal water in El Dorado County. Its planning assessments and construction and operation plans are therefore of significance to the ability of EDCWA to put the Proposed Project water rights and SMUD Upper American River Project (UARP) facilities (which only possess power rights) to beneficial consumptive use.

EID offered substantive comments to EDCWA on the Proposed Project EIR. EID's comment letter has substantial concurrence with many of the comments we offer here. EID's comment letter should be reviewed closely, but we include one summary excerpt from their comment letter to provide a quick summary of EID's perspective on the Proposed Project and its DEIR:

EID and the Water Agency share the mutual objective of securing and maintaining sufficient water supplies to meet the water needs of El Dorado County residents now and in the future. Within the context of this mutual objective, EID generally supports the Water Agency's efforts to obtain additional water rights. However, the comments below illustrate that (1) the Draft EIR fails to adequately describe how the Project's proposed water right will be exercised, (2) the Draft EIR analyzes a Project inconsistent with EID's current plans for meeting future water demands, (3) the hydrologic modeling performed for the Draft EIR related to EID's operations does not reflect EID review or input, and (4) the Water Agency lacked communication, coordination, or collaboration with EID during the development of the Project and, as such, has prepared a flawed Draft EIR. (M0125-001 EIDs Comments Regarding the Draft EIR for the El Dorado Water Reliability Project with Comments.pdf, p. 2)

We understand that EID has told EDCWA that the two proposed points of diversions are ill-suited to serve the proposed modeled General Plan water uses outside of the EID service areas. Indeed, it appears to be EID's judgement that there are no feasible ways to serve the General Plan areas that the Proposed Project assumes it will serve. In effect, the Proposed Project seeks consumptive water rights that cannot or will not be used.

A key issue is that EID's service areas are not in need of the additional entitlements from the Proposed Project. Some materials from EID are illustrative. EID prepared a 2024 draft proposed purveyor specific agreement (PSA) for an updated Sacramento Water Forum Agreement. EID's PSA demonstrated a recent demand profile that has been relatively flat and little change is projected:



2

EID is proud of its water use efficiency efforts:

The District has invested in long-term water efficiency efforts that have kept water demands relatively stable despite population growth in El Dorado County. Current District demands are on average approximately 35 thousand acre-feet (TAF) annually. This is down from approximately 45 TAF in 2008[,] but demands are expected to return to approximately 40 TAF by 2045. See Figure 1 [above]...for historic District diversions from both the American River and Cosumnes River to meet customer potable demand at water treatment plants (WTP). (EID draft PSA, p. 3)

EID calculates that the annual firm yield of its major supply sources—Jenkinson “Lake,” Folsom Reservoir, and Forebay Reservoir on the South Fork American River—is 63,500 acre-feet, with entitlements from these sources at 81,500 acre-feet. (EID draft PSA, p. 3) EID’s water rights and contracts are more than double the current demand.

EID’s draft PSA also lists future EID Projects and Investments, noting on p. 8, “[t]he following projects and initiatives are key to EID meeting the commitments contained herein and EID’s water supply reliability in 2030 and beyond:

- Sly Park Intertie (construction to begin in 2024)
- Regional water transfers and agreements (partnerships)
- Addition of upstream point of diversion to Permit 21112

² Draft El Dorado Irrigation District Purveyor Agreement, 2024, p. 4

- Improved and expanded transmission within the District distribution system (as described in Water and Recycled Water Master Plan)
- Expanding treatment capacity at El Dorado Hills Water Treatment Plant
- Recycled water storage project
- Negotiation of agreement with EDCWA to utilize Fazio water

EID provides additional detail (EID Draft PSA, p. 9):

Water Purveyor / Water Right Holder	Project(s) Identified in Water Forum Agreement	Project Status
El Dorado Irrigation District	<u>Completed Actions</u> <ul style="list-style-type: none"> • Main Ditch Piping project • Replacement of wooden flumes with concrete • Folsom Lake Intake project with temperature control device (TCD) 	<u>Completed Actions</u> <ul style="list-style-type: none"> • Project completed in 2022 • Many sections completed with others in the planning/design phase • The project is complete and TCD operational as of 2023
	<u>On-going/Pending Actions</u> <ul style="list-style-type: none"> • Sly Park Intertie • Replacement of Silver Lake Dam • Addition of upstream point of diversion for Permit 21112 • Improved and expanded transmission with the District distribution system • Expanded treatment capacity of El Dorado Hills Water Treatment Plant • Recycled water storage project • Negotiation of agreement with El Dorado Water Agency to utilize Fazio water • Potentially provide transfer water to meet LAR needs 	<u>On-going/Pending Actions</u> <ul style="list-style-type: none"> • Intertie construction to begin in 2024 • Dam construction to begin in 2027 • Public engagement and environmental document preparation • See Water and Recycled Water Master Plan for details • Planning and public engagement phase • Planning phase • TBD • TBD based on potential agreements with LAR purveyors

The Proposed Project, to the extent that it implies project works to put the proposed assignment to beneficial use, does not appear in EID's planning portfolio.

In summary, EDCWA's Proposed Project dependence on EID for its Folsom Dam diversion site does not appear in EID's plans for EID use or use outside of EID, nor does EID regard the necessary new delivery infrastructure contemplated in the Proposed Project to be feasible. EID has no plans to deliver Proposed Project water from the blind flange at the White Rock Powerhouse upper penstock, nor does it regard the resulting needed delivery infrastructure to be feasible.

D. The Proposed Project is unlikely to meet water code diligence requirements while State Filings and other legal arrangements available in the "No Project" Alternative preserve county access to water rights without diligence requirements

In view of Water Code diligence requirements, it appears that the Proposed Project is unlikely to qualify for (or would be able to maintain) the sought-after water rights assignments. The reason is simple: achieving the project purpose and objectives of putting the water to beneficial use appears beyond the reach of EDCWA or other county governments or special districts. The Proposed Project DEIR articulates little more than the hope that the sought-after water rights can be put in "cold storage" on speculation that someday the necessary facilities can be financed and constructed by others.

Indeed, the "No Project" alternative will better achieve these implied and real-world "cold storage" project purposes, for in the absence of any demonstrated ability or intention to diligently put the acquired water rights to beneficial use, "cold storage" may best serve the purposes and objectives of the Proposed Project.

Consider the following: The EDCWA contract with SMUD (the El Dorado - SMUD Cooperation Agreement) does not expire or require diligence. State filings do not expire or require diligence. The Proposed Project DEIR recognizes this when it describes the California Water Code "County of Origin" Law":

The State of California has taken steps to ensure that the areas of origin will have adequate water supplies for their reasonable and beneficial use. California Water Code Section 10500 et seq. provides for the reservation of priority applications for future development and specifies that the priority of State Filed Applications may not be released, nor may such applications be assigned such that the county of origin is deprived of water covered by the State Filed Application necessary for its development. (p. 2-13)

EDCWA is seeking partial assignments for state filings. These inchoate rights are held by the state and are exempt from diligence requirements. (Water Code §10505)

In contrast, applications for assignments may be rejected or cancelled based on lack of showing of plans or actions to diligently put the rights to beneficial use (in this case, consumptive use). More consequentially, diligence is required even after such filings are assigned: the acquired right is subject to revocation for lack of diligence, exposing EDCWA to the loss of the assigned state filing—or even the state filing itself.

EDCWA and EID may also benefit from the Area of Origin Law (Water Code §§ 11460–11463). EDWCA holds an unused 15,000-acre-foot water service contract with the U.S. Bureau of Reclamation. (EID Draft PSA, p. 2) EID, with its own water rights, operates diversion facilities at Reclamation’s Central Valley Project (CVP) Folsom Reservoir. The CVP is subject to California’s Area of Law:

In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Water Code § 11460)

The inchoate rights of areas of origin do not expire or require diligence.

The Proposed Project DEIR notes that the Water Board has made other major rights in the basin subject to depletions to “Area of Origin” and “County of Origin” applications.

In response to the large number of concurrent water rights applications for water originating from the American River (and the more than 2,000 protests), the State Water Right Board (now State Water Rights Control Board [State Water Board]) on March 18, 1958, rendered Water Right Decision No. 893 (D-893) to approve Reclamation’s water right applications for Folsom and Natoma reservoirs as part of the CVP, SMUD’s water right applications to develop the UARP, and Sacramento’s water right applications to obtain water originating in the SMUD UARP. In recognition of area of origin protections under state law and state filing reservations of water within El Dorado County, the following condition on Reclamation and Sacramento’s water rights permits is included in D-893 (State Water Rights Board 1958):

The amounts which may be diverted under rights acquired or to be acquired under these permits are and shall remain subject to reduction by future appropriation of

water for reasonable, beneficial use within the American River watershed tributary to permittees' points of diversion. (p. 2-1)

Saying it another way:

Protection is afforded these applicants and other potential users within upstream sub-areas of the American River watershed by terms to be inserted in permits to divert at points below them to the effect that diversions under those permits are and shall remain subject to reduction in the event of appropriation for use within the watersheds that lie above the diversion works relating to those permits. (D-893, pp. 58–59)

These permit terms do not expire or require diligence on behalf of El Dorado parties.

In summary, while EDCWA has described its methodology to model General Plan demand, neither EDCWA nor EID have described any feasible way to serve this hypothetical future demand. EDCWA has neither the authority nor plans to put the proposed assigned water to beneficial use. The largest actual water supplier in the County, EID, does not intend to serve or believe that the Proposed Project can feasibly serve the modeled General Plan demand outside the EID service area. EID has no plans or immediate need to use proposed rights assigned to EDCWA to serve EID's service area. EID is not presently seeking or describing a need to acquire additional rights to meet foreseeable demand (through at least 2040 and likely much longer). No other water supplier in El Dorado County has described any plans (realistic or otherwise) to put the proposed assignments to beneficial use. If water rights assignments are secured, diligence requirements are likely to subject the rights to revocation and consequent loss of the underlying state filings used to acquire the right. El Dorado County's present circumstances provide for "cold storage" of potential rights sought or similar to those sought by the Proposed Project. Only the "No Project" alternative preserves potentially assignable state filings from risk of loss until, if ever, water can be feasibly delivered to partially meet today's general plan demands.

II. The DEIR fails to consider the proper significance threshold for injury to other legal users of water that would attach to proposed changes in the proposed project from the underlying state filed application

Appendix D of the DEIR contains the water rights applications for the project. In addition to two applications to appropriate water, there are two change petitions (Appendix D, PDF pp. 38–42, 82–85). In addition, the Board notice of the applications and petitions is also contained there (Appendix D, PDF pp. 43–47)

The change petitions answer in the affirmative the question of whether “the old point of diversion or place of use be abandoned.” The reason for the changes is “to conform the application to the proposed use.” (App. D, PDF pp. 38, 82) The Board notice is less telegraphic:

The applicant has petitioned to change the sources, points of diversion, purpose of use and place of use in State-filed Application 5645 to the sources and locations shown in Table 1. (App D, PDF p. 45)

The applicant has petitioned to change the sources, points of diversion, purpose of use and place of use in State-filed Application 5644 to the sources and locations shown in Table 3 (App D, PDF p. 47)

The information contained in Appendix D is clear. The Proposed Project, at the time of application and the State Board notice was seeking partial assignments of two state filings along with accompanying change petitions. However, the description of the Proposed Project in the DEIR does not include the change petitions as part of the sought-after water rights. This might be just an oversimplification of the Proposed Project. However, when asked to clarify, representatives of EDCWA asserted that no change was needed because the Proposed Project conformed to the underlying state filings.

The Proposed Project DEIR is supposed to support EDCWA’s decision to pursue its water rights applications. (*See, for example*, p. ES-1). In practice, project EIR’s also serve as the environmental document for a Water Board decision on the applications and petitions. If the DEIR is to serve these purposes, the DEIR should not remain silent on the detailed nature of the proposed purpose of the Proposed Project DEIR. Obviously, if the Proposed Project is no longer seeking the change petitions contained in its Appendix D, the DEIR should disclose that.

Applicants/Petitioners seeking to use the water that would be developed in state filings if the state filings are constructed have three ways to accomplish that purpose: (1) If the project is the same as the state filings, they can apply for the state filings or on a portion thereof. If the application is successful, the priority date of the state filings are applied to the assigned water right. (2) If their project is different but involving waters that would be developed by the state filing, they can apply for a water right and a release from priority of the relevant state filings. If successful here, the acquired right would carry the date of the application but not be subject to de-facto junior status if that the state filing is later assigned. (3) Finally, they can apply for an assignment of the state filing and petition for the state filing to be changed to conform to the project sought by the applicant. If both the application and change petition are granted, the revised project carries the date of the state filing.

By implication the DEIR describes the Proposed Project as a project that would fall under option 1 above. However, Appendix D describes the Proposed Project as an option 3 project. Again, the Proposed Project has no clear explanation of what type of water right acquisition path is being sought. If the option 1 path is now being sought, there is no explanation on why a change petition is no longer necessary. There are, of course, CEQA requirements for a clear and stable project description, which should, of course, be portrayed in the DEIR and be subject to comment. The Proposed Project DEIR does not do so.

Option 3 (application for assignment and change petition) has some obvious bearing on the standards of significance adopted by the EIR. Change petitions are subject to the requirements of California Water Code §§ 1700–1707. §1702 provides a good summary of these code sections:

Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.

The “no injury” standard is a rigorous standard. Comments received in the first DEIR to support this water rights application from downstream legal users of water, argued that there were injuries.

The current Proposed Project DEIR, shows some impacts to other users of water, although below the threshold for CEQA “significance” adopted in the Proposed Project DEIR. Other legal users of water commenting on the Proposed Project DEIR may have alternative models to show project effects. Some may disagree with the significance thresholds of the current DEIR. The latter objection is easy to make. The threshold of significance in the Proposed Project DEIR is described:

For purposes of this analysis, an impact is considered significant if the Proposed Project would:

- Result in substantial decreases in water supply deliveries because of changes in surface water flows and/or changes in water supply system operations, as measured by substantial changes in reservoir storage, timing or rate of river flows, or surface water quality. (p. 4.3-7)

“Substantial” does not fit well with the “No Injury” standard. The adopted DEIR threshold here does not fit well with the intended use of the Appendix D water right application/petitions.

The “change” section of the Water Code does not ignore the petitioner’s environmental responsibilities. For example, the petition shall contain the following:

(c) Include all information reasonably available to the petitioner, or that can be obtained from the Department of Fish and Game, concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.

We dispute whether the Proposed Project DEIR properly meets those requirements.

III. The DEIR retains inaccuracies regarding the wild and scenic status of the Lower American River, which causes the DEIR to understate impacts that attach to that status

Because of these and other code sections and legal precedents, in recent practice (for example the Water Board’s “Twin Tunnel” change petition hearings), the Water Board has divided change petition hearings into two phases: (1) a “no injury” phase and (2) a “public trust” phase. Here, environmental and recreational “public trust” impacts also may have stricter thresholds of significance because of the state and federal wild & scenic river designation of the lower American River (LAR). The Proposed Project’s coverage and potential consequences of these designations is spotty and sometimes inaccurate. As an initial, although relatively harmless example, the DEIR borrows the same awkward, somewhat inaccurate language from the 2010 DEIR (“First DEIR”) for the instant application and petition, prepared by the El Dorado Water and Power Authority (EDWPA).³

The lower American River is designated as a “Recreation” river with the State and Federal Wild and Scenic River Systems. (First DEIR 6.7-62 -Proposed Project DEIR p. 4.7-6)

This language is not informed by Friends of the Rivers comments on the First DEIR:

A more precise formulation of the first sentence would be the following: The lower American River has been designated a component of the National and State Wild and Scenic River systems. Based on the shoreline development criteria under both Acts, the river has been classified “Recreational” under the meaning of these statutes. The Federal Act was created in 1968, the State Act in 1972.

The DEIR does not appear to be informed by our comments on some Wild & Scenic River aspects in response to the first DEIR. As a courtesy, here they are again (FOR comments on the First DEIR, October 18, 2010, p. 12):

³ The El Dorado Water and Power Authority dissolved in 2019. The El Dorado County Water Agency became the El Dorado Designated Representative to the SMUD Cooperation Agreement and the successor to the Power Authority’s water rights applications (p. 2-12)

§6.7.24 of the [first] DEIR notes the adoption of the American River Parkway Plan in 1985 by the County of Sacramento. This omits much. In 2006, The County of Sacramento updated the management plan.

In 2009, the legislature passed and the Governor signed AB 889 adopting the plan, which included the following passage: The Parkway Plan continues to serve as the management plan for the lower American River under the Wild and Scenic Rivers Act, providing management guidance and direction for state departments and agencies, as well as local governments, in carrying out their responsibilities under the State Wild and Scenic Rivers Act, as well as the Urban American River Parkway Preservation Act. State departments and agencies, as well as local governments, also have responsibilities to ensure that their actions are consistent with their responsibilities under the State Wild and Scenic Rivers Act. ([LAR Parkway Plan] p. 88)

FOR's comments on the First DEIR also add important context to free-flowing and extraordinary-values significance thresholds to the LAR. The Proposed Project DEIR, likewise, omits this important context. (For example, see the following FOR comments on the First DEIR, p. 13):

However, in 2004, the Public Resources Code was amended to increase the breadth of responsibilities of state and local agencies concerning the State Wild and Scenic Rivers Act from that existing in 2001. The following relevant provision was added:

5093.61. All departments and agencies of the state shall exercise their powers granted under any other provision of law in a manner that protects the free-flowing state of each component of the system and the extraordinary values for which each component was included in the system. All local government agencies shall exercise their powers granted under any other provision of law in a manner consistent with the policy and provisions of this chapter.

According to the American River Parkway Plan adopted by the legislature, the extraordinary values of the lower American River are its recreation and anadromous fishery. These values were identified as outstandingly remarkable values by federal wild and scenic river managers in 1980, serving as the basis for the acceptance of the lower American River by the Secretary of the Interior. ([LAR Parkway Plan] p. 90)

The Parkway Plan also describes federal responsibilities on the LAR and whose context should be reported in the DEIR for the Proposed Project. For example, see the following FOR comments on EDWPA DEIR, October 18, 2010, pp. 13–14):

Federal responsibilities for the lower American River are also briefly described in the American River Parkway plan, and they, too, extend beyond regulation or prohibition of dams and diversions on designated reaches. Although Federal administrative responsibilities are limited for 2(a)(ii) rivers, the American River Parkway Plan is also intended to provide guidance to the Federal wild and scenic river managers in carrying out their responsibilities under the National Wild and Scenic Rivers Act. Federal land managers also retain management authority for federally owned lands within the Parkway. At the time of adoption of this Plan, the National Park Service is the agency responsible to ensure that the protections under Section 7(a) of the federal Wild and Scenic Rivers Act (USC Title 16, Chapter 28), regarding the protection of Wild and Scenic Rivers from the harmful effects of proposed water resources projects, including modifications to the bed and banks of the river, are consistently applied on these rivers. The WSRA prohibits the Federal Energy Regulatory Commission (FERC) from licensing the construction of hydroelectric facilities on designated rivers and prohibits other federal agencies from assisting in the construction of any water resources project that would have a direct and adverse effect on the values for which a river was designated. The WSRA also includes a standard that governs water resources projects below or above a designated river.

The values for which the river is designated are “free-flowing,” “water quality,” and the outstandingly remarkable values (§1(b) National Wild & Scenic Rivers Act), were LAR recreation and the anadromous fishery. “Water quality” is generally understood to include temperature, including in the Proposed Project DEIR. (Table 4.4-4, p. 4.4-12)

These Wild & Scenic Rivers Act duties do not appear in the significance thresholds of the Proposed Project. Again, the Friends of the River comments on the First DEIR appear to remain relevant to the Proposed Project DEIR. For example, see the following FOR comments on EDWPA DEIR, October 18, 2010, pp. 14–15):

The [First] DEIR devises a number of significant impact thresholds for its purposes under the California Environmental Quality Act (CEQA). However, it is by no means clear that these impact thresholds take into account the statutory standards that must guide the permitting agencies. We have already discussed the not-in-conflict and no-injury standards for assignments and changes. In addition, governments in general and the SWRCB in particular have Public Trust responsibilities. Both State and Federal Agencies

have responsibilities under their respective wild and scenic rivers acts and endangered species acts.

The purpose of the project is to acquire the rights to remove water from the aquatic environment for consumptive purposes. Below the project diversions, this means less water for flow-dependent resources.

The [First] DEIR often assesses this by attempting to model the time or number of exceedances the project trips over a threshold, often a current or proposed minimum stream-flow requirement. While this can be helpful information, by using this threshold approach, the [First] DEIR fails to portray the full implications of a proposed project—the adverse impact on actual flows rather than minimum flows. Minimum flows are seldom optimum flows ([First DEIR] Table 6.7.1-33 *Lower American River Minimum and Optimum Flow Conditions...* is a good example), and the incremental impact of this project, recent assignments, and potential future assignments or changes have the effect of driving down more optimum flows to minimum flows.

The [First] DEIR also adopts threshold standards that may conflict with statutory guidance and the judgement of permitting agencies. It is not clear that increases in the percentage of time that the project causes failure to meet the target threshold criteria for recreation flows ([first DEIR] Table 6.7.4-9) [] is consistent with a “protect” standard for this resource under the State Wild and Scenic Rivers Act. However, the DEIR appears to adopt the conclusion that certain single-digit increased failures to meet the threshold criteria are not significant. ([First] DEIR p. 6.7-89)

IV. The DEIR fails to determine the effects of the Project on Tribal Beneficial Uses and Tribal Cultural Resources

EDWCA purports to meet the requirements of AB 52 by responding to one tribe with a standing request for consultation.

As requested by the UAIC, the Agency provided additional details about the Proposed Project, specifically that the Proposed Project is the acquisition of water rights and does not include any ground-disturbing activities associated with new diversion, storage, treatment, or distribution facilities. On December 7, 2023, the UAIC responded that because no ground disturbance or construction activity would be associated with this specific project, the UAIC has no further comments or concerns. Therefore, the Agency has fulfilled and complied with Pub. Resources Code Section 21080.3.1 and has completed Tribal consultation for the Proposed Project. (p. 1-3)

However, § 1(a)(5) of AB 52 states the following:

In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decision-making body of the lead agency. (AB 52, § 1(a)(5) ⁴

EDCWA received information from the California NAHC on January 9, 2018, stating that the Sacred Lands File has a record of sacred sites in the Project Area, and provided the names of four Tribes that should be contacted regarding the sacred sites. The DEIR states the EDCWA sent 1 registered letter and 1 email in response to this information (p. 4.10-13). This response is inadequate to effectively engage the tribes who may have cultural resources in the project area. The intent of the law has not been met. The impact of the project on tribal cultural resources remains unknown—particularly the vague and inchoate parts of the project to (1) put the acquired rights to beneficial use or (2) the cumulative aspects of the project that construct delivery infrastructure and promote landscape conversion. The engagement of a single tribe, particularly when the project is not completely described, does not meet the intent of the law to establish meaningful and timely consultation regarding the potential impacts of the project for tribes. Further outreach is required to determine the interest in consultation of tribes who may potentially be impacted by the project.

The analysis of Impacts and Mitigation Measures for Cultural Resources is flawed. The cultural uses of water by California tribes are protected as tribal cultural resources under AB 52. Tribal cultural uses of water are also known as Tribal Beneficial Uses. Section 4.10.4 (Impacts and Mitigation Measures) provides an analysis of historical resources, archeological resources, and human remains but fails to include any analysis of the potential impact to the cultural uses of water by tribes. The project will divert up to 40,000 afy. The impact that may have on the cultural uses of water by tribes in the direct project area and downstream in the “indirect” project area is unknown without consulting with the affected tribes. The EDCWA response to the UAIC also failed to include any information or analysis of the potential to impact the cultural uses of water. Therefore, the UAIC Tribe did not have accurate or complete information with which to make their determination about impacts to their cultural practices.

Overall, the lack of tribal participation in the consultation process and the failure to analyze the project impacts on the cultural uses of water, indicates that tribal consultation for the Project is

⁴ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52

inadequate. Therefore, true, proper, and meaningful tribal consultation must be completed to determine the project impacts.

V. Selected resource topics require further analysis

The DEIR fails to adequately analyze the impacts of the Proposed Project on the Aesthetics of the Project area. The DEIR states, “Rivers and reservoirs are important visual resources that draw local residents and tourists to the Project Area for recreational opportunities, including swimming, camping, boating, kayaking, whitewater rafting, hiking, and viewing of scenery and wildlife.” (p. 4-7) In addition to the visual aesthetics of rivers, the enjoyment is also related to the timing, temperature, quality and quantity of flows in the river. The DEIR states, “diversion of the 40,000 afy would not diminish the scenic attractiveness of rivers and reservoirs in the Project Area by substantially reducing river flows and reservoir surface elevations beyond levels that occur under existing conditions and are within the range of historic fluctuations.” (p. 4-7) However, the attractiveness of the river to tourism is flow dependent, and lower flows are less appealing to the public. The DEIR should quantify the potential impact of lower flows on tourism for the county.

The DEIR fails to adequately analyze impacts on Agriculture and Forest Resources, Land Use and Planning, and Population and Housing. The DEIR states: “Because no new facilities would be constructed, the Proposed Project would not result in conflicts with existing zoning for, or cause rezoning of, forest land, timberland, or timberland zoned Timberland Production, and there would be no loss of forest land or conversion of forest land to non-forest use.” (p. 4-8) However, the availability of additional water put to beneficial use in the county would change potential land use, population and housing and potentially agriculture and forest resources. The DEIR must analyze the potential impact of putting the water to use, whether expected by the general plan or not.

The DEIR fails to adequately analyze impacts on Utilities and Service Systems. The DEIR states: “The Proposed Project is not anticipated to result in the relocation or construction of new or expanded water, wastewater treatment, or stormwater drainage, electric power, natural gas, or telecommunications facilities; in the generation of solid waste in excess of state or local standards, or in excess of the capacity of local infrastructure, or other impairment of the attainment of solid waste reduction goals; or in lack of compliance with federal, state, and local management and reduction statutes and regulations related to solid waste.” (p. 4-13) As discussed below, the delivery of water from the Proposed Project for beneficial use will require substantial infrastructure investments. The DEIR must analyze the costs and impacts of this infrastructure.

VI. The DEIR’s approach to modeling impacts to surface water is flawed and understates the impacts of the Proposed Project.

A. The DEIR's approach to the analysis is flawed.

The DEIR suggests that an existing-conditions baselines is used in order to analyze project effects. However, the reality of the baselines employed in the analysis is different, with more project-favorable conditions chosen in several instances.

Table 4.2-2 ARIOPs modeling uses Monthly Average Flow for all flow parameters. Monthly average is also used in the Cal Sim 3 Model and HEC-5Q model used in the DEIR's analyses. Monthly average is not an adequately fine-grained resolution to evaluate many impacts to surface water hydrology and associated resources. Significant changes in flow that occur over days or hours may greatly affect aesthetics, recreation, fish, water temperature, or other factors, all while disclosing little or no impact when washed out in a monthly average. For many resources, daily, hourly or even 15-minute flow data is the appropriate time-step for flow information and associated impacts. This fundamental flaw in the project modeling has direct impacts on the DEIR's ability to analyze Chapter 4 Effects and Chapter 5 Indirect Effects on many subsequent levels. Modeling should be repeated using a time-step appropriate to resources and impacts, and alternative models should be selected if the DEIR's currently selected modeling does not support daily or hourly flow information.

The Results Summary makes poor assumptions about the level of significance at the areas described and indicates additional locations that were not included because of arbitrarily assigned "negligible model changes." (p 4.2-30) This is particularly consequential for evaluating impacts to whitewater boating. Simulated changes across the board indicate flow reductions at Chili Bar. Averaging them to "less than 5%" does not mean they will not occur with the project, or that on any given day or series of day these changes will not be significant. In nearly all months and water types, the Proposed Project would yield decreased flows in the Chili Bar reach of the Upper American River. These impacts should be included at a daily and hourly basis, for both Surface Water Hydrology and follow-on river-based recreation. Because the DEIR does not clearly indicate the threshold for insignificance, the FEIR should treat all modeled locations fully and clearly.

Table 4.2-7 describes Project effects to surface water hydrology at the Chili Bar Dam. While broadly averaged effects might be calculated to 5% as indicated above, individual months would see significant impacts, in some cases 20% or more reductions of flow from as compared to the No-Project alternative. The DEIR's conclusions regarding significance is not supported by the given analysis, and a more robust and accurate analysis would likely disclose greater project impacts.

The differential in flow between the Project and No Project alternatives are greatest in dry or critically dry years, and in the late summer and fall months. These dryer time periods are also challenging for maintaining water quality and temperature, and critical for the health and well-

being of aquatic and biological resources. More detailed modeling to identify the risks associated with climate stress in times of drought are needed to fully understand the impacts of the project on water quality, aquatic and terrestrial resources.

B. The DEIR fails to accurately describe impacts to whitewater recreation

The Water-Related Recreation analysis suffers from similar failings as that of other direct effects of the project. Effects cannot be accurately analyzed using a monthly average timestep. The Surface Water Hydrology findings are incomplete and poorly characterized in Section 4.2. Nevertheless, using those flawed and Project generous assumptions, there are direct errors in Section 4.7 of the DEIR as well.

The DEIR describes flows for river recreation as “mandatory streamflow requirements”⁵ rather than “mandatory minimum streamflow requirements”. The minimum streamflow component is a key misunderstanding of the DEIR preparers and the analysis of impact significance. Minimum streamflows on the Upper American River are required as mitigation for federally regulated hydropower projects. There is no basis for the Federal Energy Regulatory Commission to penalize hydropower project owners for flows above minimums, whether those flows are driven by recreation or water quality. Flows on the Upper American routinely exceed the FERC-required minimums. These minimum streamflows are not mitigation for the DEIR-described project, and simply meeting them does not constitute a suitable basis for a finding of No Significance. Analysis of the significance of project effects requires analysis of specific hours, the timing of those hours, and overall project days of boatable flow, as well as of enjoyable angling flow and impacts associated with water quality. Similarly, analysis of impacts to the values identified in the federally designated Wild & Scenic sections of the Lower American requires granular hydrologic modeling. Winter high flow events can reorder aquatic habitat, transport sediment, and otherwise provide beneficial impacts to these Wild & Scenic designated reaches. Because rivers are dynamic ecologies rather than water conveyance systems, the DEIR needs to analyze individual flow events as well as monthly averages.

The Lower American’s designation as a Wild & Scenic River requires that its recreation values be protected by law. The DEIR indicates the threshold of significance should be “substantial adverse effect” but protecting the Lower American’s recreation values and also analyzing the other project-affected reaches instead requires “adverse effect” as the threshold of significance. The DEIR’s threshold of significance is not sensitive enough to protect Wild & Scenic River Values or to fully analyze the impacts of the Proposed Project.

The Instream Flows analysis in Section 4.7 makes fundamentally flawed assessments about Project impacts. Model sensitivity and overly generalized averaging notwithstanding, the DEIR states that averaged flow decreases at Chili Bar would be 5.9 percent less than the existing-

⁵ 4.7-4

conditions baseline and that flow decreases would be greatest between June and December.⁶ June through September is the peak rafting season, and many local outfitters, eateries, guides, and others rely on the Upper American River and associated tourism during this period. Drier water years often see greater use as other river sections dry up. A substantial portion of this economic activity is centered around Coloma, CA and below Chili Bar Dam, the most-impacted reach of the Proposed Project and the focus of much of the DEIR's analysis of hydrology.

Acknowledging these impacts and then determining they lack significance speaks to a fundamental misunderstanding of recreation use in the area.

The DEIR expresses a fundamental misunderstanding of FERC-required minimum flows for recreation and ecologic benefits. The flows negotiated for and required in the UARP FERC license provide a minimum amount of recreational water. Additional water is enjoyed by recreationists in nearly all water types—additional days and also additional flow above the minimum release numbers. The character of the recreation changes at various flows with different features, difficulties, and levels of enjoyment. The normal range of boatable flows is between about 1,000 cfs and 7,000 cfs.

The minimum required flows are not the baseline condition against which changes in hydrology or levels of significance must be measured. The baseline condition is the actual flows in the river.

The DEIR also indicates that the project might prevent SMUD from meeting minimum recreation releases in 4.7 percent of cases. Not meeting these minimum recreation releases is not an option for SMUD, and compliance issues with SMUD's FERC license are not a trivial issue. While the ARIOps modeling is likely not granular enough to assess which precise days and hours of release might be impacted, the DEIR's suggestion that these impacts are within modeling error is an inadequate conclusion. SMUD and the recreation stakeholder communities will be unable to support any project that has direct impact on SMUD's ability to meet FERC license-required flows.

The DEIR does not discuss streamflows below Folsom Reservoir where recreation is enjoyed and protected by the Federal Wild & Scenic designation.

The DEIR's overall finding that impacts of the Proposed Project to recreational boating are less than significant is fundamentally flawed. A repeated analysis of flows that accurately captures the reduction of instream flow using future and historic modeling at each relevant streamflow point and an appropriately sensitive timestep is necessary for the Final EIR to accurately capture recreation impacts.

⁶ See Section 4.7-10.

VII. The DEIR ignores crucial issues regarding both Project impacts and cumulative impacts, and lacks data to adequately analyze the cumulative impacts resulting from the Project

The DEIR fails to analyze cumulative impacts caused by the proposed project. The geographic area impacted by the Proposed Project is an especially unique environmental and recreational resource. It is widely acknowledged that the South Fork American River is one of the “finest recreational resources in California” with the Lower American River listed as the only urban waterway in the United States to be designated a “Wild and Scenic River” and home to over 43 fish species including species deemed federally threatened.⁷ The Upper American River Watershed provides \$14.9 billion dollars per year in goods and services delivered to people globally.⁸

Given the unparalleled environmental, recreational, and economic importance of the watersheds impacted by the Proposed Project, a complete assessment of its cumulative impacts is necessary. Without such an assessment, stakeholders and the public cannot properly weigh impacts caused by the proposed project. The importance of a complete picture of impacts is broadly understood, as shown in *Roberson v. Methow Valley Citizens Council*, (1989) 490 U.S. 332, 349, which articulates that purpose of the National Environmental Policy Act (NEPA) is twofold: (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public. Similarly, CEQA’s purpose “of an environmental impact report is to provide public agencies and the *public in general with detailed information* about the effect which a proposed project is likely to have on the environment ...” Public Resource Code § 21061. Thus, the heart of the CEQA process is to provide both the public agencies and the *public* with detailed information about the impacts of the proposed project. Clearly, a DEIR that is lacking crucial data and information on project impacts is incomplete, as both the public and public agencies would be unable to identify the Proposed Project’s impacts on the environment.

Here, in multiple areas of the DEIR, the agency fails to provide necessary data to understand the Proposed Project’s impacts. In addition, the DEIR fails to provide proper analysis on both individual impacts as well as cumulative impacts and makes conclusions regarding those impacts that are not supported by data.

First, the DEIR fails to provide adequate data to address individual as well as cumulative impacts the project will have on recreational boating, swimming, fishing, and use of the

⁷ *South Fork American River*, Bureau of Land Management, <https://www.blm.gov/visit/south-fork-american-river>

⁸ *An Incentive to Invest: Understanding the Economic Value of the Upper American River Watershed*, El Dorado Water Agency (March, 2024)

waterways in the project area. Flow variability on any given day has broad impacts on the recreational opportunities of a waterway. “Flow variability is an important characteristic of river systems, with implications for river geomorphology, ecology, and human uses.” (*Catchment Dynamics and River Processes: Mediterranean and Other Climate Regions*, (2005) G. Mathias Kondolf and Ramon J. Batalla) Here, the project has clear negative impacts on the South Fork American river below Chili Bar. The DEIR acknowledges that average monthly flows of the South Fork American River with the proposed project below Chili Bar Dam were 6.1 percent less than under existing conditions’ baseline. (p. 4.2-33) Importantly, during critically dry years the proposed project would result in 23.5% less flow during September. (p. 4.2-33)

Despite this significant impact, the DEIR concludes that the impacts would not be significant based arbitrarily on the assumption that required minimum instream flow requirements would still be met. Even assuming that required minimum instream flows could be met for the Chili Bar section of the South Fork American River with the Proposed Project, instream flows is not the proper metric for determining an impact to recreation. Because the project will substantially decrease the water flowing down the South Fork American River - one of the most boated stretches of river in the United States - a proper study on flow reduction on an hourly basis is needed to accurately assess the impacts to recreation and boating below Chili Bar. This includes providing data on hourly flow impacts due to the proposed project, as well as providing data on the impact of various water flow levels on the use and enjoyment by the recreational boating community. This broader data is crucial in determining impacts to both the private boating sector and the multitude of commercial boating companies that rely on particular river flows for their businesses. Providing additional data and modeling is also crucial to show how many days of opportunistic recreational paddling would be lost due to the proposed project, and how many opportunistic hours of flow would be lost outside of normal guaranteed releases. This data is of even greater importance considering the greatest impact the proposed project will have on flows appears to be during the summer months, which coincides with the most frequent season of recreational use on the South Fork American River.

In addition to the flow impacts the Proposed Project would have on the South Fork American River below Chili Bar, the Proposed Project also impacts flow amounts and timing on other extremely popular recreational river reaches. While the proposed project discusses water diversion from either White Rock Powerhouse or Folsom Reservoir, the proposed project impacts storage on multiple upstream reservoirs. These include but are not limited to Caples Lake, Silver Lake, Ice House, and Union Valley Reservoirs. The DEIR fails to provide monthly data based on water type year for all the reservoir levels with and without projects. The DEIR also fails to provide data for the daily flow impacts for water type year for the stretches of rivers and streams flowing from each of the reservoirs impacted by the project. Modeling shows significant reduction in flows to Silver Creek during multiple water year types. Silver Creek is a

popular recreational boating, fishing, and swimming section. The recreational impacts of the proposed project on Silver Creek and the daily flow impacts need to be addressed in the DEIR. In addition to providing daily flow impact on all stretches of Silver Creek with the proposed project, the DEIR also fails to provide impacts and data to Silver Fork, Camp Creek, the Upper South Fork above White Rock, and Pyramid Creek. These are all sections of river and streams that are popular boating, hiking and fishing corridors. Further data needs to be provided as clearly upstream reservoir operation and storage will be greatly altered due to the proposed project. As reservoir operations change, flow release changes which significantly impact recreational opportunities. The DEIR fails to provide complete data on all reservoir storage impacts for all months given water year type. This is essential to determining recreational impacts due to the popular boating, swimming and fishing activities on upstream reservoirs and the businesses that rely on them.

Second, the DEIR fails to provide proper data and analysis for impacts and cumulative impacts related to Aquatic Biological Resources, Terrestrial Biological Resources, Aesthetics, Agricultural and Forestry resources, Geology and Soils, Wildfire, Utilities and Service Systems, and Surface Water Quality, and Climate Change. “Alteration to the natural flow regimes of rivers and streams and their floodplains and wetlands is recognized as a major factor contributing to loss of biological diversity and ecological function in aquatic ecosystems, including floodplains.” Alteration to the natural flow regimes of rivers, streams, floodplains & wetlands—key threatening process listing (2013) NSW Scientific Committee – final determination. In the DEIR, Table 4.2-6 clearly shows significantly less water flowing down the South Fork American during nearly every month and water year type. Importantly, during the hottest and driest months of Dry and Critically Dry years, the Proposed Project would divert the most water. These diversions would reach as high as an 11.5% reduction in water flow reaching Folsom Reservoir (flowing through the South Fork American) during September months in critically dry years. Despite clear data showing the Proposed Project would have negative environmental impacts relating to flow reduction and water temperature increases across multiple drainages, the DEIR makes a finding the impact is less than significant. The DEIR relies on arbitrary in flow requirements being met. This standard is not appropriate as CEQA requires analysis of the proposed projects impact compared to a current baseline. The current baseline is not set at minimum flows but at actual flows in the South Fork American River. Therefore, the DEIR must provide data and analyze impacts to biological resources and aquatic resources based on current conditions.

The DEIR also makes conclusory statements relating to impacts around a 5% threshold, seemingly asserting that any reduction in flows under 5% cannot have significant environmental impacts. Concerningly, even when the agency modeling shows significantly greater reduction than 5% in flows (multiple months showing flow reductions over 10%) the DEIR circles back to the impacts being less than significant because instream flow requirements will still be met. This

circular argument goes directly against the purpose of CEQA, which is to provide data and analysis as to the actual impacts a proposed project will have.

Without addressing environmental impacts related to current conditions (versus an arbitrary 5% threshold and/or baseline in-stream flow requirements) the DEIR does not disclose cumulative environmental impacts. To adequately address these environmental impacts, additional stream and reservoir data along with temperature data on stream and river flows impacted by the proposed project need to be modeled. Missing data includes proposed hourly project flow and temperature data impacts on Caples Creek, Silver Fork, multiple reaches of Silver Creek including Ice House outflow and at Union Valley, Pilot Creek, and upper and lower Gerle Creek. This is essential for a wide variety of impacts, especially on these reaches world-renowned trout populations. Temperature data is crucial for identifying these impacts as only a 3.6 degree increase in water temperature would create uninhabitable conditions for rainbow trout and brown trout in the lower reaches of most streams.⁹ Thus, additional data and biological opinions are needed to determine the proper threshold impacts the proposed project has on the environment.

Third, the project fails to adequately account for the impacts of the current project along with reasonably foreseeable projects to determine the overall cumulative impacts. The DEIR acknowledges that additional construction would be required to put the water requested to beneficial use. In particular, the proposed project cannot put any water to beneficial use without additional construction at White Rock Powerhouse. Despite the fact that such infrastructure will be necessary, the DEIR fails to address the cumulative impacts of the taking of the water with the infrastructure construction reasonably foreseeable to put the water to beneficial use. CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones, each with a minimal potential impact on the environment, which cumulatively may have disastrous consequences.” (Bozung v. Local Agency Formation Com. (1975) 13.3d 263, 283-284.) Further, “It is well established that CEQA forbids ‘Piecemeal’ review of the significant environmental impacts of a project.” (Banning Ranch Conservancy v. City of Newport Beach (2012) 211 Cal.App.4th 1209, 1222.) Here, the DEIR must further address impacts related to additional infrastructure needed to facilitate the beneficial use of the water being taken. The DEIR discusses the cumulative impacts of the proposed project with El Dorado Irrigations Project 21112 change in point of diversion request. However, the DEIR fails to provide data that provides monthly and hourly impacts given water year type with and without the Project 21112 change in point of diversion. While Project 21112 provided modeling of Upper South Fork American flow impacts related to their request to change the point of diversion, the current DEIR failed to model daily and hourly flow impacts associated with their project on the Upper South Fork American. In addition to flow impacts, the DEIR should describe temperature impacts on the Upper South Fork American to understand the cumulative impacts of the two projects. Clearly, flow patterns would change with the proposed project as reservoir storage that

⁹ *Trout in Trouble* NRDC (2008) <https://www.nrdc.org/sites/default/files/trout.pdf>

supply the Upper South Fork American will be impacted, thus outflow from these reservoirs into the South Fork American would also be impacted and flow patterns would be changed from the current baseline.

In addition, the DEIR should address impacts associated with the proposed project in conjunction with Alder Creek Reservoir. The reservoir is a proposed large storage project that the EDCWA states “is uniquely positioned to capture snowmelt and create storage from the Upper South Fork of the American River.¹⁰” The current project would have significantly more impacts when coupled with the Alder Creek project, and addressing those impacts would prevent the DEIR from having a piecemeal approach in determining project impacts.

Finally, the DEIR fails to address potentially significant wildfire impacts associated with the current project. Scientific studies have found a statistical relationship between river flows and the occurrence of fires.¹¹ The cumulative impacts associated with taking water from a large section of the Upper South Fork American Watershed on increased fire danger should be addressed in the DEIR. The increased impacts from less water would likely be magnified due to the increased water taking during the critically dry year summer months, the most fire prone time in Northern California.

Conclusion

Thank you for the opportunity to comment on the Draft Environmental Impact Report for the El Dorado Water Reliability Project. We strongly recommend that EDCWA consider the serious issues identified with the Proposed Project and instead plan to more efficiently use existing developed water resources to better support the environmental sustainability of the farming and tourism economy and the affordability of water costs for the residents of El Dorado County.

Respectfully submitted,

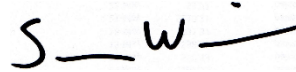
Signatures on the next page

¹⁰ *Alder Creek Reservoir and Conservation Project*, El Dorado County Water Agency
<https://www.eldoradocounty.ca.gov/files/assets/county/v/1/documents/water-agency/edwa-alder-creek-reservoir-overview.pdf>

¹¹ *River flows Are a Reliable Index of Forest Fire Risk in the Temperate Tasmanian Wilderness World Heritage Area*, Australia (2021) David M. J. S. Bowman and Grant J. Williamson



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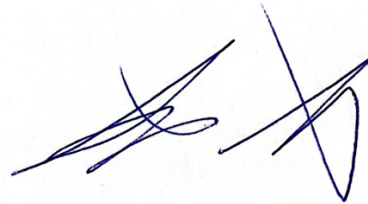
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