



The Relationship Between a Contractor and a Consultant

- **Byron Burkholder** – Valley Rain Construction
- **Dig Karki** – Hunter Contracting
- **Nicholas Khoury** – BrightView
- **Kenny Shepherd** – Willmeng Construction

Moderator: Doug Macdonald, Aqua Engineering



*You've Been Served - The Anatomy of
a Lawsuit
&
INSURANCE!
Everyone's Favorite Topic*

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Program Goals

- How to effectively use contract provisions to limit liability
- How to effectively manage projects to limit liability
- How insurance, Errors and Omissions, Commercial General Liability and Employment policies, will respond to litigation
- Learn what to do, or at least what to expect, if/when *you've been served*



Out of Today's Scope: Comprehensive Litigation Avoidance

- “Litigation-Wise Project Management”
 - Client-selection issues
 - Detailed contract negotiations strategies
 - Detailed project management and effective loss prevention measures



Effective Use of Contract Provisions

•In and of itself the topic of its own seminar. but, at least the following four key provisions will be addressed:

- Limitation of Liability Provision
- Limitation of Action/Corporate Liability Provisions
- Waiver of Consequential Damages
- A manageable indemnity agreement
 - Based on “fault” not “arising out of your work” allegations
 - No immediate duty to defend
 - Limited to the extent covered by applicable insurance



The Litigation Dynamic, Part 1

Q: Will you be served?

A: Yes.

Q: What if the problem is not your fault?

A: Yes.



The Litigation Dynamic, Part 2

Q: Why will you be served?

A: Lawyers.

- Often exacerbated by cryptic and/or incomplete project documentation
- The usual A/E versus contractor blame-game
- The employee you never should have hired
- Insurance companies and contractual indemnity agreements
- Lawyers get sued too (CYA)



The Litigation Dynamic, Part 3

Q: What protection do you have against being wrongly/randomly dragged into a lawsuit?

A: Not much; many States require a “Certificate of Merit” before commencing an action against an A/E firm but most do not include landscape architects or irrigation consultants.

- A lawyer has to consult with an “expert” before suing a design professional
- Doesn’t apply to contractual indemnity claims
- Nearly impossible to impose consequence, even after vindication



Your Insurance

- You are likely purchasing multiple types of insurance for your professional practice including:
 - Professional Liability Policies (E&O)
 - Commercial General Liability Policies (CGL)
 - Workers Compensation and Employers Liability Insurance
 - Employment Practices Liability Insurance (EPL)
 - Directors and Officers Liability insurance (D&O)
 - Auto
- Typically, the E&O policy is most likely to provide coverage.
 - Claims made
 - Consent to settle required
 - Expense within limits
 - Deductible
 - Does not provide coverage for purely contractual obligations (ex. Indemnity)



Notice of a Potential Claim

- Often, receipt of a Subpoena Duces Tecum (under penalty of perjury you shall...) is the first notice of a potential claim
- Can be a nastygram, a verbal accusation, a withholding of payment, or an internal discovery of a potential problem
- Litigation Hold
- Tender Through Broker/Counsel
- Loss Prevention Coverage





2023 National Conference SCOTTSDALE, AZ



| | |
|---|--------------------|
| SUBP-010 | |
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): | FOR COURT USE ONLY |
| TELEPHONE NO.: E-MAIL ADDRESS: ATTORNEY FOR (Name): | |
| FAX NO.: | |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF | |
| STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME: | |
| PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: | |
| DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS | CASE NUMBER: |

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

| | |
|----------------------------------|------------|
| To (name of deposition officer): | At (time): |
| On (date): | |
| Location (address): | |

Do not release the requested records to the deposition officer prior to the date and time stated above.

- ☐ by delivering a true, legible, and durable **copy** of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
 - ☐ by delivering a true, legible, and durable **copy** of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
 - ☐ by making the **original** business records described in item 3 available for inspection at your business address by the attorney's representative and permitting **copying** at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
3. The records to be produced are described as follows (if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):

☐ Continued on Attachment 3

4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

| | |
|----------------------|--|
| (TYPE OR PRINT NAME) | (SIGNATURE OF PERSON ISSUING SUBPOENA) |
|----------------------|--|

Notice of a Claim

- A “claim” is generally defined as a demand for services or compensation
- A claim is the trigger for coverage under your Professional Liability Policy
- Typically, service of a Complaint is the first notice of a claim
- Other examples of a claim:
 - A deductive Change Order
 - A written demand letter
- Tender/Litigation hold



The Litigation Life Cycle

- At least a year, or three
- “Pleadings” – formal claims and responses in court
- “Discovery” – formal investigation / exchange of information
- Summary Judgment
- Settlement negotiations (mediation)
- Trial
- Post trial: attorney fees, appeals, collections



Pleadings: The Claims

- Complaints
 - Negligence
 - Breach of Contract
- Cross-Complaints
 - Equitable/implied indemnity
 - Express/contractual indemnity

Note: both typically devoid of meaningful detail.



Pleadings: The Responses

- Answer: general denial, general defenses (example: statute of limitations)
- Demurrer: asks the court to dismiss the case (example: no Certificate of Merit, limitation of actions against individuals)
 - At most, usually granted with leave for the Plaintiff to amend and correct the errors in the Complaint
- Motion to Strike: asks the court to disregard limited portions of the Complaint (example: request for punitive damages, or consequential damages if waived by the contract)



Discovery

What you can get from, and have to give to, the other side:

“[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.”

Cal. Civ. Proc. Code section 2017.010

(Often covered as part of a Case Management Order)



Discovery: Written Questions

- “Interrogatories” and “Requests for Admission,” asked and answered in writing and under oath under penalty of perjury
- Often vague/confusing questions, written by lawyers
- Often vague/confusing answers, written by lawyers



Discovery: Exchange of Documents, Part 1

Expect a request to turn over “everything” to the opposing side:

- Complete project file
- All emails (and maybe texts)
- Billing records
- Anything else “related to” the project



Discovery: Exchange of Documents, Part 2

- Often an enormous volume of material
- One of the most time-consuming, effort-intensive parts of a lawsuit
- Penalties for failure to produce and spoliation of evidence



Discovery: Exchange of Documents, Part 3

The documents are likely to make or break the case:

- Practically (although not technically) necessary to prove any fact
 - “If it isn’t in writing, it didn’t happen.”
- Also potentially very damaging
 - Negative comments about your client or subconsultants in company emails



Manage Project Documentation by Understanding Discovery + Evidence

Example: being able to prove your own scope (the what and why of your performance).

- Base information
- Budget and schedule
- Deliverables
- Construction Administration (special litigation trap: was the architect responsible to inspect the work, or for site safety?)
 - Also a reason to do good contracts (but remember, a written scope can evolve over time based on conduct of the parties)



Avoid Harmful Project Documentation

- Argumentative/posturing emails
- Unprofessional emails
- Inter-office communications
- Drafts

Remember, no digital document is ever truly “deleted,” and everything can be recovered by computer forensics.



Document Retention Policies, Part 1

- No law controlling document retention
- No obligation to keep anything (unless required by contact, litigation-hold demand, etc.)
- No 10-year statute of limitations
 - There is a 10-year rule, but lawsuits can still come after
 - Only firm limit on lawsuits is death of the plaintiff, plus 1 year
- But: retaining (well-organized) documents can be extremely useful – be able to prove the what and why of your performance



Document Retention Policies, Part 2

10 years is not a solid rule, but a reasonable guideline.

- Industry standard is about 8-12 years; purging a file earlier can raise suspicion about what you were trying to hide
- Longer is probably better
 - A 10-year case might come after 15 years
 - No longer the cost concern of paper files
- Even after 10 years, keep the contract
 - Consider a “Key Documents” file with the contract, addendums/change orders, and work product
 - Also consider retaining emails *if you have a consistent email filing system*; a partial collection of project emails can do more harm than good



Discovery: Depositions

Live testimony, under oath, with a court reporter writing down everything that is said.

- The goal: to get sound bites to embarrass the witness (you) at trial
 - Not an opportunity to explain your innocence or convince the lawyers you've been wrongly blamed
- Often a day long, sometimes multiple days
 - Multiple lawyers asking every question they can think of
 - Starting with "tell me where you went to high school and your complete employment history"
- Also: expert depositions
 - "Expert" testimony required to prove the "professional standard of care" and whether your services met that standard of care



Summary Judgment (or Adjudication)

Ask the court to decide issues without a trial/jury.

- Must show that there is “no triable issue of material fact”
 - Even some slight evidence in the other side’s favor usually defeats summary judgment
- Might defeat an entire claim
 - Example: after 14 years, no evidence whatsoever that you were involved with the project
 - Or, a claim for purely economic loss for an alleged error/defect outside of the Right to Repair Act’s list of building standards (Civ. Code section 896)
- Might defeat, or enforce, particular claims
 - Contractual indemnity and duty to defend



Settlement

Something like 97% of all civil lawsuits settle before trial.

- Highly “encouraged” by courts, especially in construction litigation
 - Each judge has at least hundreds of cases
 - A single trial over a complex project involving all design professionals and contractors can take months
- Typically negotiated via mediation
 - A totally confidential and totally nonbinding process, with a mediator (an attorney or retired judge) as a neutral go-between
 - Sometimes required by a Case Management Order
 - Complex multi-party cases may easily see four or more mediation sessions
- Settlements often reached after months, if not years, of litigation



Trial

Something like 3% of all civil lawsuits go to trial.

- Expensive
 - Insurance implications
- Time-consuming
 - Perhaps a week for a jury trial for a simply two party (owner versus A/E) case
 - Important to be present and actively involved
- Uncertain and risky
 - A jury of 12 regular people, chosen for their ignorance and inability to get out of jury duty
 - The battle of the (lying?) experts
 - Contractual indemnity and attorney-fee provisions



You've been served!

THE END

(AND GOOD LUCK)



 **ASIC**

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INSURANCE: EVERYONE'S FAVORITE TOPIC

➤ Trends in the insurance marketplace



Cyber Security Insurance

If your company uses technology, you are at risk!

- Enable multi-factor authentication (MFA)
- Enforce robust password policy
- Adopt good email hygiene
- Implement strong backup strategy
- Beware of remote access protocol
- Understand reasons to purchase cyber security



Cyber Security Insurance

If your company uses technology, you are at risk!

- Understand reasons to purchase cyber security
 - Prevalence of cyber attacks
 - Support from insurance following a cyber attack
 - Covers your assets
 - Variable coverages to match your specific needs

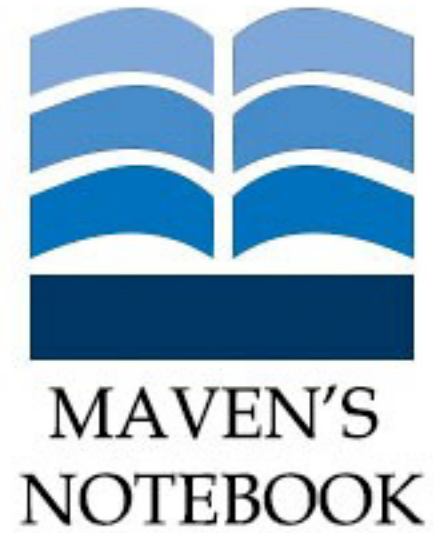




The Drought Today & California Water Management: Complex, Chaotic, or Simply Cantankerous?

Chris Austin, Maven's Notebook

Who am I?



www.MavensNotebook.com

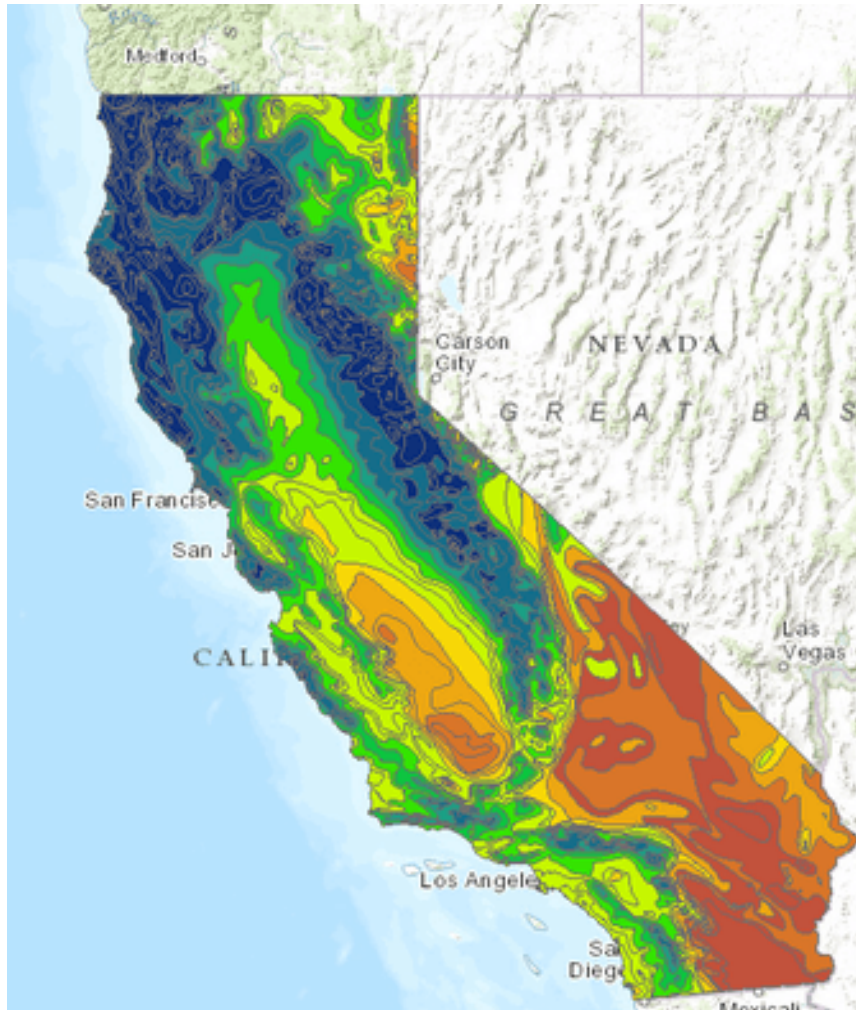
Presentation Outline

- California is complex
- California's climate challenge
- What about water storage
- California let all that water go out to sea ... ?
- Why not desalinate
- Q&A

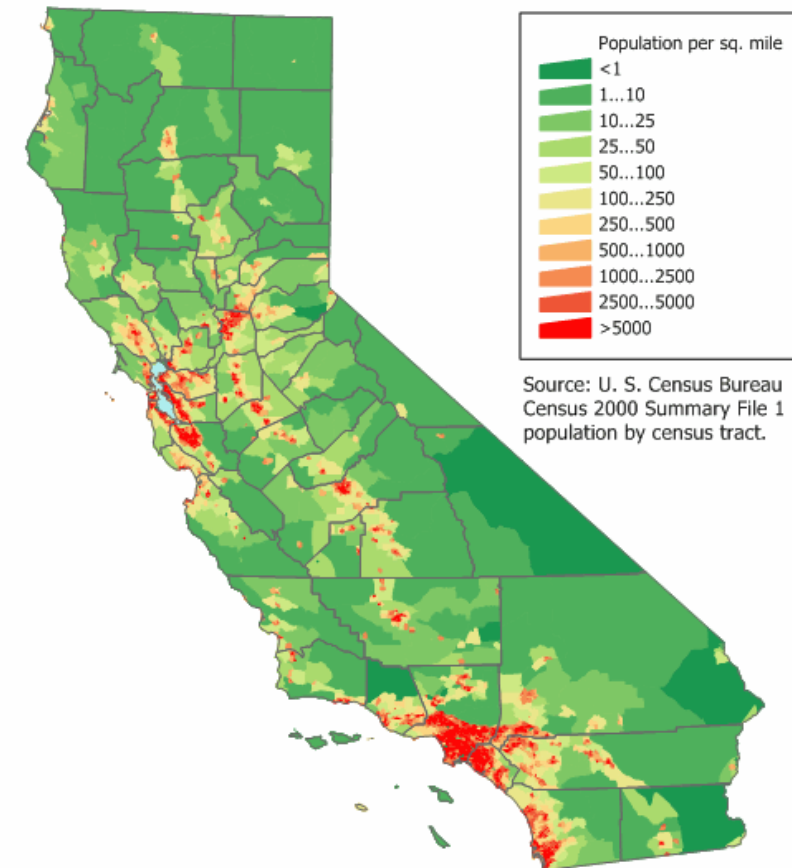


California is complex ...

Precipitation falls in the north ...

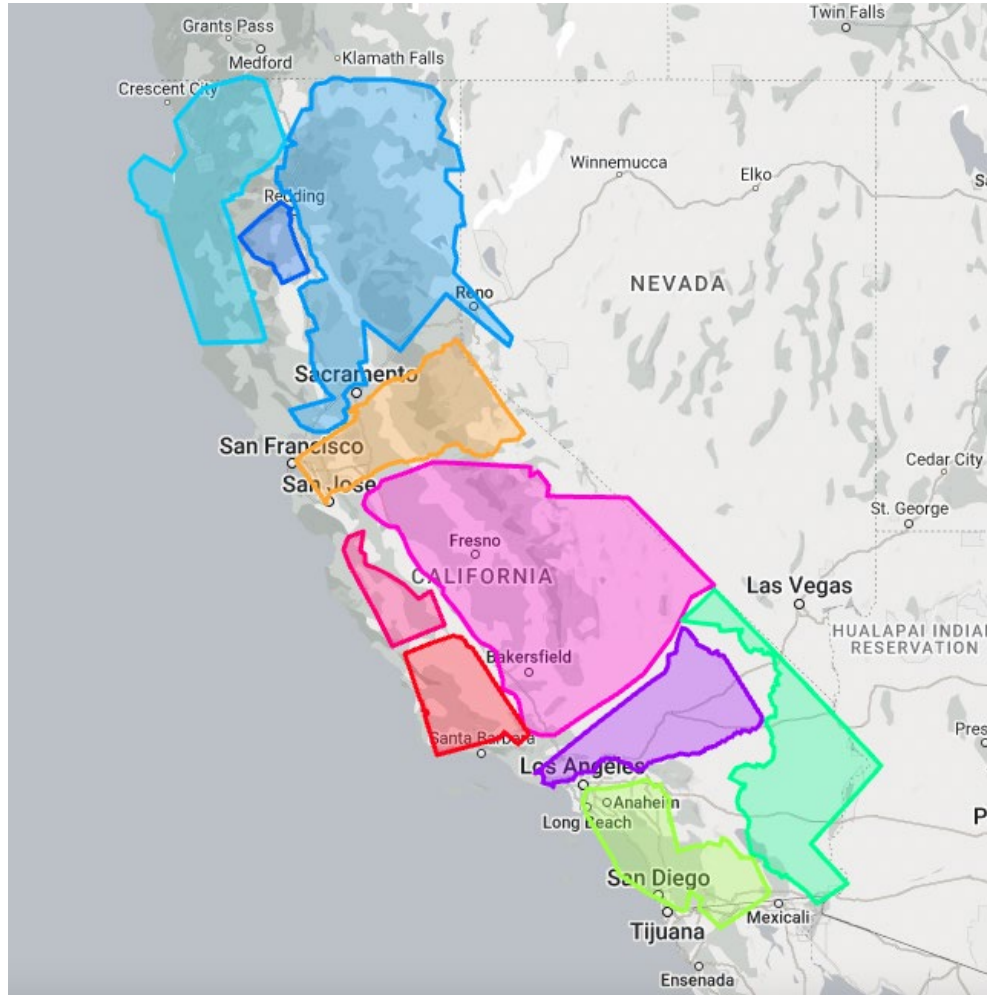


But most of the population lives in central and southern California ...



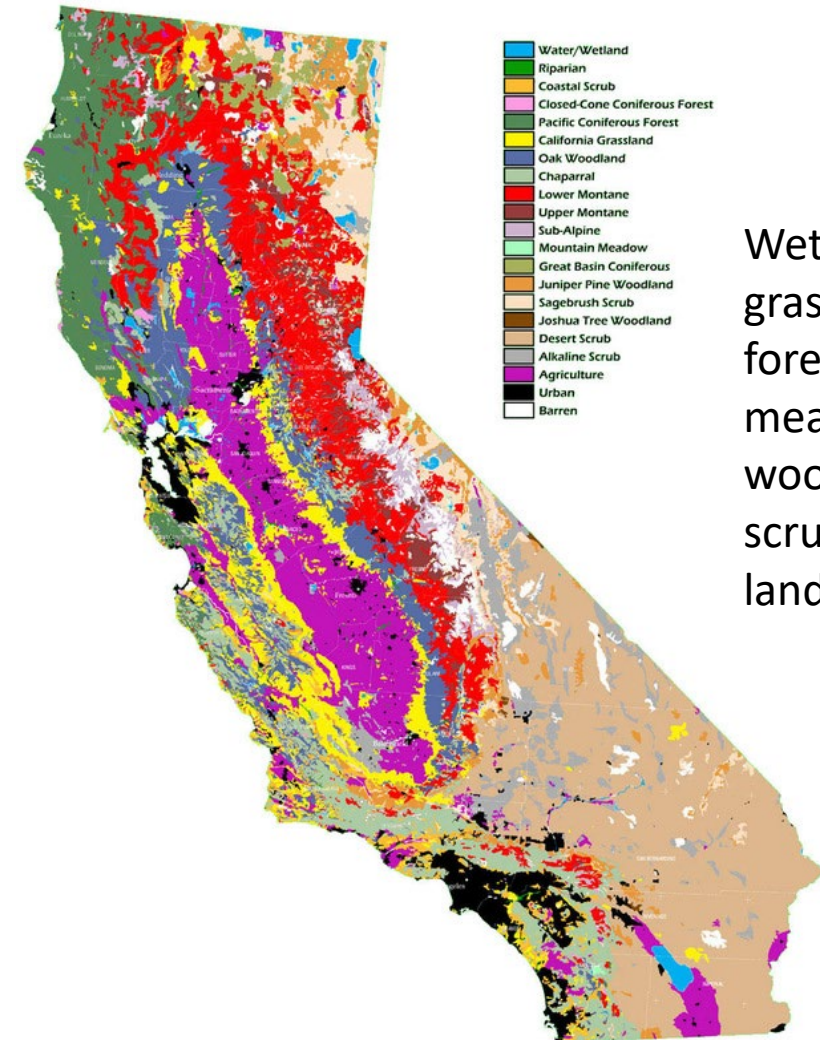
California is **BIG!**

The size of ten states ...



Massachusetts, West Virginia, Rhode Island, Vermont, South Carolina, Delaware, Connecticut, New Hampshire, Maryland, and New Jersey squeezed into California, created via Thetruesize.com.

with diverse ecosystems.



Wetlands,
grasslands,
forests, alpine,
meadows,
woodlands,
scrub, ag
lands, etc ...

There are a lot of governmental entities involved ...

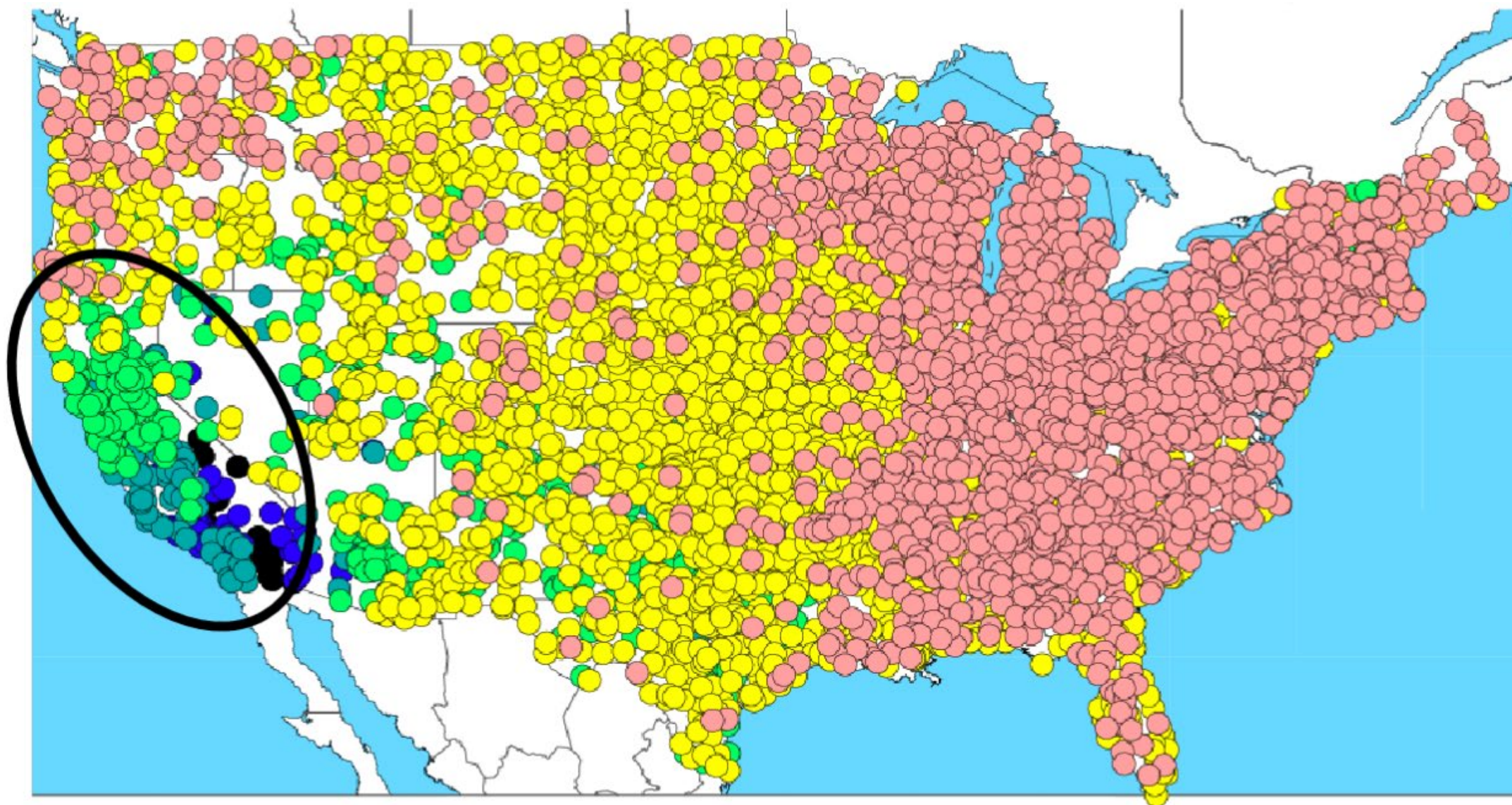


Map of California
water agencies

Does not include:

- Flood Control Agencies
- Reclamation Districts
- Resource Conservation Districts
- Small water systems
- Sanitation Districts
- Water Replenishment Districts
- JPAs to manage regions
- Groundwater Sustainability Agencies
- Etc.

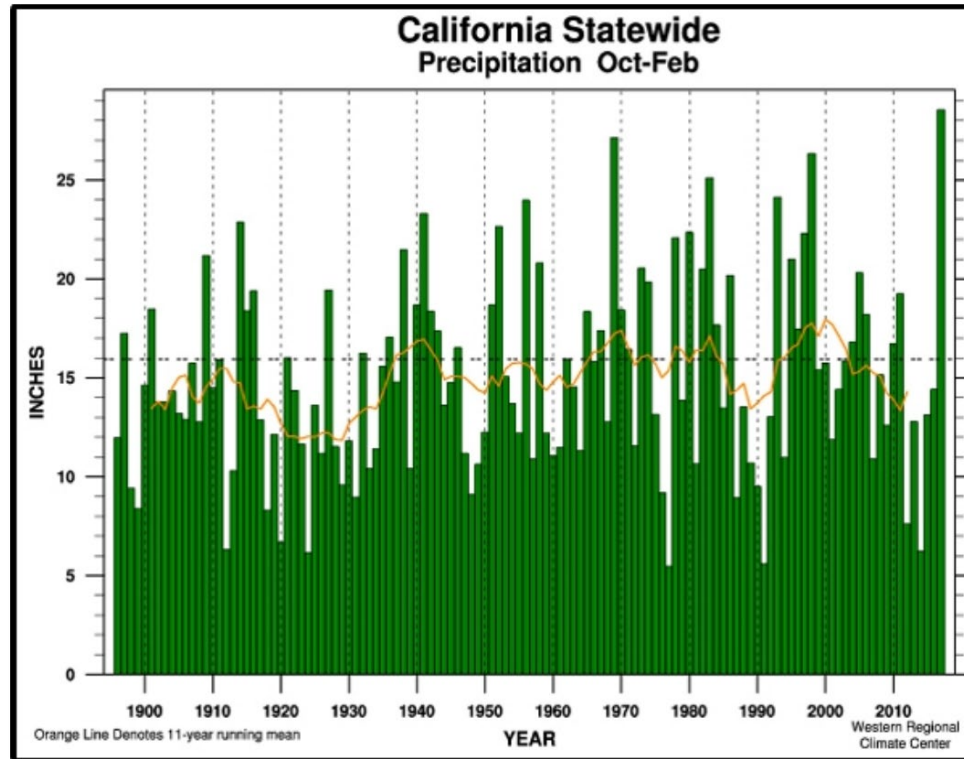
California's precipitation is highly variable ...



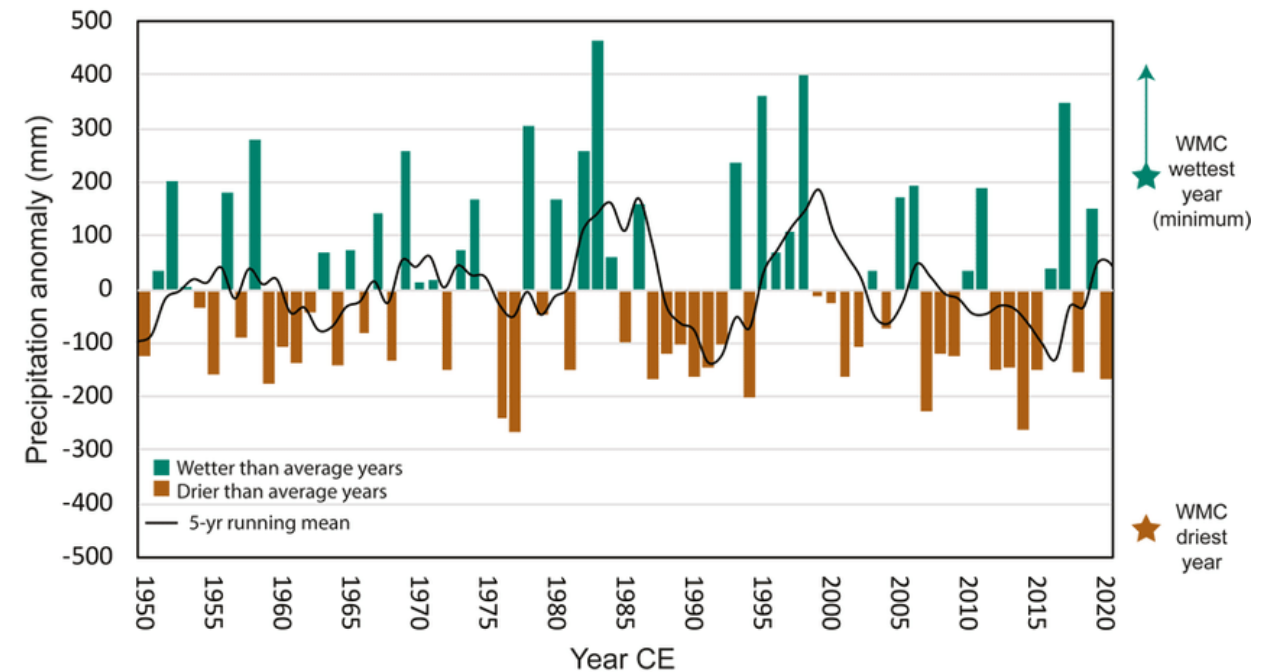
Annual coefficient of variation

What does that variability look like?

Annual precipitation ...

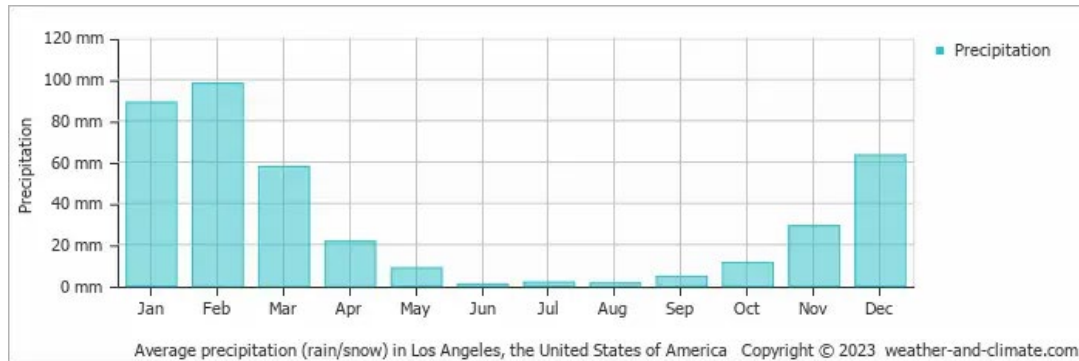


Variation from the mean ...



The precipitation mismatch:

Precipitation falls almost entirely during November – April ...

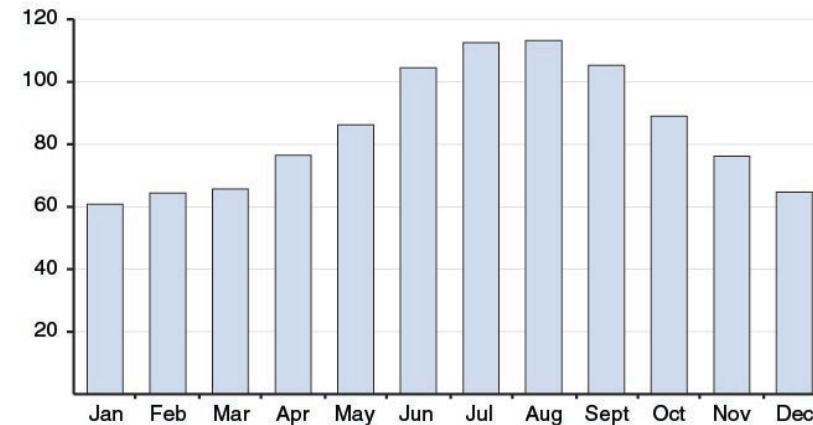


But water demand is highest in the summer and fall.

Figure 1

Urban Water Use Highest in Summer

Average Per Capita Use Per Day in Gallons, 2016

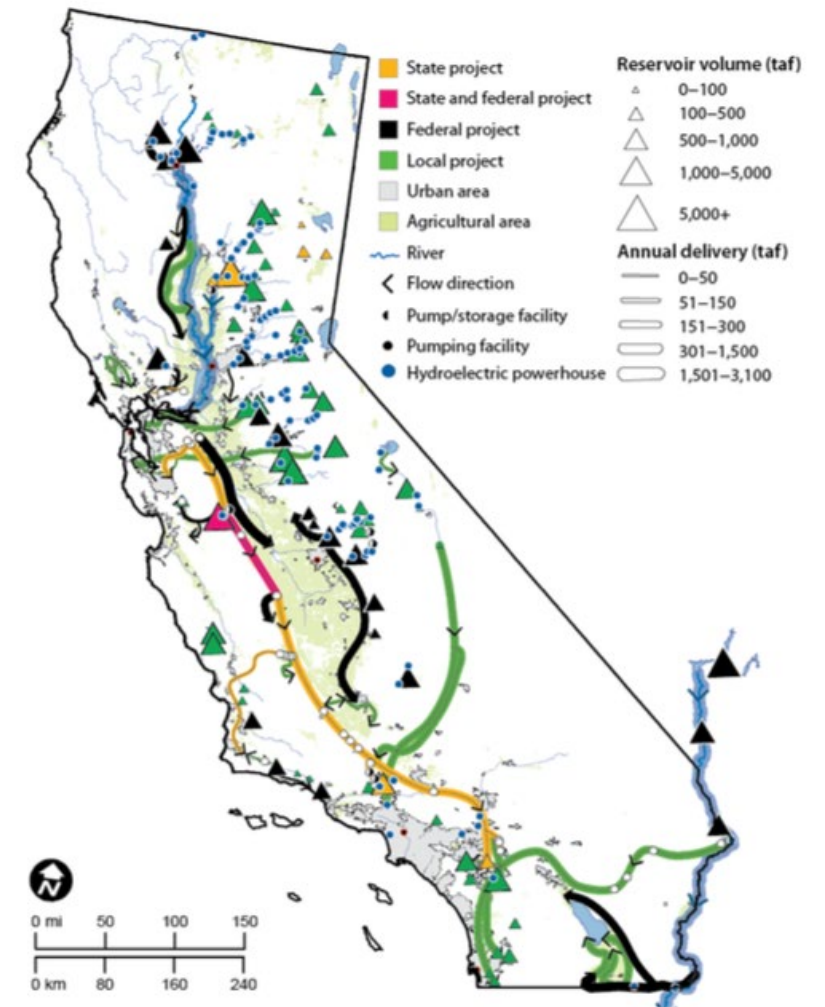


The solution: Build infrastructure!



FIGURE 1

California's extensive infrastructure network facilitates water marketing



SOURCE: Hanak et al., 2011.

Triangles: Reservoirs

Dots: Pumping facilities, hydroelectric facilities

California Water Map
Thirst Edition

Flow to the Sea

Biggish River

Thirsty Place

The Delta

Former River

Former Lake, Thirsty Now

Thirsty Place

Thirsty Place

Thirsty Place

Thirsty Place

Thirsty Place

Thirsty Place

Thirsty Place

Flow to the Sea

Legend:

- River (black arrow)
- Pumped River (blue arrow)
- Diverted River (red arrow)

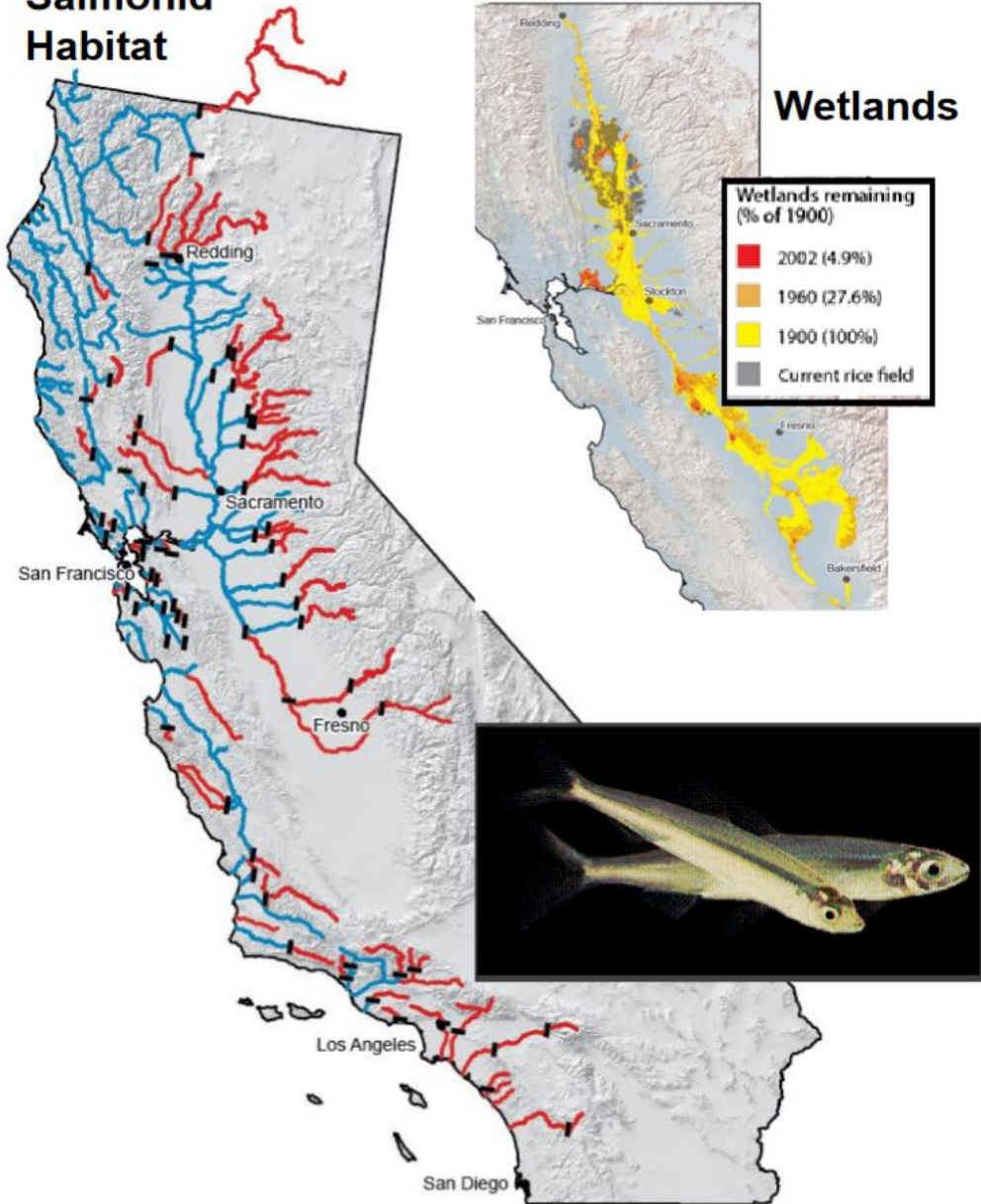
Jay Lund
<http://watershed.ucdavis.edu>

UC DAVIS
CENTER FOR WATERSHED SCIENCES



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Salmonid Habitat



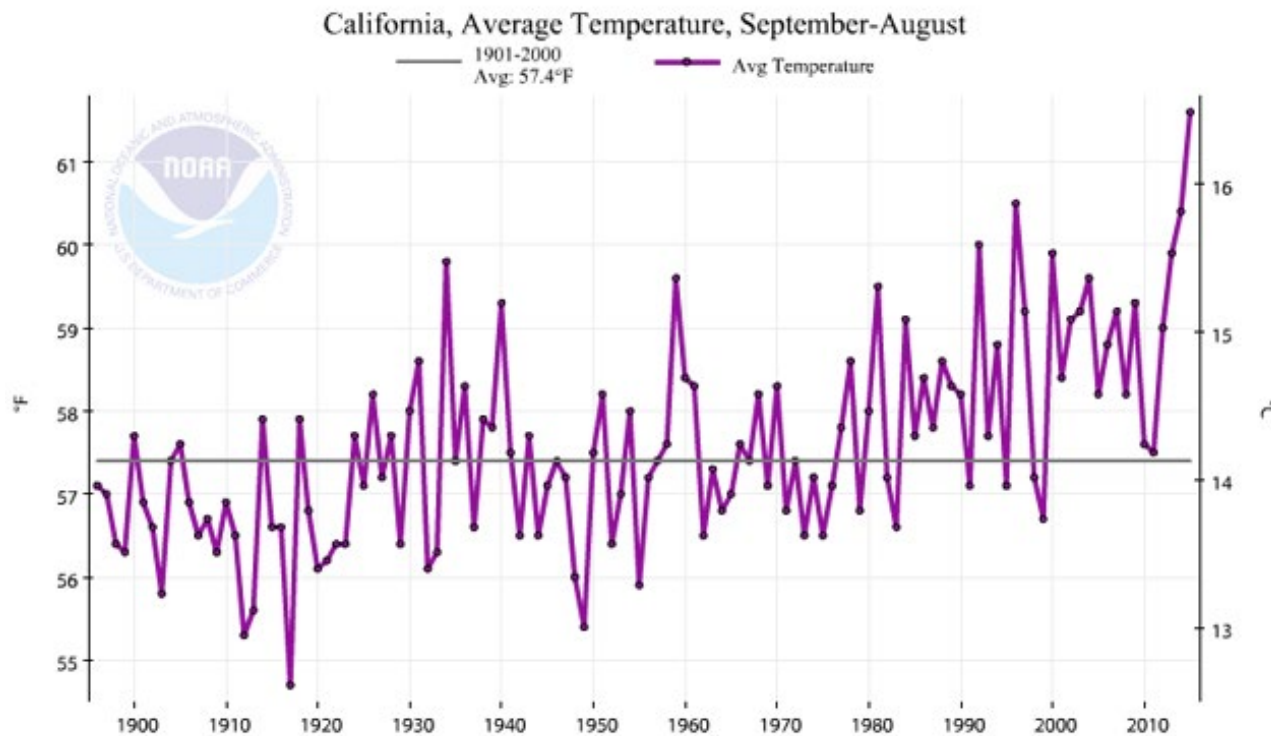
California's freshwater fishes are losing



Not just Delta smelt, but salmon, steelhead, green sturgeon, and others ...

California's climate challenge ...

Rising temperatures mean more precipitation falling as rain rather than snow

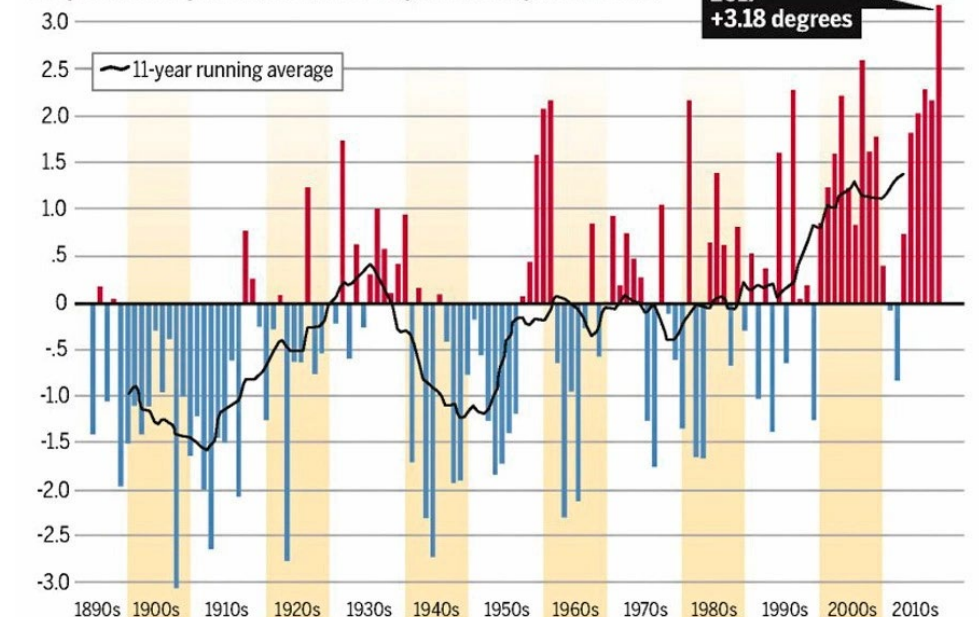


and hotter summers mean increased water demand for cities and farms.

CALIFORNIA SUMMERS ARE GETTING WARMER

This summer's departure from the average temperature for the months of June, July and August was the highest recorded, extending an upward trend since the 1950s.

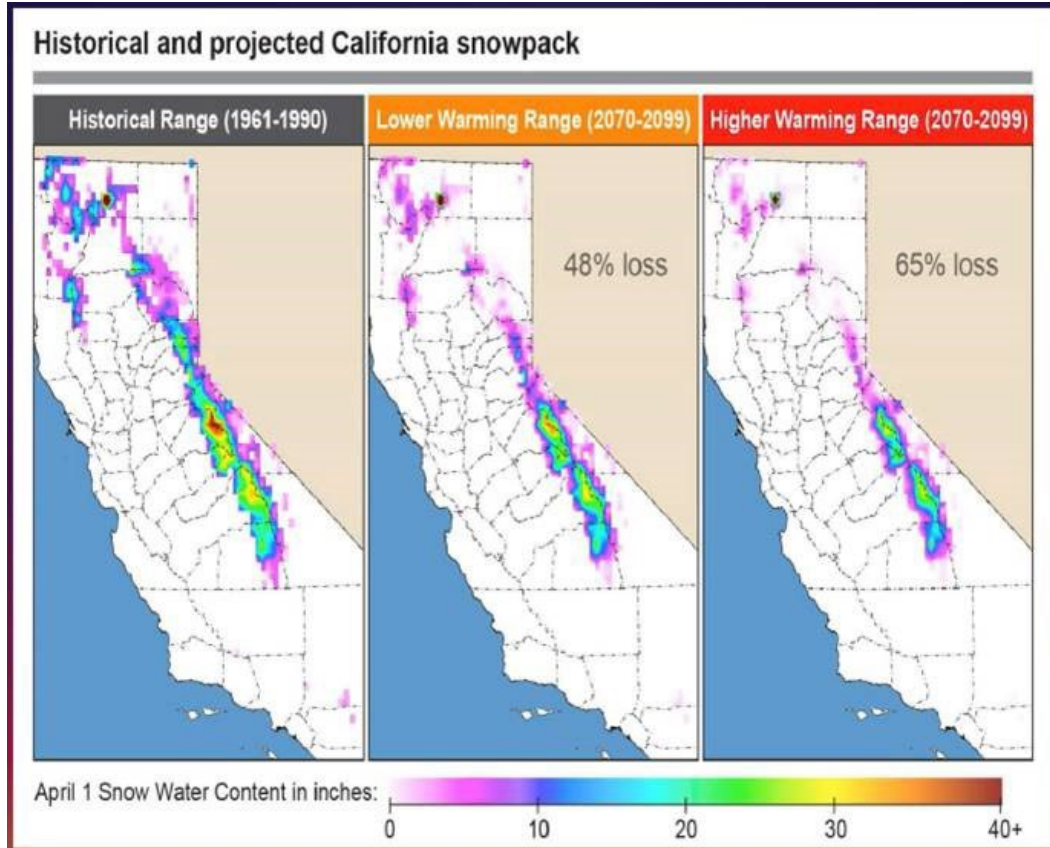
Temperature departure from 70.4 degrees average, 1885-2017



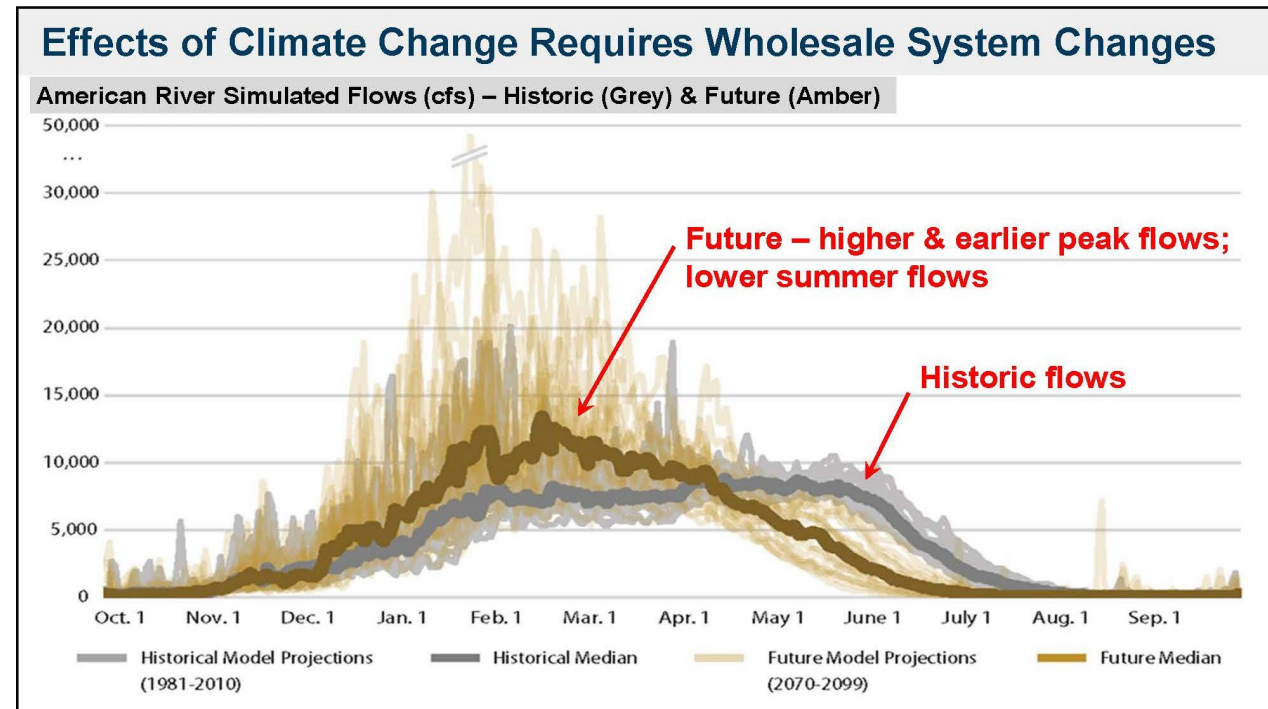
Source: Western Regional Climate Center

BAY AREA NEWS GROUP

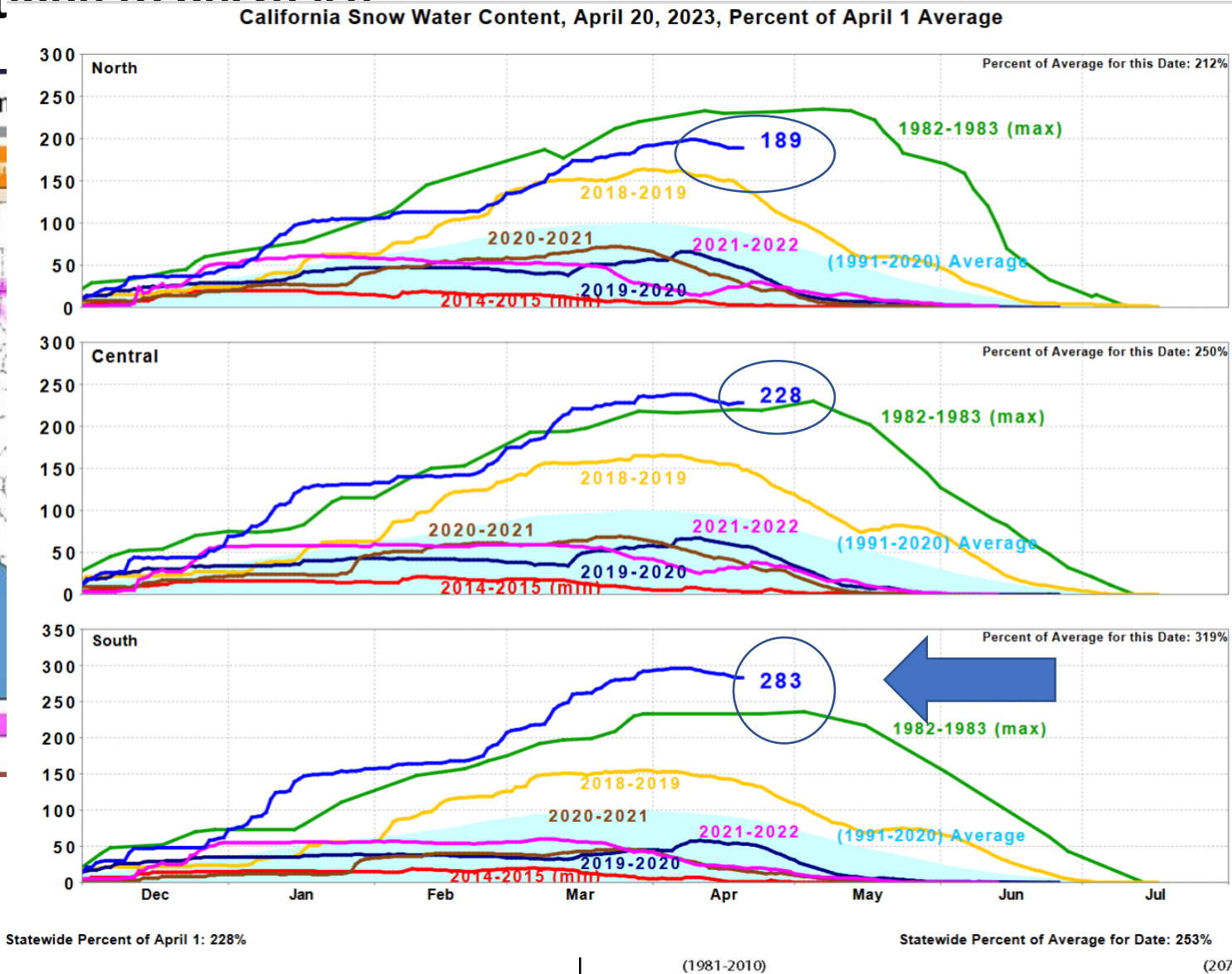
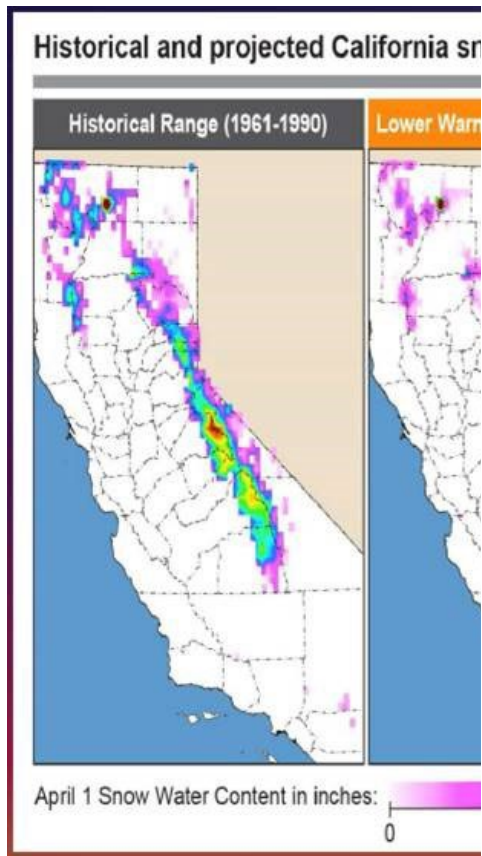
Overall, snowpack is decreasing and is projected to continue to decrease ...



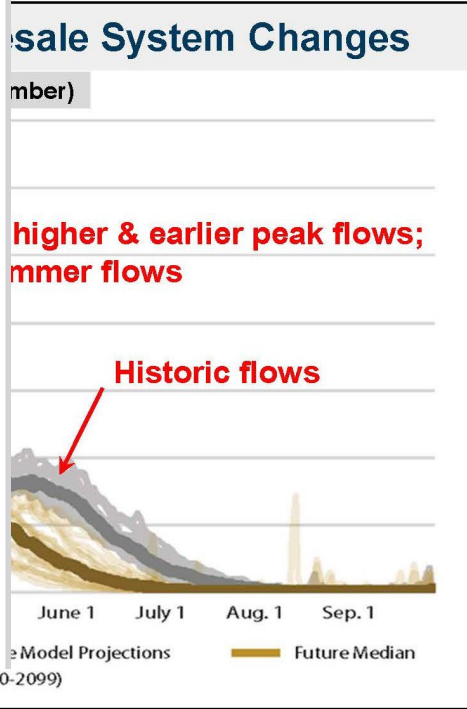
and runoff is shifting earlier and higher, with lower flows in the summer.



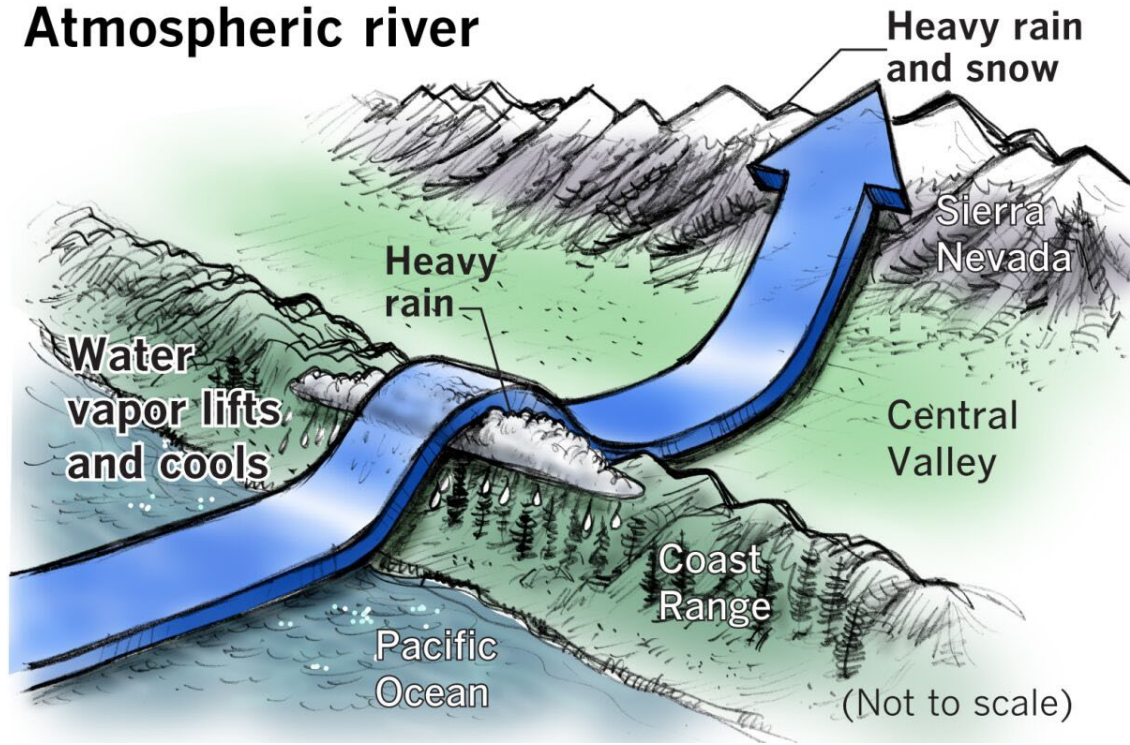
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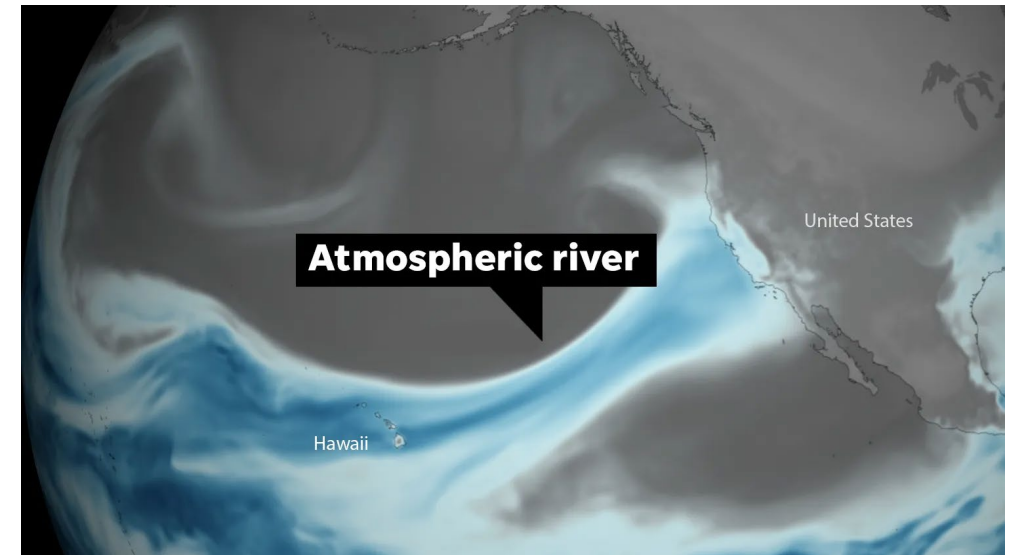
and higher, with



Atmospheric river



Atmospheric river storms are warmer and more intense ...



and drop large amounts of rain.

The diagram illustrates the water cycle with the following components:

- Water vapor lifts and cools:** Indicated by upward arrows from the ocean surface.
- Heavy rain:** Indicated by downward arrows from clouds over the land.
- Pacific Ocean:** The body of water at the bottom of the diagram.



What about water storage?



Diamond Valley Lake,
Southern California, 2003



Los Vaqueros
Reservoir, 1998, raised
the dam in 2010, and
raising it again



Proposed Sites Reservoir

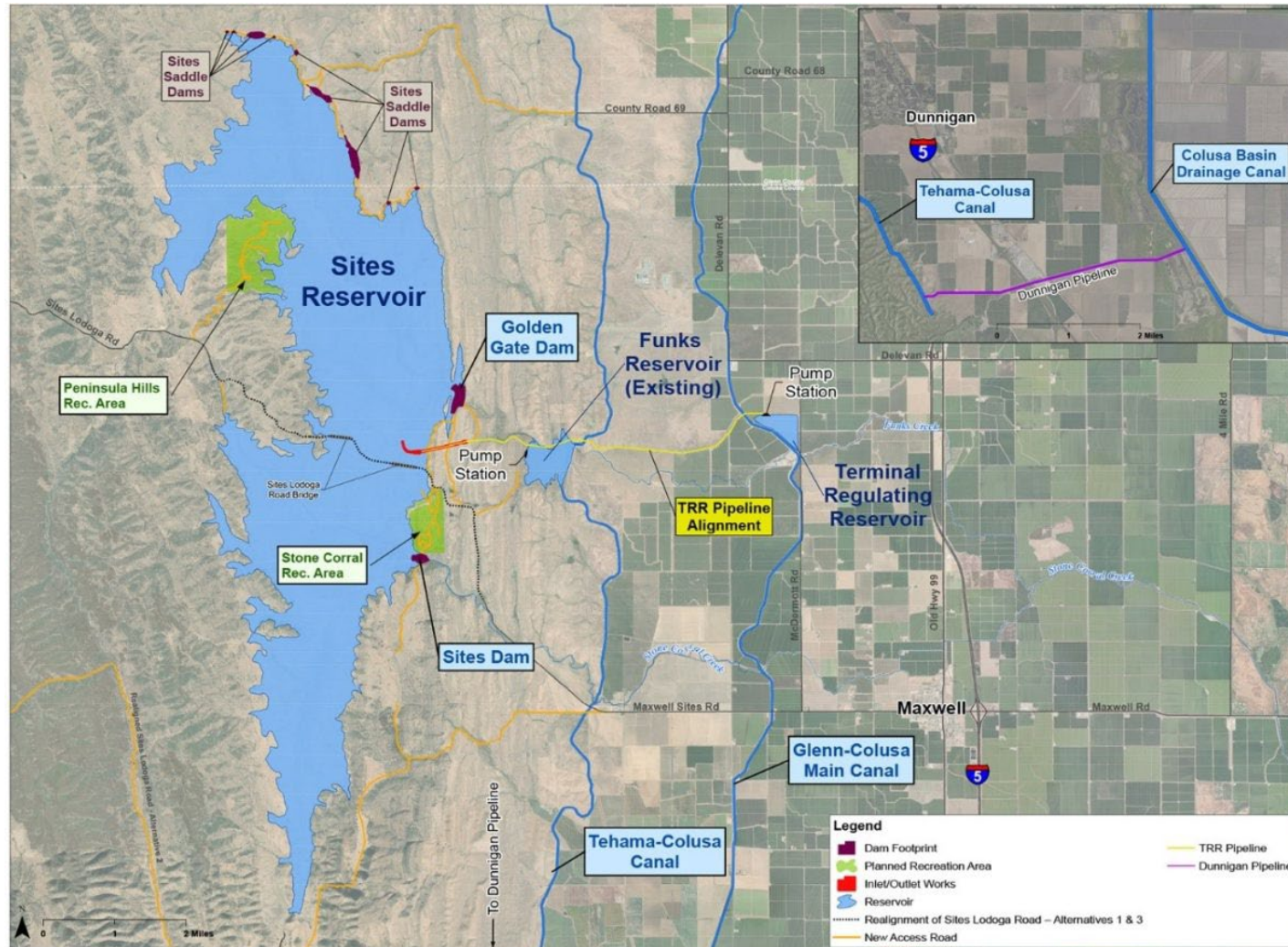


We already have a lot of dams, and all the suitable sites have already been built out.



- There are over 1,400 named dams in California.
- Only three rivers have no dams: Smith River, Cosumnes River, Santa Clara River.

We need to catch the water from atmospheric river storms ...



Sites Reservoir: off stream reservoir with multiple dams. Water will be pumped into the reservoir from the Sacramento River when flows are high.

California let all that water go out to sea ... ?

In the Central Valley and other ag areas ...

Since the implementation of state mandated groundwater management, many groundwater agencies have been building recharge basins.



And farmers flooded their fields.

and stormwater capture in urban areas is tricky ...





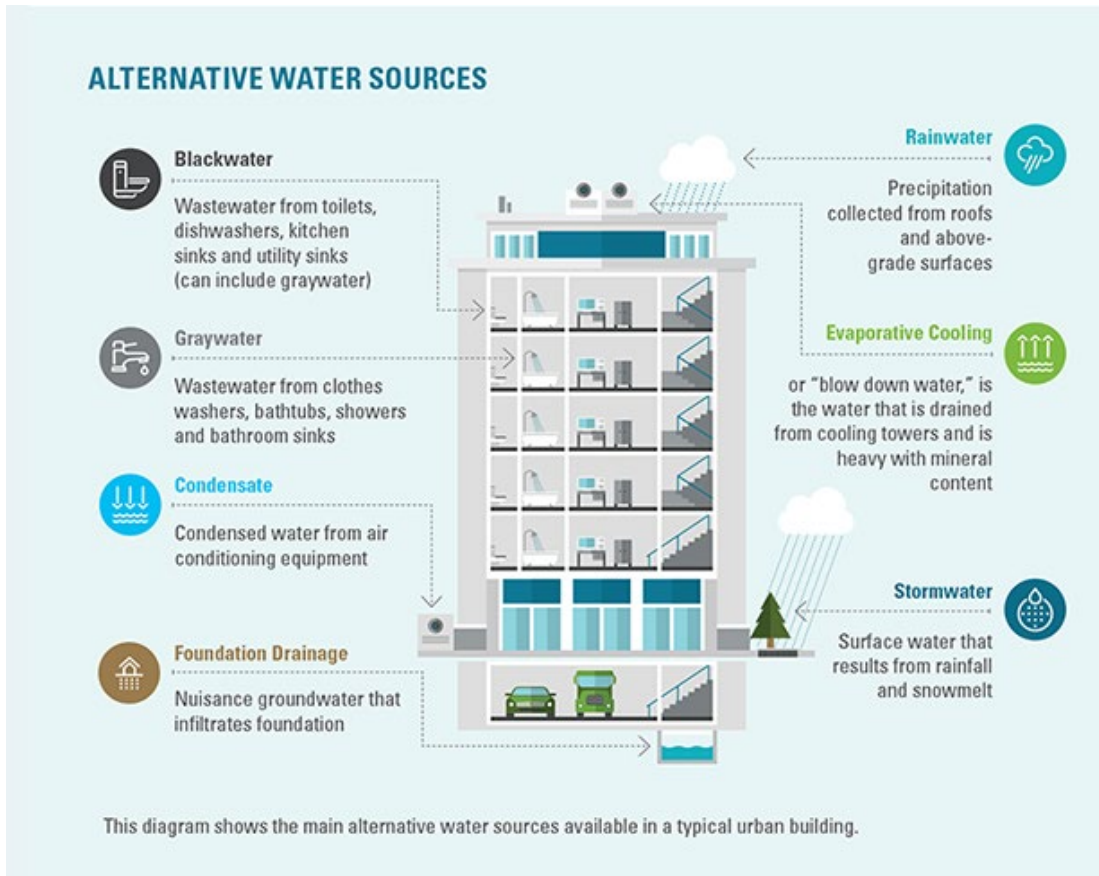
There are some large-scale recharge basins in Southern California.



There are more small-scale and community-scale projects in the works, thanks to Measure W.



San Francisco passed an ordinance requiring all new construction of 100,000 gross square feet or more to install and operate an onsite water reuse system.



The new Sales Force Tower has a on-site water recycling system.

Why is California letting all that water flow out to sea – the farmers' version

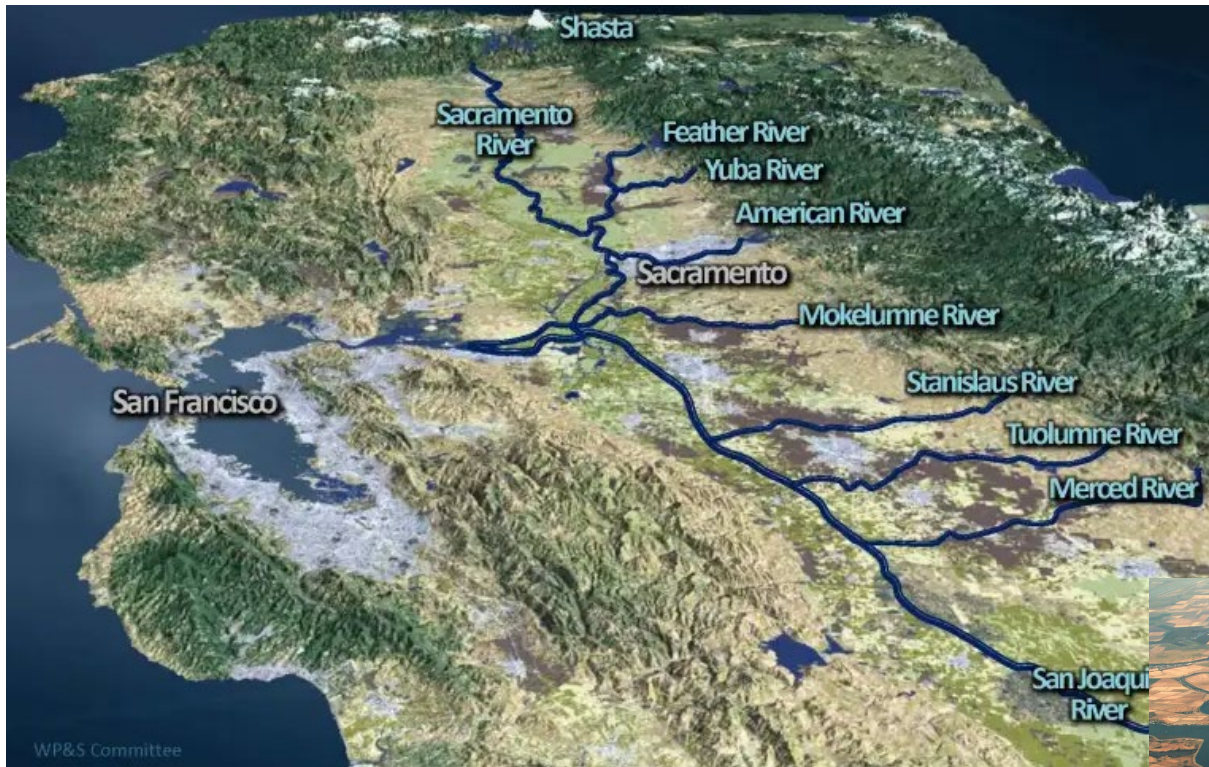
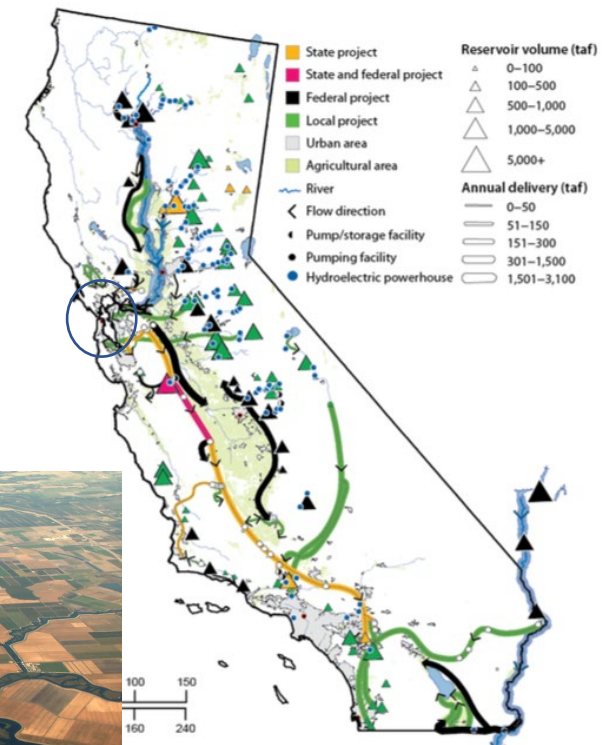


FIGURE 1
California's extensive infrastructure network facilitates water marketing



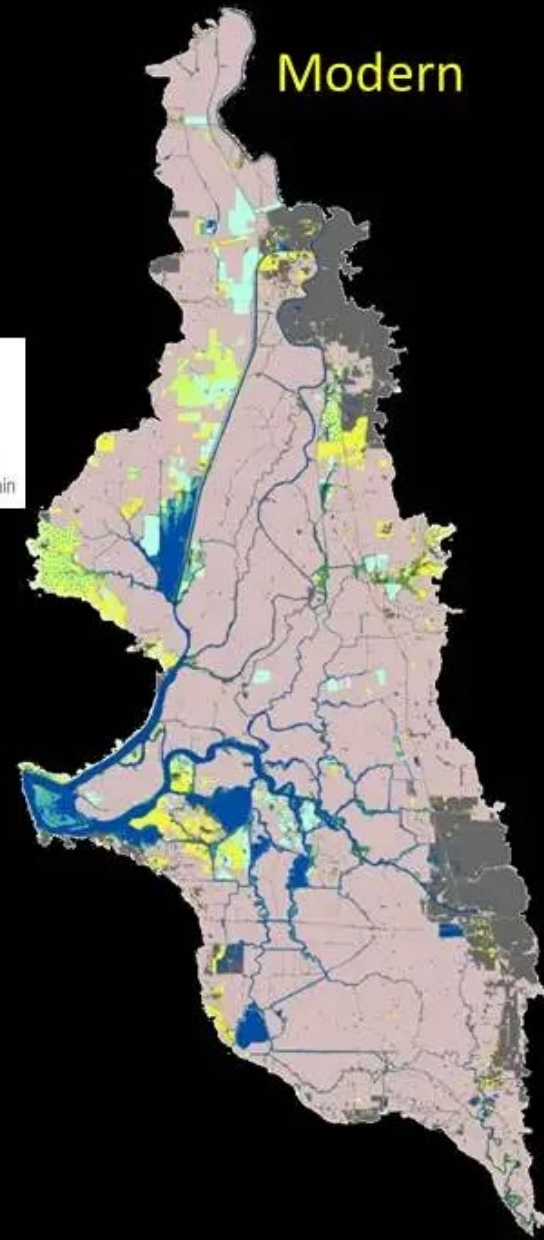
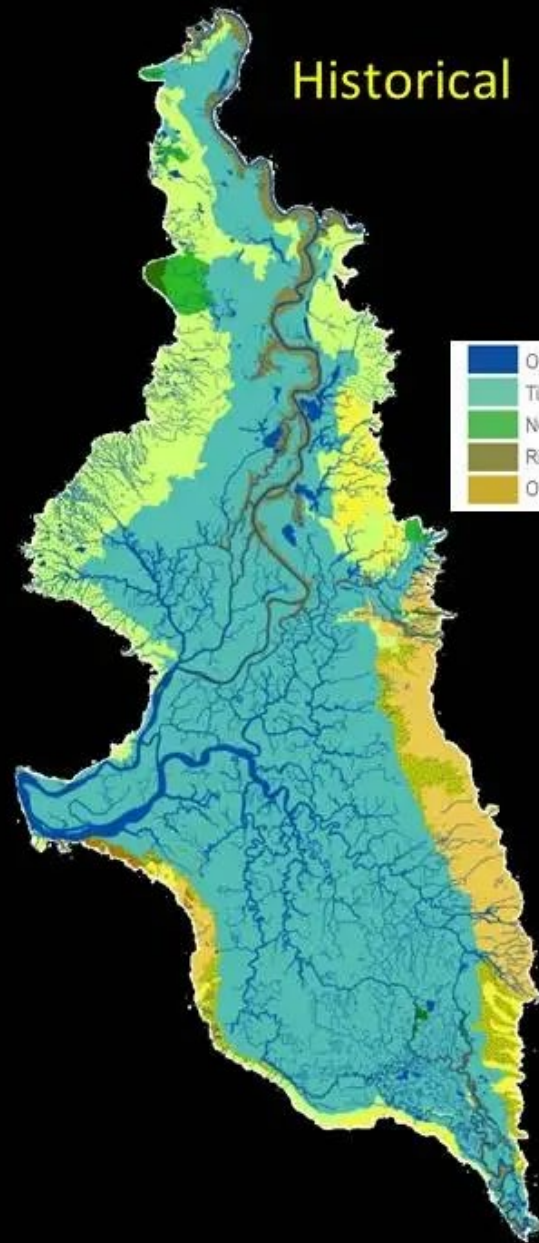
The Delta is the hub of California's water system.

So do fish and wildlife ...





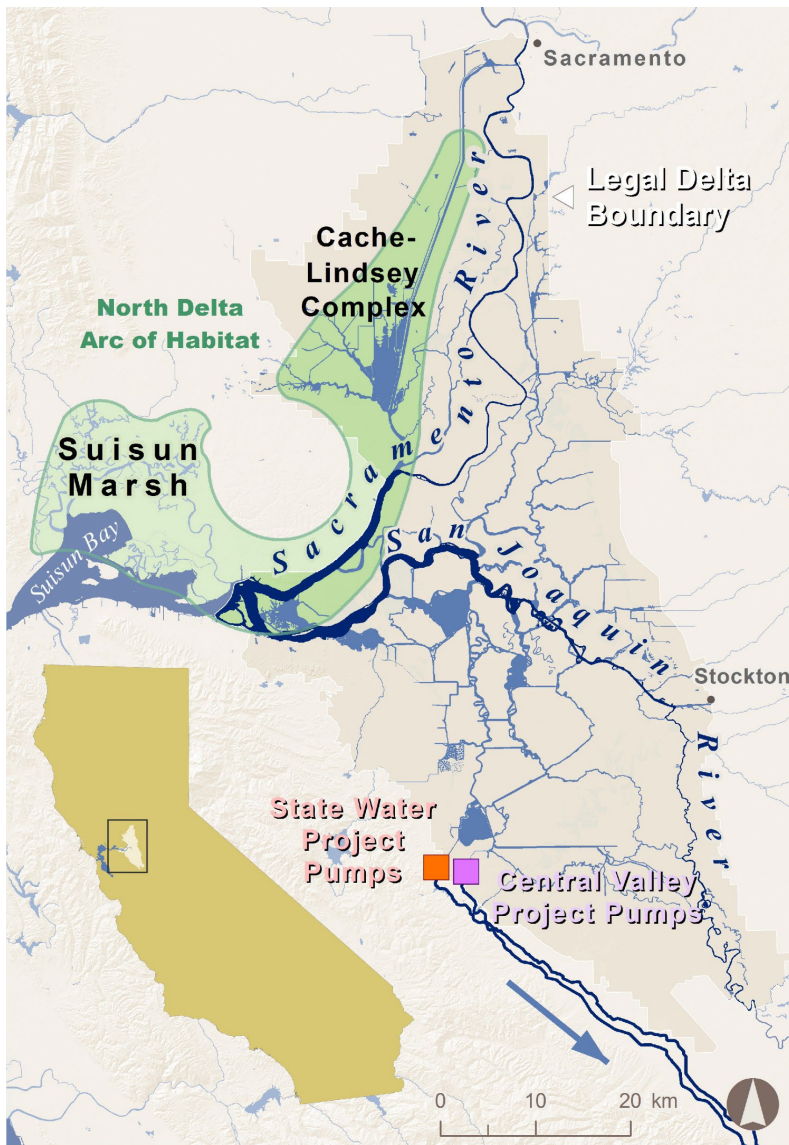
SFEI | AQUATIC
SCIENCE
CENTER



We use the Delta for a lot of things ...



But pumping from the South Delta causes impacts to protected species.



Flow Direction in South Delta

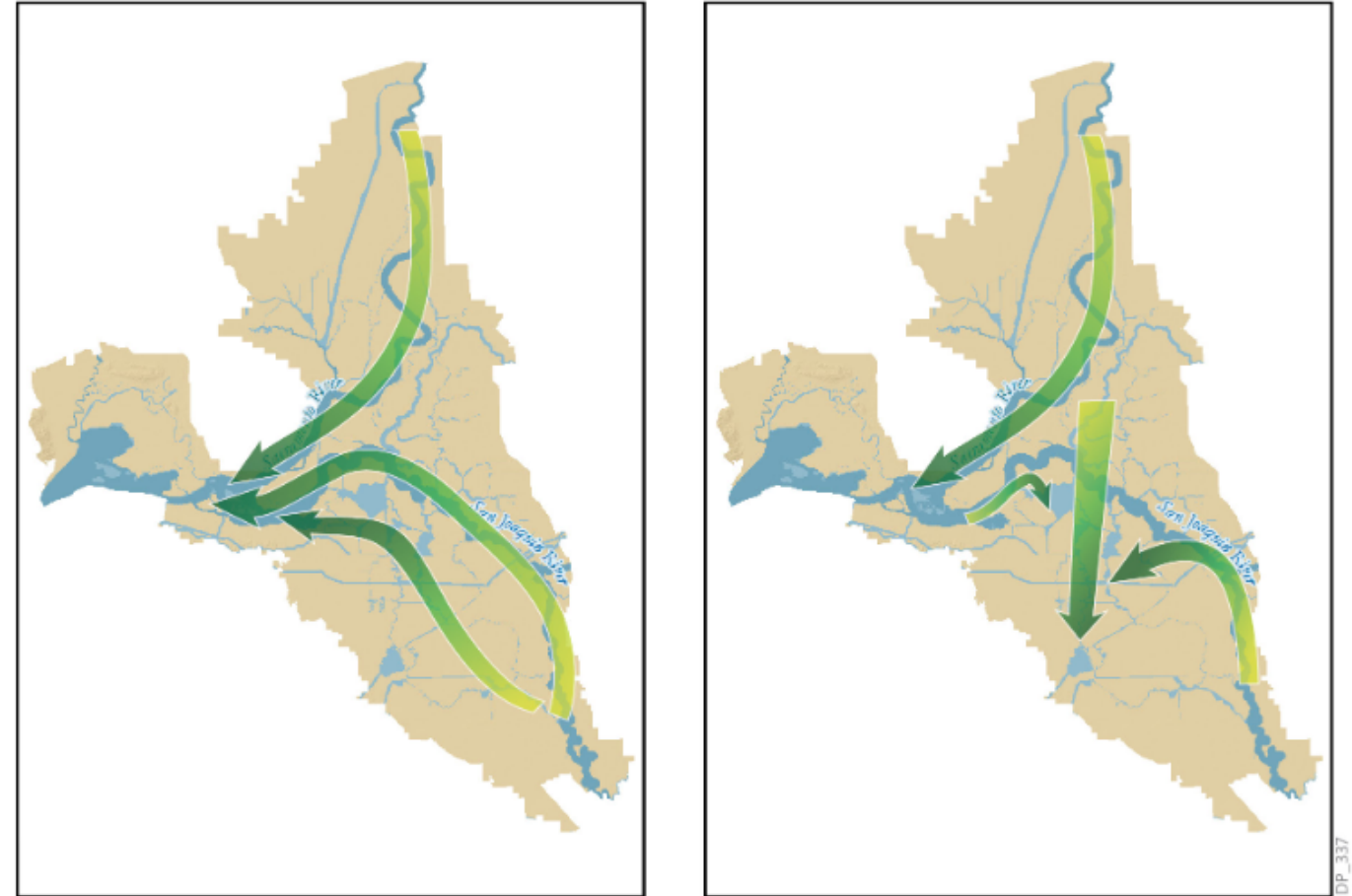
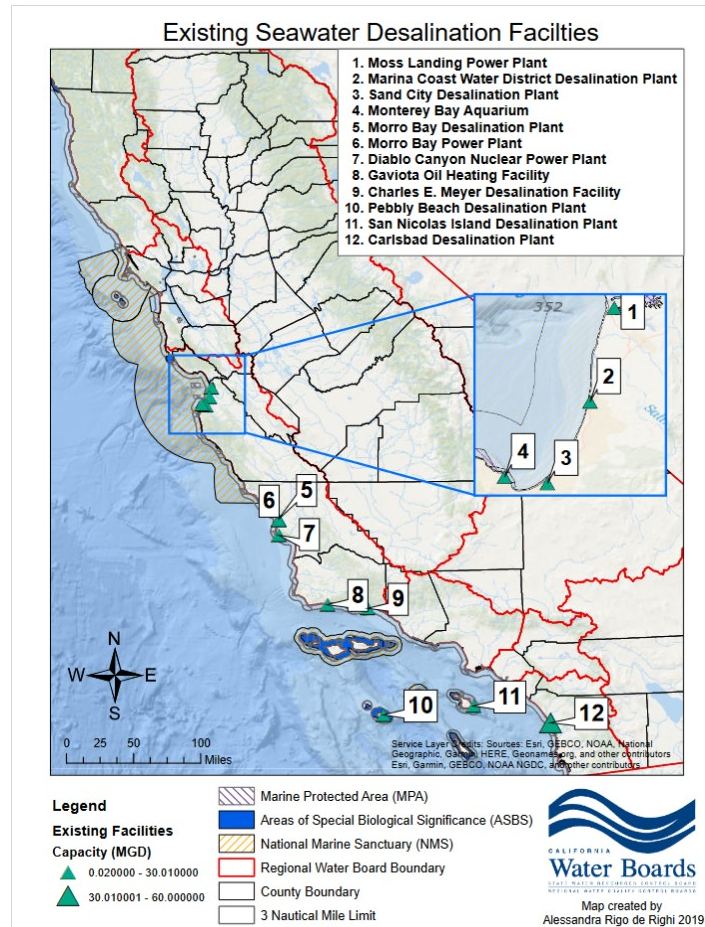


Figure 4-4

The left panel depicts the tidally averaged flow direction in the absence of export pumping. The right panel depicts reversal of tidally averaged flows that occurs during times of high exports (pumping) and low inflows to the Delta.

Why not desalinate??



Proposed water desalination plants



Sources: Pacific Institute, Chronicle research

Todd Trumbull / The Chronicle

Potentially a good option for coastal communities.

But there are some challenges:

- Energy consumption
- Disposing of the brine discharge
- Impacts of the seawater intakes on marine life
- The cost of desalinated water as compared to other sources

Yes, technology and innovation will help somewhat ...

- Renewable energy
- The ability to flex operations to support the grid
- Zero waste technologies
- Advances in intakes

But ...

But ...

Desalination will never be the silver bullet solution for Southern California.

But ...

Desalination will never be the silver bullet solution for Southern California.

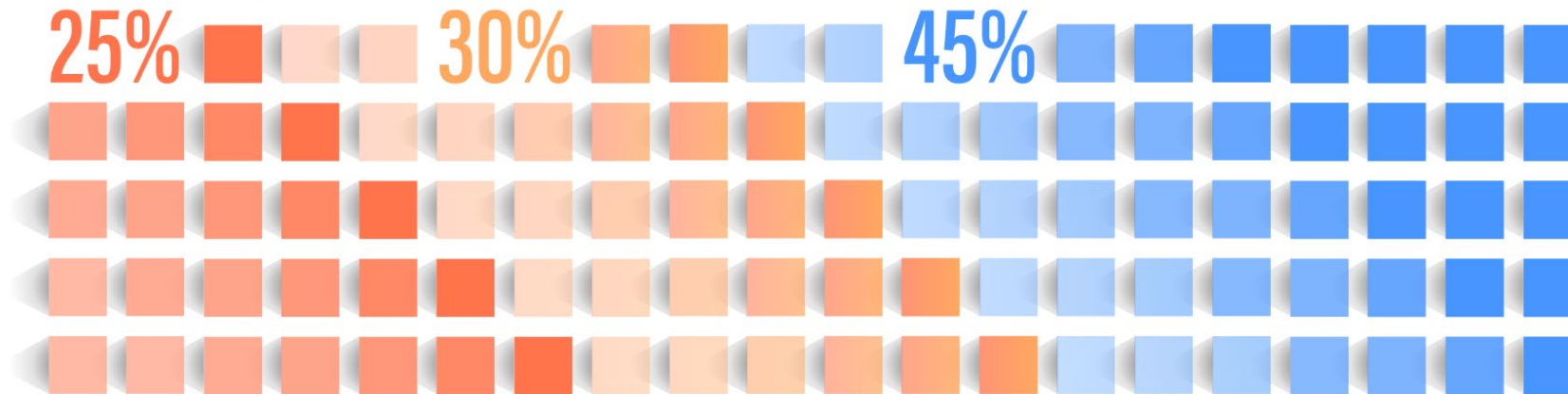
Where We Get Our Water

Imported & Local Resources

Colorado River Aqueduct

State Water Project

Local stormwater, groundwater, recycling, & desalination



Water demand in Southern California: about 1.5 MAF, so 55% = 825,000 acre-feet.

Desal plants are expensive, and don't produce a lot of water



Carlsbad desal plant:

- The largest desal plant in the Western Hemisphere
- The plant produces 50 million gallons per day (mgd) - enough for 400,000 people or 7 - 10% of San Diego County's water supply
- Cost to build plant: \$1 billion
- Cost of water: \$2500 per acre-foot

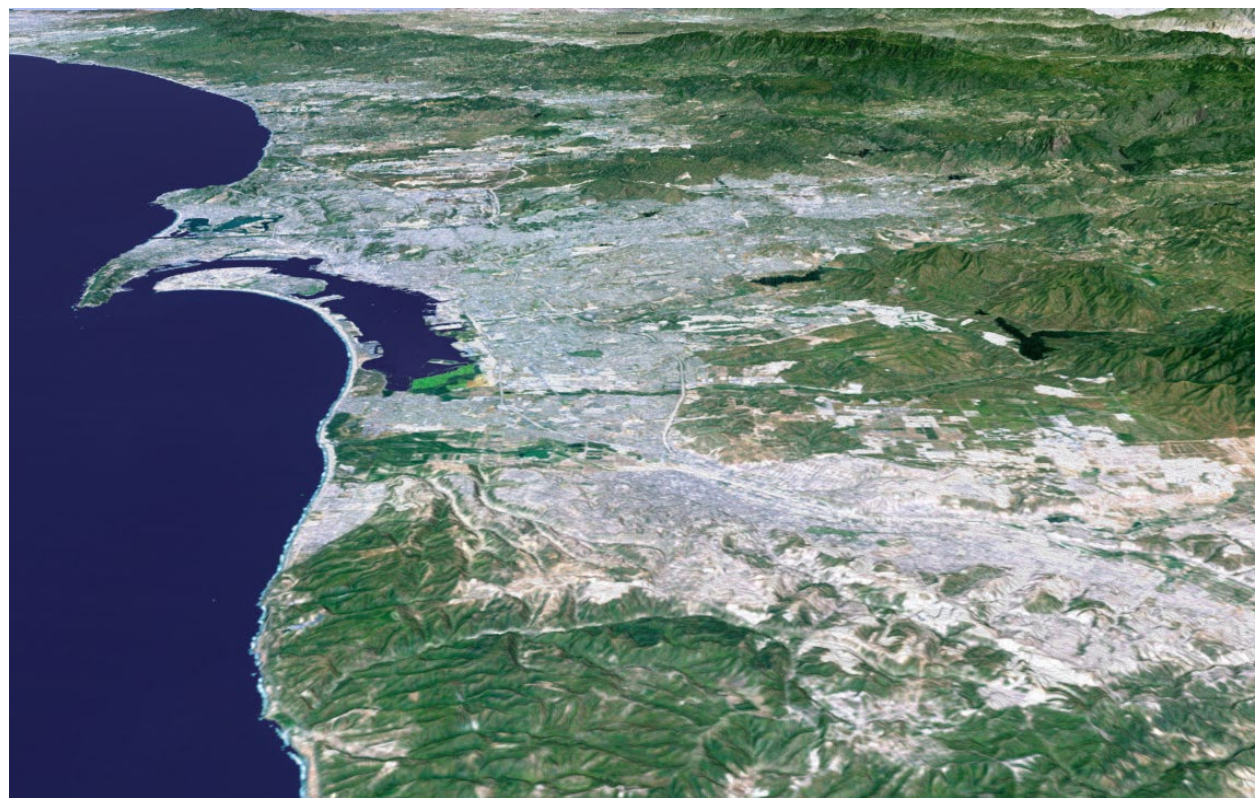
THE MATH

- 1 million gallons = 3.07 acre feet.
- 55 million gallons per day = 168.85 acre-feet per day
- 169 acre-feet per day x 365 days = 61,685 acre-feet per year

At 62,000 acre-feet per year, it would take 24 desal plants the size of Carlsbad to meet demand in Southern California.

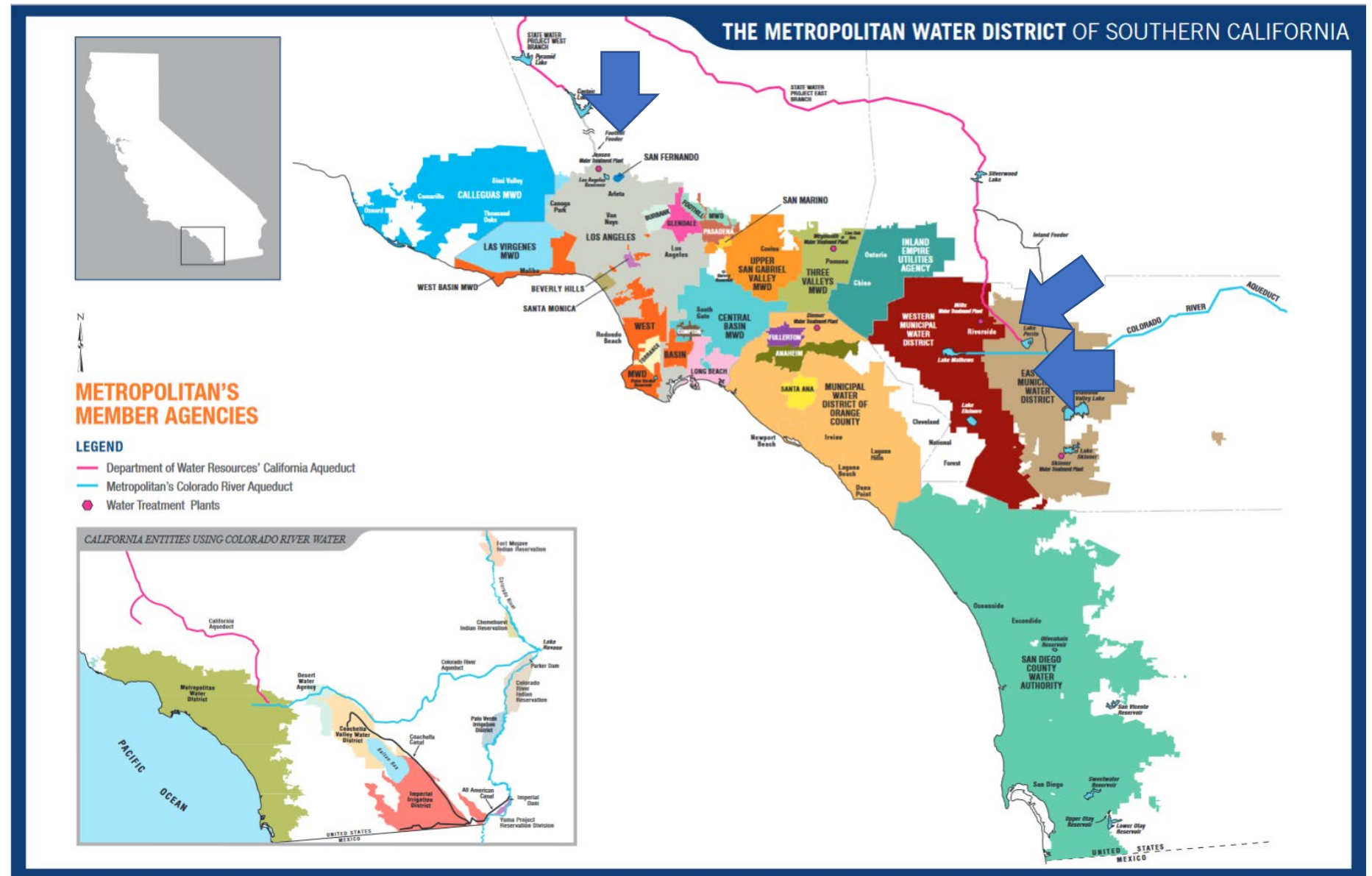


It's a heavily urbanized coastline, so where would 24 desal plants go?



Southern California's water infrastructure would have to be reversed ...

'It would be like having a blood transfusion through your pinky toe.' – paraphrase of a quote from Bill Hasencamp, MWD Colorado River Manager



And very, very expensive ... !

Not everyone is rich in Southern California
and water affordability is in issue



Not so much this ...



More this ...



In conclusion ...





California water will continue to make lawyers rich

Thank you for listening!





Consultant Collaboration What's the Benefit, if Any?

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Steve Hohl, Water Concern

Janet Luehrs, Brookwater

Bob Scott, Irrigation Consultant Services

Michael Astram, Northern Designs