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by

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THE WATER REALLOCATION ACT OF 1992: THE CENTRAL VALLEY PROJECT IMPROVEMENT ACT

*Daniel M. Dooley**

INTRODUCTION

The Central Valley Project Improvement Act of 1992 ("CVPIA" or "the Act") forever altered the certainty of water supply for farms and communities throughout the Central Valley of California. Their rights to water supplied by the Central Valley Project ("CVP" or "the Project") as guaranteed by statute and contract was effectively circumscribed by President Bush's signature of the CVPIA on October 31, 1992. The following discussion is intended to shed some light on the fears of the farm and rural communities in the Central Valley resulting from the enactment of the CVPIA.

I. BACKGROUND

The Department of the Interior estimates that the CVP has an annual reliable yield of just over 8,000,000 acre-feet of water. Water right holders whose rights predate the CVP receive 2,950,000 acre-feet of the estimated average annual yield. Sacramento River water right holders receive 2,100,000 acre-feet of water right deliveries and 850,000 acre-feet are delivered to the San Joaquin River water right holders. The San Joaquin water right holders are collectively known as the Exchange Contractors, and consist of four entities: 1) Central California Irrigation District, 2) Columbia Canal Company, 3) San Luis Canal Company and 4) Firebaugh Canal Company. Both the Sacramento River water rights holders and the Exchange Contractors had perfected riparian rights before the CVP was built. In exchange for their riparian rights, the federal government guaranteed a portion of the CVP's

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water yield.

Only 4,450,000 acre-feet of the total CVP yield is delivered to long-term water service contractors. Long-term water service contractors are those that have ten to forty year contracts with the Bureau of Reclamation ("the Bureau"). Three hundred thousand acre-feet are delivered to contractors in the Sacramento Valley, 2,200,000 to contractors within the San Luis Unit in the western San Joaquin Valley, 1,450,000 acre-feet to Friant Unit contractors on the eastern San Joaquin Valley, and 500,000 acre-feet to municipal and industrial contractors. The balance of the yield of the CVP is provided to meet existing environmental and water quality responsibilities.

It is important to distinguish the water deliveries made to pre-CVP water right holders from deliveries to long-term water service contractors. For the most part, the water supply losses and cost obligations of the CVPIA will be borne by the long-term water service contractors exclusively.

The CVP, through deliveries to long-term water service contractors, benefits 21,000 farms and 2,200,000 acres of irrigated farmland. Farms which receive water from long-term water service contractors average 100 acres in size, and produce approximately \$3.5 billion of farm commodities annually. The CVP municipal and industrial contractors provide all or a part of the water supply to nearly 3,000,000 households.

II. WATER SUPPLY REDUCTIONS

Section 3406(b)(2) of the CVPIA mandates that the Secretary of Interior ("the Secretary") dedicate 800,000 acre-feet of the Project's yield to implement fish and wildlife purposes of the Act. This 800,000 acre-feet of dedicated water is over and above the water provided to augment Trinity River releases under section 3406(b)(23) or water required to meet level 2 wildlife refuge water supply needs as identified in the Bureau's *Refuge Water Supply Report* under section 3406(d)(1). These sections of the Act require an additional 200,000 acre-feet for Trinity releases and 235,000 acre-feet for refuge water supplies. The total "up front" fish and wildlife water required under the CVPIA is 1,235,000 acre-feet. Thus, at least 800,000 acre-feet have been lost to the long-term water service contractors, except to the extent that some of it can be recaptured and utilized for another purpose.

In normal water runoff years, the loss to long-term water service contractors is substantial. In drought years, the loss is magnified. Under section 3406(b)(2)(C), reductions in deliveries of fish and wildlife water supplies due to drought are limited to 25%, or 600,000 acre-

feet. However, reductions in deliveries to long-term water service contractors have no such floor, further reducing their water allocations to provide environmental water supplies.

The consequence of this reduced water availability is further magnified when it is understood from whose "pocket" it must come. The Act specifically prohibits any releases from Friant Dam into the San Joaquin River until Congress provides additional authorization. The Sacramento River pre-CVP water right holders and the Exchange Contractors have been guaranteed water supplies. Therefore, the fish and wildlife water supply required by the CVPIA must come from the Project yield presently supplying Sacramento Valley and west side San Joaquin Valley long-term water service contractors.

In a normal year, Sacramento Valley and west side San Joaquin Valley long-term water service contract demand is approximately 3,000,000 acre-feet. The dedication of the 800,000 acre-feet for fish and wildlife purposes will reduce contract deliveries by nearly 27%. When combined with Trinity River and refuge level 2 requirements, total average contract deliveries could be reduced by as much as 41%. In 1990, the Bureau delivered about 50% of contract requirements (1,500,000 acre-feet) to Sacramento Valley and west side San Joaquin Valley long-term water service contractors. The CVPIA would have restricted such deliveries to less than twenty percent of normal rather than fifty percent. Similarly, no water would have been delivered to Sacramento Valley or west side San Joaquin Valley contractors in 1992 if the CVPIA had been in effect. The Bureau actually delivered a twenty-five percent supply in 1992.

CVP water users believe that the Act mandates permanent drought conditions. Further, they believe that rather than making fish and wildlife uses equal to irrigation and domestic uses of CVP water, the CVPIA gives such uses a priority because it limits the reduction in water dedicated to fish and wildlife in a dry year. The reallocation of CVP water was made without the traditional balancing of beneficial uses which would occur under California water and public trust law. Under traditional balancing, the reallocation to fish and wildlife would be weighed against the harm caused to users who have relied upon water delivered according to law and under contract for over forty years.

III. UNCERTAINTY

The CVPIA has created what may be an extended period of uncertainty in the Central Valley. Water districts, farmers, businesses and

homeowners have made enormous investments in facilities, equipment, and communities in reliance on Reclamation laws and water service contracts that purportedly guaranteed a certain supply of water. Water suppliers can no longer speak or act with certainty with respect to their long-term water supplies. Many San Joaquin Valley residents now understand that reliance upon laws enacted by Congress and upon contracts executed with the Bureau provide no certainty that their communities will be preserved.

In addition to direct water reductions, the CVPIA compromises the certainty of water supply by significantly muddling the processes for execution of new water service contracts and renewal of existing contracts. Specifically, the Secretary is precluded from entering into new contracts until fish and wildlife objectives of the Act are met, the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("the Delta") hearings of the State Water Resources Control Board are completed, and the Secretary reports to Congress on obligations of the Project to maintain the Delta. These provisions effectively restructure the CVP as originally envisioned by Congress, and send it in an entirely new direction.

More troubling than the limitations on new contracts are the CVPIA restrictions on renewal of existing contracts. Section 3404(c) limits the right to renewal to one twenty-five-year term. Any renewals after that term are discretionary with the Secretary. In addition, contract renewals are limited to terms of twenty-five years, unlike original contracts which spanned forty years. Finally, no contract may be renewed until the required environmental impact statement is completed.

The CVPIA restrictions on renewal of existing contracts conflict with current CVP contracts which include a provision providing for renewal as authorized by the Act of July 2, 1956, c. 492, § 1, 70 Stat. 483 [43 U.S.C.A. § 485h-1 (West 1986)] ("the 1956 Act"). Specifically, section 1 of the 1956 Act requires the Secretary to "include in any long-term contract hereafter entered into . . . provision . . . for the renewal thereof." Section 2 of the 1956 Act [43 U.S.C.A. § 485h-2 (West 1986)] provided for similar right of renewal of contracts entered into prior to the passage of the 1956 Act.

Virtually all long-term water service contracts also contain a provision similar to paragraph 2 of the RENEWAL CONTRACT BETWEEN THE UNITED STATES AND PORTERVILLE IRRIGATION DISTRICT PROVIDING FOR PROJECT WATER SERVICE (Renewal Contract No. I75R-4309R). In pertinent part, paragraph 2 states:

This contract shall be effective from the date first hereinabove written and

shall remain in effect through February 28, 2029: Provided, that under terms and conditions mutually agreeable to the parties hereto *renewals of this contract may be made for successive periods not to exceed 40 years each* (emphasis added).

Contractors and water users find the Act's reallocation of water perplexing in light of California water rights law as well. The State Water Resources Control Board addressed beneficial uses for which the water could be put to continued use when it granted appropriative water right permits for the Friant Unit of the CVP. Specifically, the Board ruled in its Decision 935 that: "The right to the beneficial use of water for irrigation purposes . . . shall be appurtenant to the land on which said water is applied, subject to continued beneficial use." Additionally, the Board held: "The right to beneficial use of water for irrigation purposes shall, consistent with other terms of this permit, continue in perpetuity." These provisions in the Bureau's Friant Unit water right permits are representative of the application of California appropriative water law to all permits issued for the CVP.

The CVPIA completely abrogates the right of successive renewals of the long-term water service contracts as provided in the 1956 Act and in specific contract provisions. The CVPIA preempts state law that water rights are appurtenant to the lands upon which the water is beneficially used.

Destruction of these long understood principles by the CVPIA has cast a dark cloud over the water users and communities who rely upon the CVP. There is no assurance of future continued water service. Consequently, long-term financing for land acquisition, installation of irrigation technology, and planting permanent high-value crops has lessened significantly. In some areas served by the CVP, long-term financing is simply unavailable. For example, some lending institutions now refuse to provide crop loans to farmers in the Westlands Water District, a water contractor in the western San Joaquin Valley, because of concerns about water availability.

As the availability of long-term financing for water users dries up, performance of obligations resulting from bonded indebtedness incurred to construct water distribution systems becomes more difficult. Failure to pay these obligations will result in default on bonds and potential water contractor insolvency.

IV. INCREASED COSTS

In addition to reducing the amount of water deliveries and limiting the certainty of additional contractual water supplies, the CVPIA will have a substantial and immediate impact on the cost of water delivered

to CVP water users. Provisions of the Act directly increase the cost of water. In addition, the cost of water is indirectly increased as water deliveries are reduced.

Operation and maintenance charges of the CVP are apportioned among water users based on the amount of water actually used. Consequently, in below-normal or dry water years the operation and maintenance charges are much greater per acre-foot than in normal or above-normal water years. Because the CVPIA has reduced the supply of water which will actually be delivered, it has permanently and substantially increased operation and maintenance charges on a per acre-foot basis to water users. In short, water contractors will pay more for the privilege of receiving less.

In addition, the CVPIA has established a substantial restoration assessment in section 3407, a Friant surcharge in section 3406(c), and a tiered pricing procedure in section 3405(d). The restoration fund will derive largely from annual assessments on CVP water and power users and additional surcharges on Friant water users.

It is estimated that the collective effect of these cost provisions will impact the Friant Unit of the CVP by increasing the Class 1 water costs nearly 100% when fully implemented. Class 1 water is the firmest water supply delivered, for the most part to water districts with limited groundwater. The 1993 price for Class 1 water without CVPIA costs is approximately \$20.00 per acre-foot. The price of Class 1 water with CVPIA costs will rise to approximately \$40.00 per acre-foot.

The price of Class 2 water in the Friant Unit is projected to increase by 154% of the existing price. Class 2 water is delivered after Class 1 obligations have been met, primarily to districts with useable groundwater supplies. The 1993 price for Class 2 water without CVPIA costs is approximately \$10.00 per acre-foot. The price with the CVPIA costs will rise to over \$25.00 per acre-foot.

The impact of these increased costs are best understood by looking at the practical effect on the operation of the projects. For example, the primary purpose of the Friant Unit of the CVP was to reduce reliance upon the pumping of groundwater which was causing severe overdraft within the Friant Unit service area. For the most part, project water in the Friant Unit service area has been delivered to lands which were irrigated prior to the construction of the Project. Class 2 supplies are provided to districts which have sufficient groundwater resources available to carry them through below-normal water years. If the Class 2 price rises beyond the price of pumping groundwater, districts will have a difficult time encouraging farmers to utilize Class 2 project water. Consequently, substantial increases in the Class 2 price will result in

greater difficulty in marketing the Class 2 water, thereby defeating the objective of the Project.

Similarly, many of the Friant Unit districts utilize Class 2 water in wetter than normal years to recharge groundwater aquifers through direct percolation in recharge basins. The cost of the Class 2 water put into such basins is apportioned among the water users within the district by increasing the charges for water actually delivered. The estimated 154% increase in Class 2 water costs resulting from implementation of the CVPIA will dramatically impact the ability of these districts to conjunctively manage their surface and groundwater supplies in an effective manner.

In addition to the specifically authorized price increases resulting from the Friant surcharge, restoration fund, and tiered pricing provisions of the bill, the general operation and maintenance charge of the Project will increase as well. The operational and physical changes to the Project required under section 3406(b) will clearly result in additional operation and maintenance charges. Many of the section 3406(b) projects must be reimbursed as "main project features" which presumably will be reflected in water contractor's cost of service rates. Although these additional "main project feature" costs are unspecified in the Act and, as yet, undetermined by the Secretary, they can be expected to be substantial.

Finally, it is clear that the CVPIA intends to put the majority of the cost burden on the long-term water service contractors. The Sacramento River pre-CVP water rights holders and Exchange Contractors do not pay operation and maintenance costs of the Project. Water dedicated to fish and wildlife will not come from reductions in supplies delivered to Friant Unit water contractors [at least not until Congress considers the plan specified in section 3406(c)(1)], Exchange Contractors, or Sacramento River pre-CVP water rights holders. Sacramento Valley rice growers are exempt from tiered water pricing increases if they agree to maintain waterfowl habitat. Therefore, water reductions and the majority of the increased operational and maintenance costs will fall on the long-term water service contractors south of the Delta in the western San Joaquin Valley.

V. TRANSFERS

The CVPIA permits all individuals and districts receiving CVP water under long-term water service contracts, water right settlement contracts, or exchange contracts, to transfer CVP water within and outside the CVP service area. Such transfers are subject to the approval

of the Secretary, and those involving more than twenty percent of the water supply of a particular long-term contractor are subject to approval of the contracting district as well. Transfers are limited under the Act to water that would have been consumptively used or irretrievably lost by the transferor—so-called “real water.” Transfers are prohibited if they would have significant long-term adverse effects on groundwater conditions in the service area of the district from which the water would be transferred.

The transfer provisions of the CVPIA, while not viewed to be perfect by long-term water contractors, are generally felt to be workable particularly in light of the interim transfer guidelines developed by the Bureau. However, there is significant concern that allowing individual water users to initiate transfers without the contracting water district's approval could result in a disruption of the district's general operation and financial conditions. Some concerns of contracting districts in this regard have been partially resolved by the procedures proposed by the Bureau for implementation of the transfer provisions of the CVPIA. These procedures require the district to develop information to facilitate the Secretary's decision to approve or disapprove a particular transfer even in those cases where the total transfer or the aggregate transfers within the district have not exceeded twenty percent. This safeguard will provide for substantial district input as to the impact of transfers on the operation of the district.

The concern about the operational and implementation considerations related to the transfer provisions of the CVPIA pales in comparison to the general fear that the Act's transfer mechanisms will result in the gradual reallocation of water from existing uses to urban uses outside the CVP service area. This fear is shared not only by farmers but by cities and counties throughout the CVP service area who rely on CVP imported water supplies to support growth and development.

VI. CONCLUSION

The Act represents a dramatic change in direction in the operation of the federal Central Valley Project. The CVPIA reallocates a significant portion of the existing CVP supply, and substantially increases the cost of the remaining water delivered to long-term water service contractors. It has cast a cloud of uncertainty over the long-term future water deliveries of the project to existing long-term water service contractors.

More disconcerting, however, is the subtle but persistent attitude of the CVPIA sponsors that agriculture and others who have benefitted from the CVP have “ripped off” the people of the United States, and

should be punished for their more than forty years of excesses. The beneficiaries of the CVP are hardworking men and women who have relied upon programs and policies adopted by the Congress of the United States.

The Act is not a reasoned negotiated solution to the legitimate fish and wildlife problems associated with the operation of the CVP. It is rather a hodge-podge of preferred projects and policies advocated by special interests which have not been perfected by the process of careful examination and negotiation.

The agricultural community represents a small portion of the population of California. Nevertheless, agriculture contributes disproportionately to the economy of the Golden State, and provides the livelihood for a large sector of California's population. The communities of the Central Valley served by the CVP are among the fastest growing in the State. While it is convenient at times to think of the regions served by the CVP as essentially rural and populated only by farmers, this is not the case. Fears about the effect of implementation of the CVPIA are shared with others far beyond agriculture because it strikes at the heart of the continued prosperity of this significant region of California.