



November 3, 2009

The Honorable Jeff Bingaman, Chairman
Committee on Energy and Natural Resources
304 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Lisa Murkowski, Ranking
Member, Committee on Energy and Natural
Resources
304 Dirksen Senate Building
Washington, D.C. 20510

Transmitted via Facsimile to 202-224-6163

Re: *Water Transfer Facilitation Act of 2009- S 1759*

Chairman Bingaman, Ranking Member Murkowski and Members of the Water and Power Subcommittee:

We hereby request that this correspondence be included in the hearing record for S 1759 and that it be provided to the committee members in anticipation of the hearing on November 5, 2009.

Our organizations oppose the *Water Transfer Facilitation Act of 2009* as introduced. As California continues to seek resolution to water conflicts, we agree that water transfers can play a role but we point out that there is already comprehensive water transfer authority in the Central Valley Project Improvement Act (CVPIA). Pub. L. 102-575 §3405. Moreover, significant progress in facilitating water transfers has already been made by the Bureau of Reclamation and the California Department of Water Resources through the federal/state Drought Water Bank. Reclamation and DWR successfully petitioned the California State Water Resources Control Board to combine the Permitted Places of use for the Central Valley Project and State Water Project. However, without adequate protections, the language contained in S. 1759 will go too far to expedite transfers, and will likely create a market for paper water, create third party impacts, impact federal Indian Tribes, and further exacerbate regional conflicts over water in California.

A determination of availability and need for additional water to be transferred must precede any transfers and should come from a comprehensive package of facts. Since we are committed to working with you toward a sustainable hydrologic future for California, we respectfully urge you

to amend the bill to prevent redirected impacts to other beneficial uses of water. Our specific concerns and suggestions are provided below.

Section 2

Section 2 (a), as written, creates a water transfer market for paper water- water that does not exist. Paper water would be created through exemption of transfers from the existing requirement in paragraphs (A) and (I) of section 3405(a)(1) of the CVPIA that transferred water not exceed the actual 3 year average delivery amount and the requirement to show proof that the transferred water would otherwise be beneficially used or irretrievably lost during the time period of the transfer. This exemption will likely result in additional upstream reservoir drawdown and an impact on water supplies for CVP-dependent rivers and wildlife refuges.

The legislation, as proposed is also redundant in its description of eligible CVP contractors in Section 2(a)1 which refers specifically to the CVP's San Felipe, West San Joaquin, and Delta division contractors as eligible for water transfers, but they are also included again in the description of all CVP contractors, past and present in Section 2(a)2 as eligible for water transfers.

Section 2(b) creates a preferential status for the San Joaquin River Restoration Program over any other CVPIA program, something never done before for ANY portion of a CVP program. It also supersedes federal and state area of origin protections by favoring the one CVP river system- the San Joaquin, which is a net importer of water, over other basins such as the Sacramento, Trinity and American river basins which are net exporters of water to the San Joaquin and Tulare basins. It further aggravates the continued failure of the Bureau of Reclamation to charge CVP contractors for restoration of the Trinity River as pointed out by the Hoopa Valley Tribe in their October 22nd letter.

Section 2(a) of the legislation, by exempting transferred water from proof of actual beneficial use, will further delay fulfillment of Federal Indian Trust responsibilities arising under Section 3406(b)(23) of the CVPIA. As pointed out in the letter by the Hoopa Valley Tribe, it would do so financially. However, we believe it may also do so physically by transferring water stored in Trinity Reservoir which is specifically dedicated to the preservation and propagation of the Trinity River fishery. It also jeopardizes stored in Trinity, Shasta, Folsom and other CVP reservoirs specifically dedicated to Central Valley fisheries and wildlife refuges made available under CVPIA Sections 3406(b)(2) and 3406(d), respectively.

The attached 1977 Interior Solicitor's Opinion on a request by the Grasslands Water District for additional water supplies explains the federal obligations to protect areas of origin such as the Trinity River from impacts to export water to areas such as the Grasslands during periods of drought.

We therefore recommend that Section 2(a)1 be deleted in its entirety, and that if this legislation is adopted in any form it include a condition on transfers that requires as a prerequisite the fulfillment of the contractors' payment obligations and establish additional protections for the Trinity River and Central Valley fish and wildlife refuges as provided in Sections 3406(b)2 and 3406(b)23 and 3406(d) of Public Law 102-575 by adding them as prohibitions of harm under new Sections 2(b)3, 2(b)4 and 2(b)5, respectively:

(3) The protection of Central Valley fish and wildlife water supplies, as described in Section 3406(b)(2) of Public Law 102-575

(4) The Trinity River Restoration Program, as described in Section 3406(b)23 of Public Law 102-575, and as embodied in the Interior Secretary's December 2000 Trinity River Record of Decision

(5) Central Valley Refuges and Wildlife Habitat areas, as described in Section 3406(d) of Public Law 102-575.

Section 3

We appreciate your emphasis to follow all environmental laws to analyze the impacts to both the areas of origin and the receiving areas from Central Valley Project water transfers. As you are aware, the Bureau of Reclamation and the California Department of Water Resources have struggled to produce programmatic federal and state environmental review for water transfers (including those proposed in your bill) since the signing of the Sacramento Valley Water Management Agreement in 2001. We suggest that beyond emphasizing that the Bureau of Reclamation, "...shall initiate and complete, on the most expedited basis practicable, the programmatic development of environmental documentation to facilitate voluntary water transfers within the Central Valley Project," that you add companion language that will protect the areas of origin from harm.

A programmatic National Environmental Policy Act document will not be completed for 2010 transfers and very likely won't be finished even for 2011 water transfers. In light of that fact, we request that you add the following provisions that will safeguard family farms, communities, and myriad species:

- Prohibit ground water substitution.
- Fallowing patterns should err on the side of preventing species impacts.
- All water transfers under this bill must be monitored by independent, third parties that are paid for by the buyers and hired through USFWS or NMFS

Past experience demonstrates just how destructive surface water sales with ground water substitution can be in the northern Sacramento Valley. For example, in 1994, following seven years of low annual precipitation, Western Canal Water District and other irrigation districts in Butte, Glenn and Colusa counties exported 105,000 af of water extracted from the Tuscan aquifers to buyers outside of the area. This early experiment in the *conjunctive use* of the

groundwater resources – conducted without the benefit of environmental review – caused a significant and immediate adverse impact on the environment. (Msangi 2006). Until the time of the water transfers, groundwater levels had dropped but the aquifers had sustained the normal demands of domestic and agricultural users. The water districts’ extractions, however, lowered groundwater levels throughout the Durham and Cherokee areas of eastern Butte County. (Msangi 2006). The water level fell and the water quality deteriorated in the wells serving the City of Durham. (Scalmanini 1995). Irrigation wells failed on several orchards in the Durham area. One farm never recovered from the loss of its crop and later entered into bankruptcy. Residential wells dried up in the upper-gradient areas of the aquifers as far north as Durham.

In 2009, the U.S. Fish and Wildlife Service failed to comply with the ESA and provide information necessary to establish the impact on the threatened giant garter snake. The Service also failed to provide measures to minimize the impact of take from transfers. To fully comply with the law and minimize the potential for legal challenges to surface water transfers, your bill could emphasize the importance of including the essential baseline data and mitigation measures to protect the species.

Section 4

The Bureau of Reclamation could bring to Congress many of the facts that have been absent from the water transfer debate. For example, a State Water Resources Control Board Strategic Plan report¹ (2008) reveals that there are rights, permits, and licenses for at least five times the amount of water than exists. A review of the Bureau of Reclamation’s seven Trinity River water permits reveals that Reclamation has permits to store and divert twelve times the average annual flow of the Trinity River at Lewiston (Stroshane 2009). It is also well known that many speculators in hydrologically dry area of California have abused their own water supplies, and some have planted permanent crops even when their contracts clearly articulate that there will be years that water deliveries may drop to zero. To the detriment of all Californians, local, state, and federal agencies have failed to stop blatantly wasteful and inappropriate uses and diversions of water and have failed to pursue aggressive planning for regional water self-sufficiency. The water transfer legislation, as proposed, encourages more of the same.

Conclusion

We appreciate your consideration of our concerns . If you decide after hearing testimony, that there is still a need and desire to move ahead with this legislation, we urge you to strongly consider our recommendations so that you do not, in your haste to facilitate water transfers,

¹ See page 10, paragraph 2 at http://www.waterboards.ca.gov/water_issues/hot_topics/strategic_plan/2007update.shtml

redirect impacts to the areas of origin, harm Central Valley fish and wildlife, and violate Federal Indian Trust responsibilities to the Hoopa Valley and Yurok Tribes.

Sincerely,



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Congressman Grace Napolitano
Congressman Steve Thompson
Congressman Jim Costa
Congressman Devin Nunes
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Hoopa Valley Tribal Council
Yurok Tribal Council

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

DEC 7 1979

Memorandum

To: Assistant Secretary, Land and Water Resources

From: Solicitor

Subject: Proposed Contract with Grasslands Water District

A question has been raised whether the Department may amend its contract with the Grasslands Water District in the Central Valley Project (CVP) to provide that, in critically dry years, the District be accorded equal priority with agricultural contractors. The District is usually delivered 50,000 acre-feet of water primarily for waterfowl management, under the terms of the Act of August 27, 1954, Pub. L. No. 83-674, 68 Stat. 879, 16 U.S.C. § 695d, *et seq.*, which was recently amended by the Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3115.

The question is whether equal priority is consistent with the applicable CVP authorizations which establish general categories of priorities for CVP operations, as follows: (1) river regulation, improvement of navigation, and flood control; (2) irrigation and "domestic uses;" (3) power; and (4) fish and wildlife and "other beneficial uses."^{1/}

The 1954 Act provides that the "entire Central Valley Project" theretofore authorized and reauthorized, "is hereby reauthorized and declared to be for the purposes set forth in said acts, and also for the use of the waters thereof for fish and wildlife purposes, subject to such priorities as are applicable [under previous authorizations]." One of my predecessors held that the express reference to the use of waters for fish and wildlife in the 1954 Act is "simply a more definitive specification" of "other beneficial uses" which were an authorized project purpose (and lowest priority) ever since the 1937 reauthorization of the project. See 50 Stat. 844, 850; Opinion by Acting Solicitor Armstrong, "Allocations for fish and wildlife conservation on Central Valley Project," Nov. 15, 1954, p. 3. The Solicitor went on to point out: "The condition in [section 1 of] Public Law 674 that the use

^{1/} See Pub. L. No. 75-392, 50 Stat. 844 (Aug. 26, 1937).

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of such waters for wildlife conservation purposes shall be subject to such priorities as are applicable under prior authorizations also is simply a specific recognition by the Congress of the existence of the priorities originally specified."

I agree with and reaffirm this opinion. It does not, however, directly address the question here presented. For the same reason, the provisions of section 6 of the 1954 Act, which authorized contracts to supply CVP water to certain wildlife areas on an "if and when available" basis, begs the question presented here of how much water can be made "available" by the Secretary under general CVP priorities. As noted above, the 1954 Act was amended in 1978, but in a way not relevant here.

A narrow, technical reading of the CVP statutory priorities might suggest that in every situation throughout the CVP deficiencies shared equally by irrigation and fish and wildlife are unlawful; in other words, to require that a higher priority must be totally satisfied before a lower one can be met. I am unaware of any legislative history of CVP statutory authorities which supports such a theory.

The Secretary has never applied the priorities or operated the project that way. Rather, the allocation of relative shortages or benefits among priorities in any specific situation has been regarded as a discretionary matter within the Secretary's judgment.

For example, this kind of narrow interpretation — placing total emphasis on flood control (the highest priority) — would reduce water storage in reservoirs for irrigation. Maximizing flood protection would dictate that reservoirs be kept nearly empty certain times of the year in the event massive precipitation and runoff occurred. Operation that way would limit storage of water for irrigation and other uses later in the year. But reservoirs are not operated to wring every conceivable bit of flood storage capability out of the storage space; instead, they are operated according to Corps of Engineers criteria which strike a reasonable balance between the need for stored water and the remote possibility of huge storms.

To give a specific example, the Folsom Reservoir on the American River above Sacramento is not sufficient, in the judgment of the Corps of Engineers and the Bureau, to protect Sacramento from the worst conceivable flood (the so-called "standard project flood"). Additional flood control is one justification for the proposed Auburn dam, authorized to be built upstream from Folsom. Yet Folsom reservoir is not, in advance of completion of the Auburn dam, kept at its lowest possible storage level in the spring even though additional protection from

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an unexpected, and highly improbable, standard project flood (estimated to occur once every thousand years) might be obtained if it were.^{2/}

To take another example, many CVP contracts provide that municipal and industrial uses are cut in critically dry years after irrigation is cut, even though irrigation and "domestic uses" are of equal statutory priority. To take a third, more immediate example, in the 1976-77 drought Grasslands was delivered water on an equal priority with municipal and industrial users, and ahead of irrigators, because of very serious threat to migratory waterfowl.

Operating a huge, multi-purpose project like the CVP is a complicated undertaking, which precludes applying the order of priorities in any individual situation in an absolute, inflexible way. Rather, the Bureau has strived to coordinate disparate functions in a way which serves them all in the project as a whole, while maintaining a balance which fairly reflects the authorized priorities of purpose. The fact that Congress has typically provided, in adding new features to the project, that the new features shall be integrated into the overall project reinforces this view that it is the project as a whole which supplies the context for applying the statutory priorities.^{3/}

On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion. See Pub. L. No. 84-386, §2. In that case, Congress'

^{2/} While Congress specifically provided that the Auburn Project be operated for flood control in accordance with Corps of Engineers criteria, 43 U.S.C. § 616bbb, Congress made no such direction in the Folsom authorization. See 58 Stat. 900.

^{3/} See, e.g., Pub. L. No. 84-386, 69 Stat. 719 (Aug. 12, 1955) (Trinity River Division authorization), § 2, 43 U.S.C. § 616bbb; Pub. L. No. 89-161, 79 Stat. 615 (Sept. 2, 1965) (Auburn-Folsom South Unit authorization), § 2. The Auburn-Folsom South provision is typical, providing in pertinent part that the unit be "integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project . . . in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available." 43 U.S.C. § 616bbb.

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usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

Applying the general statutory priorities in the context of the project as a whole accords both with past practice and Congress' intent. The priorities have meaning in the sense that it would be improper for the Secretary to devote most CVP-stored water primarily to power production or fish and wildlife protection while shorting other purposes of a higher priority. The record shows that the vast bulk of the CVP yield of nearly 8 million acre-feet is devoted to irrigation and other uses of a higher statutory plane than fish and wildlife protection. Thus the statutory priorities are fairly being met, even if they have not slavishly dictated every individual decision in the thousands of operating judgments that must be made in a project this large and complex.

In short, the congressional priorities must not be applied in the context of a single contract or a single small facet of an enormous project, but from the perspective of project operation as a whole. For this reason, it is plain that the Grasslands contract is consistent with the statutory priorities.



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