

# THE CENTRAL VALLEY PROJECT IMPROVEMENT ACT PROPOSED REFORMS

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## INTRODUCTION

The proposed Central Valley Project Reform Act of 1995 (CV-PRA), contained in HR 2738, was approved by the House Committee on Resources on December 13, 1995, and provides for various changes and amendments to the Central Valley Project Improvement Act (CVPIA).<sup>1</sup> The CVPIA is probably the most far reaching amendment of authorizing legislation for the Central Valley Project (CVP) since its original enactment in the mid-1930's. Contained within the 1993 symposium issue of this Review are four articles from different perspectives, analyzing the CVPIA, including a comprehensive review of the CVPIA and background on the CVP by Professor Noll. Therefore, this article will not dwell on all the provisions of the CVPIA, but rather note the major provisions which are proposed to be amended through CVPRA.

## I. BACKGROUND

The Central Valley Project is the largest single water project in the United States with an estimated yield of just over 8 million acre-feet per year. Of that amount approximately 4.5 million is delivered to long-term water service contractors, with the balance provided to historic water right holders on the San Joaquin and

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The opinions expressed herein are exclusively those of the author and not necessarily those of any Central Valley Project coordinator or water user.

<sup>1</sup> Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, tit. 34, 106 Stat. 4600 (1992) [hereinafter CVPIA].

Sacramento Rivers and environmental requirements.<sup>2</sup> The CVP deliveries to long-term water service contracts benefit approximately 21,000 farms and provide irrigation water to 2.2 million acres, which produce on average approximately 3.5 billion dollars of farm commodities. Additionally, the CVP provides all or part of a water supply for nearly 3 million households in the state.<sup>3</sup> The CVPIA reduced the water supply which would otherwise be available to long-term CVP contractors by dedicating 800,000 acre-feet of the Project's yield to fish and wildlife purposes,<sup>4</sup> increasing releases on the Trinity River to 340,000 acre-feet,<sup>5</sup> and by providing increased supplies for refuges of 150,000 to 200,000 acre-feet,<sup>6</sup> among other things. The CVPIA increased costs by establishment of a restoration fund contributed to by CVP water and power contractors and made renewal of existing long-term water supply contracts less certain. The CVPIA also authorized transfers from individuals and districts of CVP water to areas outside the historic authorized CVP service area.

While there were many provisions of the CVPIA which were supported by CVP contractors, overall the package as rammed through the House of Representatives by Congressman George Miller and the Senate by Senator Bill Bradley was aggressively opposed by CVP contractors and most congressional representatives from the CVP service area. There had been companion bills authored by Senator Seymour and Congressman Dooley and others that were supported by the CVP contractors and among other things provided for the "physical fixes" and water transfers contained within the CVPIA, but such alternative legislation ultimately did not prevail. Instead, the more onerous CVPIA, both in terms of water loss and financial costs, was passed by the Congress and signed by President Bush over the objection of CVP contractors.

The legislative process under which CVPIA was enacted, although perhaps typical of the process, was very frustrating to the CVP contractors in that CVPIA was merely one "ornament" on a "Christmas tree" contained within HR 429. CVPIA was Title 34 of many titles within the bill which included projects throughout the

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<sup>2</sup> 3 S.J. AGR. L. REV. 48 (1993).

<sup>3</sup> *Id.*

<sup>4</sup> CVPIA, *supra* note 1, § 3406(b)(2).

<sup>5</sup> CVPIA, *supra* note 1, § 3406(b)(23).

<sup>6</sup> CVPIA, *supra* note 1, § 3406(d)(1).

western United States. Pending election, many senators and congressmen were anxious to see their projects approved and the committee leadership within the House and Senate was able to "package" the onerous CVPIA provisions affecting the Central Valley Project with projects which were long sought by other representatives throughout the west. Clearly, if CVPIA stood on its own merits, the legislation would not have passed the Congress in the form it did. Nor would there have been the pressure put on President Bush to sign the bill.

Not only were CVP contractors frustrated by the passage of CVPIA, the first three years of implementation of the law demonstrated continued lack of clear interpretation of many of its key provisions, a history of reversal of policies, soaring expenditures for studies and administrative costs, and little demonstrated environmental improvement. In 1993 the third wettest year of recent history, CVP contractors south of the Delta only received a 50% allocation of contract supplies, because of the CVPIA and the Endangered Species Act.

Following the change in makeup of the Congress resulting from the November, 1994 election, the CVP contractors considered various alternative approaches. There was a cry from many for outright repeal of CVPIA, but ultimately cooler heads prevailed and the approach proposed, which ultimately was accepted by the congressional representatives from the Central Valley, and set forth in what is now HR 2738, was to take a more "surgical" approach. Under this approach, the basic tenets of the CVPIA were left in place, that is, additional water is dedicated to the environment and fees from users are imposed to help restore and protect environmental resources related to the CVP. With this approach in mind, changes were proposed to the CVPIA which generally fit into one of three categories:

- (1) Changes necessary to clarify issues that have proven difficult to interpret or controversial since enactment of CVPIA; for instance, accounting of the 800,000 acre-feet;

- (2) Deleting those provisions that are punitive and provide no environmental benefit; for instance, providing restrictions on renewal of contracts much more onerous than those applicable to other reclamation projects throughout the West; and

- (3) Deleting those provisions that make no sense; for instance, a separate federal study to restore salmon fishery on a river which was dried up 50 years ago with the construction of the CVP.

There are those within the environmental movement that characterize CVPRA as an attempt to "gut economic and environmental reform provisions" of the CVPIA.<sup>7</sup> Further, the Administration has suggested that all or part of the changes in the CVPIA are not necessary and could be facilitated through administrative action. It may well be that some of the issues may be adequately dealt with through administrative action. However, the water users and their legislative representatives have little confidence in administrative solutions, without demonstrated results and fear of changing policies as administrations change. The Administration is currently pursuing a more formalized approach to seeking administrative solutions, which was supposed to be completed March of 1996, and if that effort proves successful, possibly some of the provisions of the CVPRA could be dropped from the legislative arena. Other provisions, as will be summarized below, are more fundamental and if it is the will to change these items, for the most part, legislation will be required. Through the administrative process many problems have been identified concerning implementation of CVPIA, far beyond the fundamental problems identified following for which legislative solutions are being sought.

With this background, focus of this article now turns to describing the specific changes which are proposed by the CVPRA and the rationale for these changes. The list following is not comprehensive, but is intended to summarize the most significant changes proposed.

## II. ANALYSIS OF PROPOSALS

Following, not necessarily in the order they appear in HR 2738 are changes to CVPIA, identified by the section which would be amended.

### A. *Fish and Wildlife Restoration*

The definition of anadromous fish is changed at section 3403 (a) in order to target CVPIA actions toward native species of concern, namely salmon and steelhead.<sup>8</sup> It is felt that other spe-

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<sup>7</sup> *Ag. Water Users Renege on Bay-Delta Deal: New Threats to Environmental Water and Funding*, (Press release from Share the Water: A Coalition for Federal Water Reform, Oakland, Cal.), Dec. 15, 1995.

<sup>8</sup> Central Valley Project Reform Act, HR 2738, 104th Cong., 2d Sess. § 103(a)

cies, some of which are not native, will be protected to the extent appropriate through State developed programs, and in particular the Bay-Delta Agreement discussed below now being implemented under the supervision of the California Water Resources Control Board.

It is proposed that section 3406(b)(1) of the CVPIA be clarified by providing that by *pursuing* the mitigation projects, programs and activities outlined in section 3406 the Secretary shall be deemed to have met such responsibilities.<sup>9</sup> Section 3604(b)(1) of the CVPIA currently provides that “the programs and activities authorized by this section shall, *when fully implemented*, be deemed to meet the mitigation, protection, restoration and enhancement purposes established by subsection 3406(a) of this title.”<sup>10</sup> It is hoped that by addition of the language at section 3406(i) it is clarified that good faith efforts to implement these restoration activities will be sufficient to meet project purposes, whereas the existing language could be read as essentially precluding a determination that those project purposes have ever been met. Many of the activities provided for in the CVPIA may not be completed for decades, if ever, since they will be ongoing maintenance programs to continue to protect fish and wildlife resources.

Section 3406(b)(1) of the existing law provides that the Secretary is to “make all reasonable efforts to insure” that by the year 2002 the natural production of anadromous fish in Central Valley streams are doubled as compared to conditions during the period 1967-1991.<sup>11</sup> The concern has been expressed by many that this is an unachievable goal by the year 2002, if ever. Meanwhile, the State of California has its own doubling goal and several reports published by the Department of Fish and Game have attempted to provide a road map for reaching the goal. However, substantive progress has not materialized in part because of a lack of funding. The authors of CVPRA believe that a better approach would be to have the United States and State, along with local entities, pursue a common program using monies provided by the restoration fund and other tools and authorizations of the CVPIA rather than having two ongoing programs. Accordingly, language is included in the bill to eliminate the “federal only”

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(Jan. 1996) [hereinafter CVPRA].

<sup>9</sup> *Id.* § 106(a).

<sup>10</sup> CVPIA, *supra* note 1, § 3604(b)(1) (emphasis added).

<sup>11</sup> CVPIA, *supra* note 1, § 3406(b)(1).

program and direct the surety to assist the State in pursuing its goal of doubling the population of anadromous fish in Central Valley rivers and streams.<sup>12</sup> Water users are encouraged by a draft federal plan recently released which appears more realistic than was once feared and expressly recognizes that some efforts needed to double the populations of these species may not be "reasonable," and therefore the plan "will likely fall short of doubling production of some species and races."<sup>13</sup>

An ongoing issue over implementation of the CVPIA has been the accounting of the 800,000 acre-feet dedicated to fish and wildlife purposes under section 3406(b)(2) of the CVPIA. Through the historic December 15, 1994, Bay-Delta Agreement, many of these issues were clarified, including that the 800,000 acre-feet made available to meet Bay-Delta quality standards and endangered species act requirements could be reused for agricultural and municipal and industrial purposes after it has fulfilled its fish and wildlife obligations. Language is included in the bill, consistent with the December 15, 1995 agreement to codify this understanding.<sup>14</sup> Additionally, at the December 13, 1995, committee "markup" language was added to section 3408, which was principally drafted by Congressman Miller, providing as follows:

(m) In exercising any discretion afforded to the Secretary under this title or the Reclamation laws relating to the Central Valley Project, the Secretary shall act in accordance with the letter and intent of the agreement entitled "Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government," dated December 15, 1994, for as long as the agreement remains in effect.<sup>15</sup>

In developing the bill there has been a lot of discussion about releases of water from Trinity River as set forth at section 3406(b)(23) of the CVPIA. There has been an ongoing debate over the quantity of water to be released from Lewiston Dam, rather than diverted through an inter-basin transfer tunnel to join the flows of the Sacramento and thereby be available for delivery to CVP contractors and generation of hydroelectric power. CVPIA provided that releases were to be at least 340,000 acre-feet and that the Secretary need only consult with the Hoopa Valley

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<sup>12</sup> CVPRA, *supra* note 5, § 106(b).

<sup>13</sup> U.S. FISH & WILDLIFE SERVICE, DRAFT ANADROMOUS FISH RESTORATION PLAN (Dec. 6, 1995).

<sup>14</sup> CVPRA, *supra* note 5, § 106(b)(3).

<sup>15</sup> CVPRA, *supra* note 5, § 108(f).

Tribe if releases to the ocean were to be increased. An administrative process is ongoing concerning possibly increasing the flows. Through the CVPRA it is provided that if additional releases are deemed necessary from the Trinity beyond the 340,000 acre-feet, that the Secretary will make an effort to replace that water from other sources.<sup>16</sup>

As amended by the Committee during the December 13, 1995, "markup" the bill now includes a provision requiring further public disclosure and involvement in implementing section 3406 of the CVPIA. There has been concern expressed by urban and agricultural water users, along with environmental advocates, that the Bureau and Fish & Wildlife Service lack direction in using the water and financial resources dedicated to fish and wildlife purposes through the CVPIA and that little has been done in three years since the enactment of the CVPIA. This new section would, among other things, make available scientific information and data used to develop plans to implement the CVPIA.<sup>17</sup>

### B. *The San Joaquin River*

One of the more controversial aspects of CVPIA is section 3406 (c), which requires a study to determine if it is "reasonable, prudent and feasible" to reestablish an anadromous fishery from Friant Dam to the San Francisco Bay.

By way of background, Friant Dam was constructed and authorized consistent with the State Water Plan<sup>18</sup> and State Central Valley Project Act,<sup>19</sup> to impound and deliver substantially all of the flow of the San Joaquin River in order to supply the Friant Division with water. Two United States Supreme Court cases deal directly with this point. In *United States v. Gerlach Live Stock Co.*,<sup>20</sup> the Supreme Court stated relative to Friant Dam:

A more dramatic feature of the plan is the water storage and irrigation system at the other end of the valley. There the waters of the San Joaquin will be arrested at Friant, where they would take leave of the mountains, and will be diverted north and south through a system of canals and sold to irrigate more than a million acres of land, some as far as 160 miles

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<sup>16</sup> CVPRA, *supra* note 5, § 106(b)(7).

<sup>17</sup> CVPRA, *supra* note 5, § 106(c).

<sup>18</sup> CAL. WATER CODE §§ 10000-10003 (Deering 1977); CAL. DEP'T OF WATER RESOURCES, BULLETIN 29 (describing the State Water Plan).

<sup>19</sup> CAL. DEP'T OF WATER RESOURCES, STATE WATER PLAN, BULLETIN 29 at 313.

<sup>20</sup> 339 U.S. 725 (1950).

away. A cost of refreshing this great expanse of semiarid land is that, except for occasional spills, only a dry river bed will cross the plain below the dam.<sup>21</sup>

In *Dugan v. Rank*,<sup>22</sup> the Court stated in relation to Friant Dam:

As the Court of Appeals found, the Project "could not operate without impairing, to some degree, the full natural flow of the river." Experience of over a decade along the stretch of the San Joaquin involved here indicates clearly that the impairment was most substantial—almost three-fourths of the natural flow of the river. To require the full natural flow of the river to go through the dam would force the abandonment of this portion of a project which has not only been fully authorized by the Congress but paid for through its continuing appropriations. Moreover, it would prevent the fulfillment of the contracts made by the United States with the Water and Utility Districts, which are petitioning in No. 115. The Government would, indeed, be "stopped in its tracks."<sup>23</sup>

As meetings and hearings were held to discuss the study authorized by section 3406(c), literally thousands of concerned citizens appeared, fearing that a study was only the first step, and that ultimately the Secretary and Congress might try to implement such a program. The water loss to implement such a program would be significant due to the porosity of the now dry riverbed below Friant Dam, which would absorb large quantities of water in order to maintain a stream flow sufficient for salmon to migrate upstream and spawn. In response to public controversy, President Clinton, Secretary Babbitt and Senator Feinstein have all indicated that they did not believe that it was reasonable, prudent and feasible to reestablish a salmon fishery on the upper San Joaquin River. The water users within the Friant Division have asked that those positions be codified by repealing the study. Instead of a study, the legislation would provide that the United States would cooperate with an ongoing State program to enhance the San Joaquin River, and that all or a portion of certain surcharges authorized under CVPIA would be used for that effort.<sup>24</sup> The bill would further affirm that under no conditions would water be released from Friant Dam other than to meet

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<sup>21</sup> *Id.* at 729.

<sup>22</sup> 372 U.S. 609 (1963).

<sup>23</sup> *Id.* at 620-21 (citation omitted).

<sup>24</sup> CVPRIA, *supra* note 5, § 106(b)(8).



flood control requirements, or to honor certain existing contractual arrangements with downstream users.

### *C. The Stanislaus River*

Contractors from the New Melones Project of the CVP are very concerned because they have constructed facilities to take delivery of CVP water from the Project but have received very little water under their contracts because of the CVPIA actions in implementing the Bay-Delta Agreement and other factors. Language is included in the bill directing the Secretary to provide alternative supplies to these contractors, at the contract rate, which does not reduce deliveries to other contractors.<sup>25</sup>

### *D. Refuge Supplies*

CVPIA dedicates approximately 150,000 to 200,000 additional acre-feet of water to refuges to meet "level 2" requirements with that number potentially increasing by another 150,000 to 200,000 acre-feet to meet "level 4" requirements. The "level 2" deliveries are, for the most part, water that is reallocated directly from existing project water users. The "level 4" commitment can only be met with purchased water. Section 3404(d)(5) provides that in times of shortage, supplies to refuges *may* be cut up to 25%, provided the reduction to refuges do not exceed the reduction for agricultural water service contractors. While the Bureau is still trying to interpret the refuse shortage provision, it appears that, for instance, during a 1991 scenario where agricultural contractors had a 25% supply, refuges would have at least a 75% supply. CVPRA would both codify the current administrative practice of reducing supplies to refuges in times of shortage to other CVP contractors rather than make such shortages discretionary, and would tie the shortages to agricultural water service contractors. The reductions could never exceed those imposed on agricultural water service contractors.<sup>26</sup> Furthermore, the legislation would require the Secretary to reevaluate and update previous reports to reevaluate the water supply needs of the refuges, and additionally require that the refuges implement water management and measurement practices similar to that required of CVP water service contractors. Finally, CVPRA directs the Secretary to acquire con-

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<sup>25</sup> CVPRA, *supra* note 5, § 108(e).

<sup>26</sup> CVPRA, *supra* note 5, § 106(b)(9).

veyance for the increased supplies. Agricultural water service contractors are presently being exposed to deeper shortages because of the over commitment of capacity at the Tracy pumping plant, which is used to convey refuge supplies before it becomes available for the agricultural water service contractors.

#### E. M & I Reliability

Some contractors which have contracted for municipal and industrial ("M&I") supplies have for many years sought preference over agricultural water users for water supplies in times of shortages. As amended during the December 13, 1995 "markup," language is included in the bill to provide such priority. The basic provision is that shortages imposed on such contractors not exceed 25% of the contractor's historic M & I deliveries.<sup>27</sup> This type of priority is available in some existing M & I contracts. The potential impact of the provisions on agricultural contractors is limited somewhat by its provisions in that it is applied on a division basis, it does not apply to former agricultural water transferred to M & I uses, it only applies if an allocation is provided to the contractor, and it only applies to the extent contractors were paying M & I rates at the time of adoption of CVPIA. The last provision mentioned would preclude water subsequently converted to M & I use, such as for "new towns," from gaining preferential treatment during shortages for water that historically was utilized for agriculture. M & I customers knowing this status can plan for and acquire additional water during shortage years, whereas allowing agricultural water to be converted to M & I and then giving elevated status during shortages would result in ever deepening shortages on an ever smaller pool of agricultural contractors.

#### F. Water Transfers

An important part of the CVPIA, which gained the support of many urban agencies throughout the State, was to provide for water transfers. Prior to implementation of CVPIA, there were at least two impediments to water transfers. *First*, there was the actual impediment of federal legislation whereby the authorized service area of the CVP did not include much of California, including southern California. *Secondly*, there was at least a per-

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<sup>27</sup> CVPIA, *supra* note 5, § 104(b)(2).

ceived impediment of water districts inhibiting water transfers from growers within their districts who would rather sell their allocation of water than continue to farm. Water transfer legislation in general was supported by both agricultural and urban interests. However, there was at least one area where there was disagreement, which has continued to be a subject of some controversy, namely what role should a district play, if any, in a proposed water transfer initiated by one of its water users. This issue received some notoriety when in 1994 former Assemblyman Rusty Areias and his family proposed to transfer a portion of the water they would otherwise receive from Central California Irrigation District to Metropolitan Water District of Southern California. The proposed transfer drew a lot of local controversy and was ultimately dropped as a water user initiated transfer. As with the proposed Areias transfer, any transfer will draw criticism if there is not a mechanism to insure the concerns of the area from which water is proposed to be transferred are fully considered and adverse impacts mitigated.

CVP contractors believe the district from which a transfer is proposed should have a role to:

(1) insure that the district and its water users are not adversely affected by the proposed transfer relative to their water supply and costs;

(2) consider what third party economic impacts will result to the local community if a portion of the water supply is transferred; and

(3) maintain equity among water users within the district. If there are to be transfers, should only the larger "well connected" water users "profit" from the proposed transfer, or should all water users be given an opportunity, if they wish, to participate?

The CVPRA proposes that a district must approve a transfer, whereas under the existing CVPIA, at least for the first 20%, the district has no direct approval process. In return it is proposed that very specific conditions be met before a district can deny a transfer, such as the transfer would adversely affect the district's water supply or financial conditions. Furthermore, if a district is to deny a transfer, it must set forth in specific written findings the reason for the denial.<sup>28</sup> A related issue has been whether the 20% threshold is to be applied per farm or to the total supply

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<sup>28</sup> CVPRA, *supra* note 5, § 105(d)-(f).

available to a given CVP contractor, which dispute will be eliminated through CVPRA.

Another problem which has been experienced post CVPIA is that transfers which historically could take place, both within the CVP service area and also exchanges with parties outside the CVP service area, have been affected by the vigorous requirements of the CVPIA. The Bureau of Reclamation has erroneously concluded that all transfers, exchanges and similar transactions involving CVP water are subject to the requirements of CVPIA, even those which would have been authorized prior to CVPIA. It is the belief of both agricultural and urban agencies that the intention of CVPIA was to facilitate new transfers, not to impede transfers and exchanges which historically were authorized and approved. Accordingly, language as included in the bill clarifying such transfers and exchanges which could take place under prior law are not subject to the CVPIA approval process.<sup>29</sup>

### *G. Water Management and Conservation*

A very objectionable provision of CVPIA contained at section 3405(d) is that when a District renews its long-term water supply contract, it must include a provision providing for tiered pricing, whereby the last 20% of water delivered under contract would be at higher rate. The theoretical purpose of such tiered pricing is to increase irrigation efficiency or reduce water use. The problem is that in many instances this is contrary to good water management. In areas where there are conjunctive use projects, which includes a large portion of the CVP, during years of adequate supply, good water management calls for encouraging surface deliveries and direct recharge programs. At the same time, good management will reduce groundwater pumping, which will thereby be conserved for use during dry periods. Then during dry years, good water management calls for coping with reduced surface water availability by relying on water previously stored in the underground. The effect of CVPIA tiered pricing is to provide the opposite incentives and stimulate overdraft in that higher prices discourage groundwater recharge programs particularly during years of abundant supply. It is believed that the better approach is to have districts, through water conservation programs, evaluate pricing mechanisms which may help to conserve

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<sup>29</sup> CVPRA, *supra* note 5, § 105(h).

water when appropriate, which is part of the Bureau's existing guidelines for implementing water conservation programs. Accordingly, the bill would eliminate the tiered pricing requirement.<sup>30</sup>

An issue which has proved problematic for implementing CVPIA has been the water conservation guidelines developed by the Bureau of Reclamation, the sense being those administering the program, in many cases, are not "in touch with the real world." The CVP contractors have been forced to spend significant time and expense in developing water conservation programs, which it is viewed will conserve little water and merely result in an accumulation of paper. The bill would provide that the Secretary is to reevaluate the current water conservation guidelines and require only measures which do not unreasonably burden contractors and their water users, are cost effective, and take into consideration the amount of water the contractor has contracted for.<sup>31</sup>

#### *H. New Contracts*

Section 3404(a) of the CVPIA established that certain conditions must be satisfied before any new contracts are provided, including meeting all of the fish and wildlife activities. The authors of the CVPRA believe that a more appropriate standard is that no contracts be let until an appropriate environmental review has been completed and there is a determination that there is sufficient water in the CVP to meet all contractual and legal obligations.<sup>32</sup> Whether there will ever be sufficient water in the CVP to allow for new contracts is uncertain in light of all the new obligations imposed on the CVP as a result of the CVPIA and other environmental laws and administrative actions.

#### *I. Long-Term Contract Renewals*

Some of the most onerous provisions of CVPIA relate to renewing contracts, and among the CVP users, are viewed as simply punitive as these provisions provide no environmental benefits. These provisions have led to uncertainty of what future water supplies will be to CVP contractors and thereby in some cases inhib-

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<sup>30</sup> CVPRA, *supra* note 5, § 104(b)(2).

<sup>31</sup> CVPRA, *supra* note 5, § 105(j).

<sup>32</sup> CVPRA, *supra* note 5, § 104(a).

iting financing operations dependent on CVP water. These problems generally fit into three categories:

First, section 3404(c) of the CVPIA provides for a single 25 year renewal of CVP contracts following completion of environmental studies and that thereafter renewals *may* be provided by the Secretary for terms of up to 25 years. This is in sharp contrast with prior law under which water service contracts were entered into by the Bureau of Reclamation throughout the West, and under which economies were developed based upon contracts, which provided for successive contracts of up to 40 years. The pertinent section as contained in the "1956 Act" is as follows:

In administering subsections (d) and (e) of Section 485h of this title, the Secretary of Interior shall. . . (1) Include in any long-term contract hereafter entered into under subsection (e) of Section 485h of this title provision, if the other contracting party so requests, for renewal thereof under stated terms and conditions mutually agreeable to the parties. Such terms and conditions shall provide for an increase or decrease in the charges set forth in the contract to reflect, among other things, increase or decreases in construction, operation, and maintenance costs and improvement or deterioration in the party's repayment capacity. Any right of renewal shall be exercised within such reasonable time prior to the expiration of the contract as the parties shall have agreed upon and set forth therein.<sup>33</sup>

In providing this statutory language the House and Senate stated that the 1956 Act was intended to resolve three objections voiced by contracting districts of which were as follows:

(1) That no assurance can be given in the contract itself or in any document binding upon the Government that the contract will be renewed upon its expiration; (2) That the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investments; and (3) That the water users are not assured of a "permanent right" to the use of water under this type of contract.<sup>34</sup>

In furtherance of the action of Congress in 1956, most CVP contracts entered into contained a clause substantially providing as follows:

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<sup>33</sup> 43 U.S.C. § 485h-1(1) (1988).

<sup>34</sup> H.R. REP. NO. 1754, 84th Cong., 2d Sess., 4 (Feb. 9, 1956); S. 2241, 84th Cong., 2d Sess. 2 (June 18, 1956).

The contract shall be effective from \_\_\_\_\_ and shall remain in effect for a period of \_\_\_\_\_ years; *Provided*, that under terms and conditions mutually agreed to the parties hereto renewals of this contract may be made for successive periods not to exceed 40 years each.

In that it may be argued that the existing contractual provisions providing for successive contracts up to 40 years conflicts with the single 25 year renewal provided by the CVPIA, the authors of the CVPIA have attempted to rectify the situation and again provide for successive renewals, as is available to others throughout the West who have contracted with the Bureau under the 1956 Act. A compromise that the authors have struck is that 25-year contracts would become the norm instead of 40-year contracts.<sup>35</sup> This would allow for more periodic review to insure that the terms of contracts are consistent with then existing conditions, but yet provide a contract of sufficient term that those relying on CVP water will be more able to secure financing needed for their operations and to pursue other measures, such as water conservation equipment and projects.

Second, the CVPIA, pending completion of a programmatic environmental impact statement (EIS) and subsequent "site specific" environmental review, provides for a three-year interim renewal contracts followed by successive two-year interim renewal contracts. The problem is that as a result of the cumbersome process of preparing this massive programmatic EIS, followed by other environmental review, possibly followed by protracted litigation, it could be years until the Bureau is in a position to offer long-term renewal contracts. In the interim, every two years, contractors will have to negotiate a new contract with the Bureau. To remedy that situation, the authors propose that a single interim renewal contract be entered into pending completion of the environmental review.<sup>36</sup>

Third, the CVPIA contains two provisions which constitute an outright abridgement of existing contracts. With respect to Friant Division, CVPIA provides that contracts entered into between January 1, 1988 and adoption of CVPIA in 1992, "shall incorporate in said contracts. . . modifications needed to comply with existing law, including provisions of this title."<sup>37</sup> The contracts to

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<sup>35</sup> CVPIA, *supra* note 5, § 104(b).

<sup>36</sup> CVPIA, *supra* note 5, § 104(b).

<sup>37</sup> CVPIA, *supra* note 1, § 3404(c)(1).

which this sentence refers are 14 contracts entered into with the United States and Friant Division contractors. If the Bureau attempted to implement this provision it would be equivalent to unilateral amendment of contracts by the United States. Furthermore, section 3404(c)(3) provides for contractors which have contracts not terminating prior to 1997, if they do not elect to come under the provisions of CVPIA by January 1, 1997, they will be forced to pay an additional charge for water delivered. Again, this "hammer clause" is tantamount to an attempt by the United States to unilaterally amend its contractual obligations. The authors of CVPRA propose that both these provisions be deleted and that the United States honor its contractual commitments.<sup>38</sup> However, the fourteen Friant Division contractors would remain subject to the charges imposed by the CVPIA, the same as Friant Division contracts renewed after passage of CVPIA.

### *J. Restoration Fund*

The CVPIA establishes a restoration fund of up to \$50,000,000 per year, funded principally by various surcharges on water and power contractors. Section 3407(a) of the CVPIA provides that not less than two-thirds of the restoration fund shall be available to carry out habitat restoration activities, such as buying water, and not more than one-third is available for the various "physical fixes" required to be completed under CVPIA. This arbitrary limit has limited the ability to invest restoration funds in the most timely and biologically effective manner and the CVPRA would delete this limitation.<sup>39</sup> The bill would also cap payments by power contractors to 2.0 mils per kilowatt hour (based on 1992 price levels), similar to caps provided on irrigation and M & I payments at \$6 and \$12 per acre foot, respectively, whereas presently power contractors are expected to absorb whatever shortfall there may be in the fund.<sup>40</sup>

### CONCLUSION

Undoubtedly passage of the CVPRA, particularly in the Senate during a presidential election year when attentions are focused

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<sup>38</sup> CVPRA, *supra* note 5, § 104(b).

<sup>39</sup> CVPRA, *supra* note 5, § 107(a).

<sup>40</sup> CVPRA, *supra* note 5, § 107(d).



on other matters, will be a challenge.<sup>41</sup> It is possible that the scope of the CVPRA can be narrowed somewhat if the Administration were to come forward with truly binding commitments to administer CVPRA in a different fashion in certain respects. However, there would remain a number of the issues, particularly those identified above, which for the most part can only be cured through legislation. The proponents of the CVPRA and most residents of the Central Valley who are aware of this subject remain committed to seeing this legislation to its successful conclusion.

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<sup>41</sup> On May 13, 1996, Congressman John Doolittle, Chairman of the Water and Power Resources Subcommittee, and lead author of HR 2738, announced that he would postpone until January of 1997 consideration of the bill before the full House, provided that progress is being made on the administrative process discussed in the article. Chairman Doolittle's action apparently is at least in part a result of the Administration's commitment to promulgate rules and regulations to implement the Central Valley Project Improvement Act, with summaries of administrative actions available by mid-September. The Administration believes that many of the issues raised by CVPRA can be addressed through administrative action, although the CVP water users and their legislative representatives are skeptical and believe that many of the issues relating to statutory directives can only be rectified through legislative action. Therefore, it is expected that at least significant portions of HR 2738 will be re-introduced in a new bill in January 1997.