

DE GUIR & SOMACH

A Professional Corporation
400 Capitol Mall, Suite 1900
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199

MEMORANDUMVIA FACSIMILE

To: Roger Patterson
Laura King
From: Stuart L. Somach 
Subject: 800,000 Acre Feet
Date: May 14, 1997

Attached is the analysis that we developed in the time available. In addition, I have developed the following legislative history from materials in my possession.

The legislative history of the provisions concerning the 800,000 acre-feet begins, for the most part, with the "Chairman's Mark" offered by the Senate Energy and Natural Resources Committee Chairman Bennett Johnston on February 20, 1992. Section 6(b)(2) of the "Chairman's Mark" provides for the assignation of "1.5 million acre-feet of project yield for the primary purpose of implementing the fish, wildlife and habitat restoration purposes and measures authorized by the Act. . ." With respect to the State of California, the "Mark" describes a process of placing the dedicated water under contract with the State.

The "Bradley Substitute" offered by the Senate Energy and Natural Resources Water and Power Subcommittee Chairman Bill Bradley on March 12, 1992 and H.R. 5099 offered by House Interior and Insular Affairs Committee Chairman George Miller on May 7, 1992 contained the same language as the "Chairman Mark" with respect to the dedication of the CVP yield to fish and wildlife purposes.

During House negotiations, Chairman Miller agreed to remove the Section 6(b) dedication and replace it with a provision authorizing the Secretary to ". . . modify Central Valley Project operations to be provided from project facilities' flows of suitable quality, quantity and timing to protect all stages of

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anadromous fish." (H. Rpt. 102-576, Section 6(b)(1)(B).) Again, no reference is made in the proposed legislation to address State Water Resources Control Board water quality standards or the CVP's federal Endangered Species Act obligations.

On September 15, 1992, Chairman Miller authored what is known as the House Offer to the Conference Committee. Before this language was offered, a conflict had existed over certain issues, including the 800,000 acre-feet, between certain House members. This deadlock was resolved with the assistance of Representative Fazio.

From this compromise comes the language in section 3406(b)(a)(C) of the House Offer which is where the current language in the CVPIA is, in part, derived. It required that:

The Secretary shall work with the State of California and with the Administrator of the U.S. Environmental Protection Agency to insure [sic] that the specific quantities of yield dedicated to and managed for fish and wildlife purposes under this title are credited against any additional obligations of the Central Valley Project which may be imposed by the State of California following enactment of this title, including but not limited to increased flow and reduced export obligations which may be imposed by the California State Water Resources Control Board in implementing San Francisco Bay/Sacramento-San Joaquin Delta Estuary water quality standards pursuant to the review ordered by the California Court of Appeals in United States v. State Water Resources Control Board, 182 Cal.App.3d 82 (1986). Credits involving the San Francisco Bay/Sacramento-San Joaquin Delta Estuary shall be limited to those quantities of dedicated yield which serve to increase inflows to, increase outflows from, or reduce exports from the San Francisco Bay/Sacramento - San Joaquin Delta Estuary in accordance with the above-referenced water quality standards pursuant to rules and regulations developed jointly by the U.S. Fish and Wildlife Service and the California Department of Fish and Game.

Further, Section 3406(b)(2) required that the Secretary:

[u]pon enactment of this title dedicate and manage 1,000,000 acre feet of Central Valley Project yield annually for the primary

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purpose of implementing the fish, wildlife and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect public trust and other beneficial uses of the water of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help meet such obligations as may be legally imposed upon the Central Valley Project under state or federal law following the date of enactment of this title, including but not limited to additional obligations under the federal Endangered Species Act.

Section 3406 (b)(2)(ii) also provides that:

Such quantity of water shall be measured as the annual sum of increased releases from Central Valley Project storage, where such releases are made at the request of the U.S. Fish and Wildlife Service or by the California Department of Fish and Game pursuant to contract, where such quantity remains available for fish and wildlife purposes in accordance with such requests both in and through the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and of reduced Central Valley Project exports from the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, where such reductions are measured against the average annual quantity of water exported by the Central Valley Project prior to the enactment of this title.

The October 3, 1997, Senate "counter-offer" drafted by the Senate Energy and Natural Resources Committee majority and minority staff amended both Section 3406(b)(1)(C) and Section 3406(b)(2) by modifying the amount of water dedicated for fish and wildlife purposes from 1,000,000 acre-feet to 800,000 acre-feet and by deleting the language which ties the 800,000 acre-feet of water directly to outflow and export limitations. In substitution for that language, it requires the Secretary to avoid inconsistent and duplicative obligations.

Section 3406(b)(1)(C):

The Secretary shall ~~work~~ cooperate with the State of California and with the Administrator of the U.S. Environmental Protection Agency to ~~insure~~ ensure ~~that, to the greatest degree practicable,~~ the specific quantities of yield dedicated to and managed for fish and wildlife

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purposes under this title are credited against any additional obligations of the Central Valley Project which may be imposed by the State of California following enactment of this title, including but not limited to increased flow and reduced export obligations which may be imposed by the California State Water Resources Control Board in implementing San Francisco Bay/Sacramento-San Joaquin Delta Estuary water quality standards pursuant to the review ordered by the California Court of Appeals in United States v. State Water Resources Control Board, 182 Cal.App.3d 82 (1986). ~~Credits involving the San Francisco Bay/Sacramento-San Joaquin Delta Estuary shall be limited to those quantities of dedicated yield which serve to increase inflows to, increase outflows from, or reduce exports from the San Francisco Bay/Sacramento-San Joaquin Delta Estuary in accordance with the above-referenced water quality standards pursuant to rules and regulations developed jointly by the U.S. Fish and Wildlife Service and the California Department of Fish and Game. and that to the greatest degree practicable, the programs and plans required by this title are developed and implemented in a way that avoids inconsistent or duplicative obligations from being imposed upon Central Valley Project water and power contractors.~~

Section 3406(b)(2):

Upon enactment of this title dedicate and manage ~~1,000,000~~ 800,000 acre feet of Central Valley Project yield annually for the primary purpose of implementing the fish, wildlife and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect public trust ~~and other beneficial uses of the water of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary;~~ and to help meet such obligations as may be legally imposed upon the Central Valley Project under state or federal law following the date of enactment of this title, including but not limited to additional obligations under the federal Endangered Species Act. For the purpose of this section, the term "Central Valley Project yield" means the delivery capability of the Central Valley Project during the 1928-1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms

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and conditions existing in licenses, permits, and other agreements pertaining to the Central Valley Project under applicable state or federal law existing at the time of enactment of this title have been met.

The above definition of CVP yield in conjunction with the elimination of the language in 3406(b)(2)(ii), as follows, demonstrates that Congress understood and intended to adopt traditional yield concepts as a means of dealing with the 800,000 af as opposed to a method that would simply decrease project water made available to CVP contractors.

~~Such quantity of water shall be measured as the annual sum of increased releases from Central Valley Project storage, where such releases are made at the request of the U.S. Fish and Wildlife Service or by the California Department of Fish and Game pursuant to contract, where such quantity remains available for fish and wildlife purposes in accordance with such requests both in and through the San Francisco Bay/Sacramento San Joaquin Delta Estuary, and of reduced Central Valley Project exports from the San Francisco Bay/Sacramento San Joaquin Delta Estuary, where such reductions are measured against the average annual quantity of water exported by the Central Valley Project prior to the enactment of this title, managed pursuant to conditions specified by the U.S. Fish and Wildlife Service after consultation with the Bureau of Reclamation and in cooperation with the California Department of Fish and Game.~~

I also located the following dealing with "conjunctive use" which may or may not be relevant to your current needs.

FAZIO: The bill clearly allows this so called upfront water to serve other project purposes. The language that would have barred the conjunctive use of upfront water has been stricken.

The bill also credits the upfront water toward other requirements imposed on the project under the Endangered Species Act and the requirements that we anticipate being imposed on the project under the bay-

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delta process. The Secretary of the Interior is required to the greatest degree practicable to manage the fish and wildlife water in such a manner so as to avoid duplication with these other requirements.

The Conference Report also establishes a clear limit on the amount of water that is provided for fish and wildlife purposes to this title - 800,000 acre feet in normal water years and 600,000 acre feet in dry years. . .

. . . It is also the intent of the bill that . . . this amount shall be managed to meet the purpose of the act and future obligations imposed on the project under State or Federal law, including but not limited to obligation resulting from enforcement of the Endangered Species Act or emanating from the bay-delta process."

Consistent statements, in this regard, were also made by Senator Malcolm Wallop on the floor of the Senate on October 8, 1992:

While the CVP will be required to mitigate the fish and wildlife impact of the project, those mitigation requirements are defined and contained within the four corners of this legislation. The 1.5 million acre-feet of permanently dedicated water, which is where we started this Congress, is now 800,000 acre feet of temporary, up-front water designed to deal with the requirements of the Endangered Species Act and delta requirements while the various mitigation actions are undertaken . . . I want to emphasize that this is not a dedicated permanent supply, but a temporary commitment which will be released to other beneficial uses as soon as it is no longer needed.

Senator Wallop also stated:

The Secretary will decide how to run the project based on the recommendations of Fish and Wildlife Service after consultation with California Fish and Game, the Bureau, and others, but the important thing to remember is that

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the Secretary will make the decision, not Fish and Wildlife Service, and he is free to completely ignore their recommendation.

Senator Wallop again reiterated the crediting of the 800,000 against FSA and water quality obligations in his October 20, 1992, letter to then President Bush. Senator Wallop states that, "Miller-Bradley required 1.5 million acre-feet of water as a permanent commitment for fish and wildlife. The Conference agreed to 800,000 acre-feet, but provided that all requirements of the Endangered Species Act (300,000 AF last year) and any Delta requirements would be charged against the 800,000 AF. In addition, the 800,000 AF is subject to reductions in dry years as irrigation contracts are cut back, unlike Miller-Bradley."

Congressman Miller also recognized that the 800,000 acre-feet was linked to the CVP's obligations under ESA and water quality standards. In reference to efforts made by other Central Valley congressman to eliminate the "upfront" water, Congressman Miller attempted to minimize the impact of that dedication by stating:

The gentlemen from California [Congressman Fazio] opened up a deadlock conference with a letter suggesting changes that could be made to provide additional benefits in the fish and wildlife area, at the same time providing additional benefits in the agricultural area. As a result of that they [Congressmen Dooley, Lehman, et al.] now say that we reserve 800,000 acre feet for fish and wildlife. They know that is the amount of water that Bay Delta Studies [and] Endangered Species Act are going to require. It is a question of whether we do it or the courts do it.

Please let Dave or me know what, if anything, further we can provide to you.

SLS:sb

Encl.

cc: David R. Schuster