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To: Files, from Ron Stork

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Regarding: Bill Storage Provisions, Senator Feinstein Drought (S.2533)

Introduction:

This bill is pretty much more of the same from the Senator. As before, what is not included in this memo is the effect on CVP and SWP operations and on Delta operations and impacts. Although from my quick skim, the bill continues to contain a mish-mash of changes desired by state and federal contractors that not infrequently conflict with each other or conflict with so-called environmental protections contained in the bill or other law. My prediction is that for good or ill the SWRCB will have to govern drought operations of Reclamation and the SWP if the system is supposed to work as intended.

With regard to the storage group dams, it gives them a boost, but it may not be enough to get many dams built if the Secretary is responsible, more federal money is not kicked in, state law isn't changed much, and the non-federal sponsors don't perform well in front of the Water Commission. Most, if not all, are deadbeat dams, after all. But they are also political dams, so their future rises and falls with the political (financial subsidy) tides or tsunamis.

Memo:

Today, Senator Feinstein released her long-awaited "drought" bill (S.2533). I attach the PDF of the bill here, and the link to the press release is below. I also attach a revised SLWRI unresolved-issues memo updated to include the S.2533 and the California Water Commission's proposed rules for handing out chapter-8 water-bond storage money—the Water Storage Investment Program Quantification Regulations. Anyone desiring a WordPerfect version of the SLWRI memo (the original) can contact me directly.

<http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=78F7513D-96CC-40FA-9A8E-DCBD2EF61522>

Here's a quote from the press release:

Storage projects

Given the consensus that droughts will grow more severe and the storms that follow more devastating, storing water during wet years for use in dry years is vital. The severity of this drought has highlighted the inadequacy of California's reservoir capacity. The bill takes steps to both promote the building of new reservoirs and increase the capacity of existing reservoirs.

Establishes deadlines for the Bureau of Reclamation to complete feasibility studies to allow Calfed storage projects to compete for Proposition 1 bond funds.

Authorizes \$600 million for Calfed water storage projects, which may include both federal projects (Shasta) and non-federal projects (Sites, Temperance Flat, Los Vaqueros).

Updates Army Corps dam operations to increase water supply while reducing flood risk.

Typical platitudes and assuming facts not in evidence. So let's dive into the details of the bill once again.

The storage provisions of the "discussion drafts" by Senator Feinstein are quite similar to S. 1894 that she introduced with Senator Boxer last year. The provisions of the bill continue to break traditional notions of which projects are authorized and which are not, as well as provide Federal financing for purposes that are unexamined by the Congress. It also invents (or continues to use) a novel way to "pay" for the projects—deauthorizing previous dormant Federal projects such as Auburn dam, projects for which the Federal government did not currently intend to spend money on. It's like paying for some luxury yacht by not buying an even more expensive one. Might work in your mind but not in your bank account.

Here's a quick summary of their provisions.

(1) It authorizes the Secretary of the Interior to construct Federally owned storage projects that are cost-shared 50-50 with non-Federal parties (§112(a). They must comply with environmental law (§112(a)(4). Construction can't begin until the Secretary determines the project is in compliance with Reclamation law, there is an agreement for upfront financing, and that there are Federal benefits proportionate to the cost allocations (§112(a)(3)).

Commentary:

The upfront financing is one key difference under this proposed authority from existing Reclamation law – and something requested by Reclamation in the SLWRI FEIS. S.2533 adopts the Corps’ up-front funding model rather than the traditional Reclamation financing model (which effectively loans the money and attempts to recover the reimbursable costs in rates and sales) Applying the Corps model to Reclamation would have been a good policy if it had been implemented well over a half century ago and is still a good policy reform. Although confined to projects constructed under this authority, up-front financing is a way to fix one of Reclamation’s long-standing problems: recovering reimbursable costs from its project beneficiaries. Detail-oriented folks would note that the discussion drafts are internally inconsistent, asking for compliance with both Reclamation law and agreements for up-front financing, although, presumably the latter provision would prevail under traditional principles of statutory construction. This provision also departs from traditional Federal water law in that Congress is not authorizing projects. Rather, Congress is authorizing the Secretary to participate in any project she wishes to, subject to the provisions of this bill. Finally, I presume that the “at least a 50% upfront non-federal contribution” provision would nest within Reclamation law by considering the non-federal cost share to be part of what would be normally considered to be a reimbursable cost, with any remainder of the financing to be allocated to non-reimbursible and reimbursable costs (the latter if any remain), but I am not sure that the bill makes this clear.

(2) It authorizes the Secretary of the Interior to fund 25% of state-led (actually, this should be read as non-federally-owned) projects requested by the Governor (§112(b)(2)). They must comply with environmental law (§112(b)(3)). The non-federal funding must be there (§112(b)(2)(B)). Federal benefits are proportionate to the cost allocations (§112(b)(2)(C)). The Secretary can rely on project sponsor reports that puff the project but retains independent obligations to review financing and allocation determinations (§112(b)(4)).

Commentary:

Again, these provision departs from Federal water law by delegating to the Secretary of the Interior the authority to participate in non-federal (called state-led) projects. It should be noted, however, that although the Federal government has traditionally subsidized projects in exchange for flood-control operations (Corps of Engineers §7 participation), it has not done so for the other purposes described in the discussion bill. Again, a noteworthy departure from established Federal procedures and might now be described as a gift of federal taxpayer moneys. Also in keeping with the pattern established in the discussion drafts, Congress is not authorizing participation in these non-federal projects: the

Secretary of the Interior is. I would note that it is perhaps disturbing that the bill does not appear to reinforce the Secretary's implied discretion to independently investigate a state's claims that environmental obligations also are being complied with.

(3) This authority is conferred on the Secretary in all of the Reclamation states (most of the U.S. west) (§112(c)). \$600 million is authorized for Federally owned and state-led storage projects (§112(g)). At least for now.

Commentary: A nice gift for Christmas, isn't it? Especially if the Congress continues to increase the authorization ceilings in the future.

(4) Non-Federal entities are allowed to use the storage capacity of federally owned and state-led storage projects at the discretion of the Secretary (§112(d)).

Commentary:

This provision would apply to existing federally owned projects, not just for projects constructed under this authority. An amazing opportunity for non-federal water interests to use federal assets if they can find a compliant Secretary—and eventually they usually can. I am reminded that San Francisco was unable to take advantage of the Secretary's discretion to issue a right-of-way permit in Yosemite National Park's Hetch-Hetchy Valley, at least until their man was the Secretary. Again, a considerable potential gift to non-Federal water-supply interests (the water-buffalo aristocrats to borrow a phrase from former Reclamation Commissioner Dan Beard).

(5) Federal funding for state-led (i.e., non-federal) projects in California must have a determination from the California Water Commission that the project is eligible for Proposition 1 Water Bond funding (§112(e)).

Commentary: That leaves out the expansion of Shasta Reservoir, which is illegal under current state law and therefore bond funding. Unless MWD and Westlands can change state law protecting the McCloud River.

(6) Advancing the Cal Fed dams: The Secretary of the Interior may partner with non-federal interests to advance the Shasta Dam raise, Los Vaqueros raise, Sites Reservoir, and TFD (§112(f)).

Commentary: "Advance" is rather vague but might be read to authorize quite a range of activities.

(7) Anti-pre-emption language: (i) Nothing in section 112 pre-empts or modifies any obligation of the United States to act in conformance with applicable State law (§112(i)).

Commentary: This one really actually is nice. It adds to the certainty that Congress is not intending to pre-empt state law. Added in Feb 1, 2016, discussion draft. This will hurt the Shasta Dam raise (illegal under the wild & scenic river code) and Temperance Flat Dam (on a fully appropriated stream with regard to state water rights).

(8) Sunset Clause: Section 112 (the storage section of the bill) only applies to federally owned storage projects and State-led (i.e., non-federal) storage projects that the Secretary of the Interior determines to be feasible before January 1, 2021 (§112(i)).

Commentary: The word “feasible” is not defined. Does it mean constructible given enough money, having a positive cost-benefit ratio, having actual benefits, financeable in theory, financeable by the project beneficiaries, have the finances, having completed feasibility studies and environmental reviews, has the required state and federal permits or might, in theory be able to get necessary permits, have satisfied outstanding concerns that preclude recommendations for authorization by the Secretary of the Interior to the Congress or to herself? Kind of vague language Good that there is a sunset clause, though. But how much do you want to bet that it is not going to be revisited?

(9) The Army Corps of Engineers is pushed to revise its flood-control rules for §7 reservoirs (excluding ones owned by Reclamation) to increase storage and water supply reliability. Improvements to the flood-control performance of the flood rules are not among the identified purposes of the rule updates (§113(e)(4)).

Commentary: Perhaps a laudable goal if it also pushed the Corps to update its flood-operational rules to improve flood-control performance as well. (Future events in a climate-changed world might just make this a meritorious idea too.) The bill is vague on this matter and could be read to not have flood-control performance improvements as a goal. Again, an effort by the water aristocracy to benefit from projects not paid for by them. This language was probably inserted into the Murkowski Energy bill, S. 2012 as the Flake - Feinstein amendment being considered by the Senate. This provision is hoped to be the mechanism that Merced Irrigation District hopes to force the Corps to allow it to invade Lake McClure’s flood-control reservation. That is unlikely to be a meritorious idea.

(10) Requires that Federal Cal-Fed plus San Luis Reservoir feasibility reports be completed by a date certain. Temperance Flat Dam final (March 31, 2016), Los Vaqueros final (November 30, 2016), Sites draft (November 30, 2016), Sites final (November 30, 2017), San Luis (December 31, 2017) (§115). Requires the Secretary to separate construction costs from any mitigation costs (§115(7)). The Secretary

shall establish a process to address direct and substantial impact to the projects listed in §115. It does not appear to require that the final reports have a Record of Decision or a recommended (preferred) alternative. It does not appear to require that the draft reports have a tentatively selected (preferred) alternative. It does require that the Committees of the House and Senate be informed of the schedule for Records of Decision (among some other milestones) §115(5)

Commentary: This language modifies existing law requiring that these feasibility studies be forwarded to the Congress only when the Secretary is prepared to recommend the given project. Most, perhaps all, of these projects have fatal flaws that prevent preferred alternatives and Records of Decision that decide anything other than failing to make a decision or to decide to shelve the projects. The purpose of this language (if one is cynical) is to allow the Congress to push these projects forward on the basis of incomplete “final” feasibility reports even with fatal flaws and, potentially, to indefinitely delay mitigation for any potential direct or substantial adverse impacts of the projects.

(11) Establishes a “Reclamation Loan Capital Reserve Fund” with an initial \$200 million dollar capitalization for the Bureau of Reclamation to be used to issue loans to fund non-federal water projects (§§ 132-141).

Commentary: A large portion of the “discussion bill” is devoted to setting up a Federal “bank” to issue loans to the water aristocracy that, presumably, would compete favorably with the traditional capital markets used to finance water projects. Just another favor to the water aristocracy.

(12) Title VI. Establishes a deauthorization process for inactive Reclamation projects: Section 601 establishes a process similar to the Corps of Engineers process to provide for the deauthorization of project dead wood.

Commentary: A laudable idea, but if it works as well as the decades-old Corps program, very few projects will be deauthorized as long as it has the interest of a Congressman or two. The real purpose of this provision is to game the budget rules of the Congress and claim that by deauthorizing projects that the appropriation committees don’t intend to spend money on, more projects (such as those in this bill) that the Congress intends to spend money on can be authorized and overall spending not affected. It’s crazy, but you’ve got to love their pluck.

Here is a more detailed assessment of the bill’s provisions to “goose” the Cal Fed or Cal “Feddish” dam studies along.

Some of you will have reviewed sections 114 and 115 of the Feinstein discussion (now S.2533) bill. They change existing law (P.L. 108-361, the statute that required the feasibility studies).

This statute required the Secretary to forward the studies to the Congress once the Secretary determines that it should be constructed to a requirement to finish the “feasibility studies” (whatever that means) and forward them to the Congress.

Since the studies are required to be forwarded this year or the next, the question arises, can the studies be finished by these deadlines. With regard to the Temperance Flat dam (TFD), the answer is probably yes—if the standards for a “feasibility study” are low enough. For example, the completed “feasibility study” model that Reclamation followed at Shasta Dam might fit here. There, the final “feasibility study” did not resolve key issues, have any kind of preferred alternative, have any arrangements for cost-sharing, no cost-sharing partner at all, have any agreement with other federal agencies responsible for natural resource stewardship, have a ROD, have any concept on how to achieve the necessary water-right arrangements for SWP beneficiaries, or have a potential non-federal partner with even the beginning of an EIR—in other words, not the kind of actual complete package that Congress (at least since President Carter’s and Ronald Reagan’s reforms) would require in order to consider project authorizations.

To expand slightly, although the Federal government could complete the TFD “feasibility study” described in the time described (March 31, 2016), as with the Shasta Dam final feasibility report, it would not have a selected or preferred alternative. At best, it could have a National Economic Development (NED) alternative. It could not have a locally selected alternative in that time frame since, presumably, that would require someone to undertake a CEQA process in the next two months. And unless the Secretary moved really fast and made a no-recommendation or no-project recommendation, no ROD could be done since the unresolved issues are major. Thus, if the pattern of Shasta Dam raise final “feasibility study” is adopted, the “study” would just accomplish a list and discussion of the issues that preclude a recommendation. Some might believe that this result could be a bit embarrassing for both Reclamation and those in the Congress pushing Reclamation.

It is less clear to me that the other called-for feasibility studies—Los Vaqueros and San Luis Dam raises and Sites Reservoir—could be accomplished in the next year or two. Perhaps they could be, given the above low standard for “feasibility studies,” but are such low standards rely appropriate? And if the “feasibility study” is intended to include a final EIS (as it did for the Shasta Dam raise), then I have my doubts.

These facts make the obvious annoyance with Reclamation contained in Section 114 of the discussion drafts about the need to complete the final “feasibility studies” to be misplaced: it is not the Secretary’s nor Reclamation’s fault that there are unresolved issues when the problem is largely the lack of non-federal sponsors or basic project cost-effectiveness or legal feasibility.

On a more detailed level, the sticklers will point out some drafting issues about what is really being desired. The referenced sections call for “feasibility studies.” Reclamation has been doing “feasibility reports” accompanied by environmental impact statements. The draft reports have been separate from the draft EISs. The only “completed” report is the SLWRI one. It calls itself a

final “feasibility report,” but it is being published with the final EIS published under separate cover. Perhaps that is the pattern that will be followed by Reclamation in the future. See the following from the final SLWRI (Shasta Dam Raise) feasibility report:

This Final Feasibility Report presents the results of planning, engineering, environmental, social, economic, and financial studies and potential benefits and effects of alternative plans, and is a companion document to the Final Environmental Impact Statement (EIS), published under separate cover. This Final Feasibility Report, along with the Final EIS, will be used by the U.S. Congress to determine the type and extent of Federal interest in enlarging Shasta Dam and Reservoir.

However, in chapter nine Secretary says that key unresolved issues preclude making a recommendation and are expected be resolved before the Secretary presents her recommendation to the Congress:

Prior to a recommendation, the Secretary is of the view that there must be resolution of the outstanding considerations raised. In the absence of a Congressional authorization to the contrary, resolution of these issues could be achieved through an agreement between the Secretary and appropriate non-Federal entities on a specific alternative and how the funding will be provided for that specific alternative. Any such agreement must address: total funding, payment up-front by the non-Federal partner, ability to use the non-Federal funds in the construction process, a plan to meet all environmental commitments, and agreement on the operations of the revised facility and conveyance of the associated water to the intended beneficiary. Such an agreement would then be presented to Congress for authorization.

The feasibility report does not say whether the vehicle for a presentation to the Congress would be an ROD, but that would be the “regular order” for federal water project studies, recommendations, and information to consider authorizations.

On the question of whether the “feasibility studies” being called for in the discussion drafts (or in P.L. 108-361, for that matter) should be accompanied by a final EIS, well, Section 114 does lump feasibility studies with environmental review. But Section 115 is not clear here. But the regular order would be either a project recommendation or a no-project recommendation, presumably in a completed ROD that ties up all the important loose ends.

See my attached memo as an example of the kind of analysis that might cause a Secretary of the Interior or a Congress to not authorize these deadbeat dams. It’s a well-referenced memo of some applicability to TFD. It would be good to write a similar one now for TFD, although this would be more difficult in the absence of a final report/EIS.

In the end, these two study sections are an attempt to goose Reclamation into producing a work product that, if read, should result in no study authorizations, but in the present political

atmosphere will serve as the procedural cover for federal quasi-authorizations for these dams. It's not our Congress's finest hour.

SEC. 114. FINDINGS. (from the Feb 2 discussion draft—few, if any, changes were made in the Feb 10 S.2533)

Congress finds that—

(1) the record drought conditions being experienced in the State of California as of the date of enactment of this Act are—

(A) expected to recur in the future; and

(B) likely to do so with increasing frequency;

(2) water storage is an indispensable and integral part of any solution to address the long-term water challenges of the State of California;

(3) Congress has authorized relevant feasibility studies for 5 water storage projects in the State of California, including projects for—

(A) enlargement of Shasta Dam in Shasta County under section 2(a) of Public Law 96–375 (94 Stat. 1506), as reaffirmed under section 103(d)(1)(A)(i)(I) of Public Law 108–361 (118 Stat. 1684);

(B) enlargement of Los Vaqueros Reservoir in Contra Costa County under section 215 of Public Law 108–7 (117 Stat. 147), as reaffirmed under section 103(d)(1)(A)(i)(II) of Public Law 108–361 (118 Stat. 1684);

(C) construction of North-of-Delta Offstream Storage (Sites Reservoir) in Colusa County under section 215 of Public Law 108–7 (117 Stat. 147), as reaffirmed under section 103(d)(1)(A)(ii)(I) of Public Law 108–361 (118 Stat. 1684);

(D) construction of the Upper San Joaquin River storage (Temperance Flat) in Fresno and Madera Counties under section 215 of Public Law 108–7 (117 Stat. 147), as reaffirmed under section 103(d)(1)(A)(ii)(II) of Public Law 108–361 (118 Stat. 1684); and

(E) expansion of San Luis Reservoir under section 103(f)(1)(A) of Public Law 108–361 (118 Stat. 1694);

(4) as of the date of enactment of this Act, more than 10 years have elapsed since the authorization of the feasibility studies referred to in paragraph (3), but for a variety of reasons the slow pace of work on completion of the feasibility studies for those 5 water storage projects is unjustified and of deep concern; and

(5) there is significant public interest in, and urgency with respect to, completing all feasibility studies and environmental reviews for the water storage projects referred to in paragraph (3), given the critical need for that infrastructure to address current and future water challenges of the State of California.

SEC. 115. STUDIES.

The Secretary of the Interior, through the Commissioner, shall—

- (1) complete the Upper San Joaquin River (Temperance Flat) feasibility study described in clause (ii)(II) of section 103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684) and submit the study to the appropriate committees of the House of Representatives and the Senate not later than March 31, 2016;
- (2) complete the Los Vaqueros Reservoir feasibility study described in clause (i)(II) of section 103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684) and submit the study to the appropriate committees of the House of Representatives and the Senate not later than November 30, 2016;
- (3) complete the North-of-Delta Offstream Storage (Sites Reservoir) feasibility study described in clause (ii)(I) of section 103(d)(1)(A) of Public Law 108–361 (118 Stat. 1684) and submit the study to the appropriate committees of the House of Representatives and the Senate not later than November 30, 2017;
- (4) complete the San Luis Reservoir feasibility study described in section 103(f)(1)(A) of Public Law 108–361 (118 Stat. 1694) and submit the study to the appropriate Committees of the House of Representatives and the Senate not later than December 31, 2017;
- (5) provide a progress report on the status of the feasibility studies referred to in paragraphs (1) through (3) to the appropriate committees of the House of Representatives and the Senate not later than 90 days after the date of enactment of this Act and every 180 days thereafter until December 31, 2017, as applicable, which report shall include timelines for study completion, draft environmental impact statements, final environmental impact statements, and records of decision;
- (6) document, delineate, and publish costs directly relating to the engineering and construction of a water storage project separately from the costs resulting from regulatory compliance or the construction of auxiliary facilities necessary to achieve regulatory compliance if the Secretary of the Interior determines in any feasibility study required under this subsection, reclamation laws, the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other applicable law, that the project is not feasible;
- (7) include information required in paragraph (7) in the feasibility studies issued pursuant paragraphs (1) through (5), as applicable; and
- (8) communicate, coordinate, and cooperate with public water agencies that—
 - (A) contract with the United States for Central Valley Project water; and
 - (B) are expected to participate in the cost pools that will be created for the projects proposed in the feasibility studies under this section.