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From: Ronald Stork

Summary and discussion of the savings language and selected storage provisions of WIIN 2016 versus the 2019 Feinstein/Senate "Drought Resiliency and Water Supply Infrastructure Act" (DRWSIA)

Introduction

On June 20, 2019, Senators Gardner, Feinstein, McSally, and Sinema introduced "Drought Resiliency and Water Supply Infrastructure Act" (DRWSIA),[1] a bill to amend the Water Infrastructure Improvements for the Nation Act of 2016 (WIIN).[2]

In addition to the storage provisions discussed in this memo, the WIIN requires modifications to federal Central Valley Project (CVP) and even State Water Project (SWP) operations to prioritize deliveries to south-of-Delta export customers. Reclamation has made and is making changes to its operations to do so. These operational changes, although popular in the San Joaquin Valley and among some urban water districts in the south state, received substantial criticism in other portions of the state. The authorization for this aspect of the WIIN expires in 2021. I presume, however, that the WIIN-inspired changes to CVP operations are intended by Reclamation to stay in place to the extent that they become embodied in the at least partially WIIN-inspired Long Term Operations (LTO, formerly OCAP) in the final stages of construction at this writing. I leave it to others to analyze what the retained WIIN operational features sunset means.

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[1] https://www.friendsoftheriver.org/wp-content/uploads/2019/06/1176BE9AAA5E073EF4C12572A5F12A48.drought-bill-text.pdf

[2] For a 2016 analysis of the storage provisions of the WIIN, see the following: https://www.friendsoftheriver.org/wp-content/uploads/2018/06/FOR-WIIN-CA-storage-provisions-memo-1-5-2016.pdf

The storage section of the WIIN also expires in 2021 (although grandfathering in storage projects that, like Reclamation purports for the Shasta Dam raise, receive a Secretarial determination of feasibility by January 1, 2021). The DRWSIA, in contrast, repeals this sunset clause, making the WIIN storage program permanent (albeit requiring some authorization of funding increases from time to time as funds are spent).

Looking back to 2106

But how did we get to this sad state of affairs? Although DRWSIA hopes to make some changes (often for the worse), I reprise my late 2016 summary[3] of the genesis of the California drought portions of the WIIN that affect Reclamation's storage dam programs:

> Now we move on to Title 3, Subtitle J — California. This subtitle emerged from Senator Feinstein's discussions with House Majority Leader Kevin McCarthy and was uneasily grafted on to the WRDA in the very last days of the 114th Congress. It certainly reflects the desires of southern San Joaquin Valley and Southern California water districts to squeeze more water out of the Delta pumps — how successful that will be is yet to be established (SWRCB actions under state law are arguably not preempted). But more relevant to this memo, Subtitle J reflects the desires of water districts and many elected officials to build more dams and reservoirs — and their aspirations to tap into the federal and state treasuries to do it.
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> What is striking here is the difference between the WRDA authorizations and the Subtitle J authorizations — in the latter there is no orderly progress of cost-shared feasibility studies, Fish and Wildlife Coordination Act reports, environmental impact statements, biological assessments, allocation of benefits, project beneficiary financing commitments, consolidation of all these steps into Chief of the Corps of Engineers reports, submission with recommendations by the Chief and the Assistant Secretary of the Army to Congress for authorization. These were the rules for federal water projects demanded by President Ronald Reagan and adopted in WRDA 1986. Title 3, Subtitle J of the WIIN seems blissfully unaware of them. There is an ill wind blowing from the Congress nowadays.

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[3] Ibid.

Instead, in Subtitle J, the Congress just gives the Secretary of the Interior permission to proceed on whatever the Secretary can put together under the rough conditions outlined in the Subtitle. Yes, the appropriations committees get to direct money to their favorite projects, but the concept of authorizations and the job of the authorizing committees seems to have evaporated. President Reagan and his federal water-policy reformers would not be proud.

Selected DRWSIA provisions[4]

The DRWSIA is more of the same, only more so.

(1) DRWSIA (§ 3(k) repeals § 4007 of the WIIN (that's the storage authorization and cost-sharing section, among some other provisions) and effectively substituting the DRWSIA in its place; **(2)** § 3(a)(ii) and § 4(a)(ii) adds facilities (i.e., canals) conveying water to or from surface or groundwater storage to the list of eligible federal and non-federal projects (Interior had already done this with the Friant-Kern Canal without any clear WIIN authority); **(3)** § 3(b) authorizes grants to eligible entities for federal and non-federal storage projects in addition to the WIIN federal subsidies — probably conceived as an outright subsidy for the Reclamation Yakima Basin Integrated Regional Master Plan[5] but not limited to this project (the similar WIIN § 4007(d) authorized "assistance"); **(4)** as-introduced, § 3(c) is unlike May DRWSIA discussion draft, largely preserving the WIIN conditions necessary for the Secretary to commence construction. The May DRWSIA discussion draft was more detailed, dividing the WIIN "determination of commencement of construction" quasi-authorization process for federal projects into two parts: conditions for federal participation and conditions for construction; **(5)** § 3(c)(4) adds a requirement to notify relevant Congressional committees within 30 days of the § 3(c) determinations necessary for

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[4] For an author's summary of DRWSIA, see the following: https://www.friendsoftheriver.org/wp-content/uploads/2019/07/C64D1F570979F092AF5AC6003E5DD289.drought-bill-summary.pdf. Senator Feinstein also has a section by section analysis of DRWSIA (obviously including sections not covered here): https://www.friendsoftheriver.org/wp-content/uploads/2019/06/BE26118F86B85FBF04290234BE6F065B.drought-bill-section-by-section.pdf.

[5] https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-supply-projects-EW/Yakima-River-Basin-projects/Yakima-integrated-plan

federal participation in federal storage projects; **(6)** § 3(g) triples the WIIN/DRWSIA storage project authorized ceiling for appropriations by adding $670 million through 2020 to 2024 to the previously authorized and appropriated WIIN $335 million; **(7)** § 3(g)(2) and § 3(g)(3) requires initial specific approval by project name for preconstruction and construction funding by appropriations committees, then allows the Secretary to direct spending to any of the respective accounts from general DRWSIA accounts (more specific procedures than under the WIIN); **(8)** § 3(g)(5) grandfathers any WIIN funding eligibility determinations into DRWSIA funding eligibility **(9)** § 3(j) reauthorizes CALFED from 2019 to 2024; **(10)** § 3(k) repeals the WIIN § 4007(i) 2021 Secretarial feasibility determination storage-project sunset clause, making the WIIN/DRWSIA storage program permanent! By repealing WIIN § 4007, the Subtitle J 2021 WIIN § 4013 sunset deadline for WIIN projects not already under construction, the WIIN/DRWSIA storage program also becomes permanent; **(11)** § 6 creates a Reclamation Infrastructure and Innovation Act (RIFIA) ten-year treasury rate storage loan program (35-year loans with payments deferred for up to 5 years after completion of the project). Some consolidation of the EPA and Reclamation storage-loan programs;[6] **(12)** I understand that the long and complex § 9 effectively repeals and replaces WIIN § 2011, which changed some 1982 Reclamation Reform Act and 1992 Central Valley Project Improvement Act contracting reforms, in part by establishing pre-payment provisions to convert CVP water service contracts under § 9(e) (irrigation) or § 9(c)(2) (M&I) (53 Stat. 1193, chapter 418) to repayment contracts under § (9)(d) or § 9(c)(1). The latter contracts are permanent, no-acreage-limitation contracts. However, the DRWSIA does appear to have ended the slush fund for WIIN storage projects that would result in these pre-payments being deposited into the WIIN "Water

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[6] Water interests were no doubt amused when they successfully passed the 2018 Water Resources DevelopmentAct/America's Water Infrastructure Act with provisions in subtitle B for a U.S. EPA water infrastructure loan program (WRDA 2014 WIFIA reauthorization) — and at § 1152 provisions to allow the Corps of Engineers to accept contributed funds from dam owners to pay for revisions to water regulation "flood-control" manuals). The EPA had in the past vetoed the giant Two Forks dam on the Platte River and helped to scuttle Auburn dam on the American River.
https://www.friendsoftheriver.org/wp-content/uploads/2018/10/More-storage-comming-to-CA-Sac-Bee-9-13-2018.pdf
https://www.friendsoftheriver.org/wp-content/uploads/2018/10/Merced-ID-says-more-storage-is-close-Merced-Sun-Star-Oct-17-2018.pdf

Storage Account," which appears to be discontinued (it is not known to me how many prepayments were made into this account).

Preemption Analysis

Some of these changes listed above are consequential and deserve separate analysis, but this memo concentrates on the most relevant storage-provision DRWSIA changes or similarities to WIIN's requirements to follow other state and federal laws. Given the WIIN and DRWSIA streamlining and subsidies for federal and non-federal storage projects, these legal consistency requirements may be essential to check the re-emerging federal water project free-for-all that had been previously tempered by Presidents Carter and Reagan's reforms.

There are three important savings and anti-preemption provisions discussed here. I begin with the comparable language and follow with commentary in italics.

WIIN section to be repealed — § 4007(b) Federally Owned Storage Projects (4) ENVIRONMENTAL LAWS. — In participating in a federally owned storage project under this subsection, the Secretary of the Interior shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

DRWSIA — § 3(c) Federally Owned Storage Projects (6) Environmental laws.—In participating in a federally owned storage project under this subsection, the Secretary shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

Commentary: Not much is changed by DRWSIA, except that by changing the definition of federal storage projects, DRWSIA applies this provision to eligible canal infrastructure projects. This provision only applies to WIIN/DRWSIA federal storage projects. The natural reading of these WIIN and DRWSIA subsections would require compliance with federal <u>and state</u> environmental law. The statute does not define environmental laws.

<u>WIIN § 4007(j) to be repealed</u>. Consistency with State Law: Nothing in this section preempts or modifies any obligation of the United States to act in conformance with applicable State law.

<u>DRWSIA</u> — § 3(g) Consistency With State Law. — Nothing in this section preempts or modifies any obligation of the United States to act in accordance with applicable State law.

Commentary: This WIIN section was designed to make clear that WIIN § 4007 programs remain subject to whatever state law obligations Reclamation was previously subject to. The WIIN § 4007 programs were: WIIN federal water storage projects, 25% funding of WIIN non-federal "state" storage projects, federal assistance for non-federal parties, providing the Secretary of the Interior with authority for mutual use with non-federal parties of federal and non-federal WIIN storage projects, consistency with the California Water Bond, authorization for Reclamation to partner with joint powers authorities in federal and non-federal storage projects, and authorizations of appropriations into a Water Storage Account.

DRWSIA section 3 refers to: federal WIIN/DRWSIA water storage and conveyance projects, 25% funding of non-federal WIIN/DRWSIA "state" storage and conveyance projects, federal grants to non-federal parties, providing the Secretary of the Interior with authority for mutual use with non-federal parties of federal and non-federal WIIN storage projects, authorization for Reclamation to partner with joint powers authorities in federal and non-federal storage projects, and authorizations of appropriations.

WIIN § 4012 (not repealed in DRWSIA but made less applicable). Savings Language. Subtitle J, California, should not be interpreted or implemented in a manner that preempts state law, affects obligations of the Central Valley *[sic]* Improvement Act (except for the Stanislaus River predator program), changes the Endangered Species Act (ESA), would cause additional adverse effects on fish species, and affects obligations of the Pacific Fishery Management Council under the ESA or Magnuson Stevens Act to manage California to Washington coastal fisheries.

DRWSIA — § 10 Nothing in this Act or an amendment made by this Act shall be interpreted or implemented in a manner that—
(1) preempts or modifies any obligation of the United States under Federal law to act in accordance with applicable State law, including applicable State water law; or
(2) affects or modifies any obligation under Federal environmental law.

Commentary: These two provisions apply broadly within their respective statutes or subtitles, and not just to the storage provisions of the WIIN or DRWSIA. Unlike the previously discussed savings or anti-preemption WIIN-versus-DRWSIA language, WIIN § 4012 is not repealed, and under DRWSIA, it would continue to apply to all of the remaining WIIN Subtitle J sections, some of which are being left alone (and therefore in many cases to expire under the terms of the WIIN). However, under DRWSIA, WIIN § 4012 would no longer apply to WIIN provisions that are repealed, or being repealed and replaced (the critical WIIN § 4007 & § 4011 are examples of the latter).

The § 3(g) and § 10 DRWSIA language is focused on the Department of the Interior's obligations under federal law, including any potential obligations to follow state law. These latter obligations, presumably, include Section 8 of the Reclamation Act and the Central Valley Project Improvement Act. Here's Section 8 and probably the most meaningful CVPIA provisions:

> § 8 That nothing in this Act shall be construed as affecting or is intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws…
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> § 3406(a) Amendments to Central Valley Project Authorizations Act of August 26, 1937. — Section 2 of the Act of August 26, 1937 (chapter 832; 50 Stat. 850), as amended, is amended.
> (4) By adding at the end the following: "(e) Nothing in this title shall affect the State's authority to condition water rights permits for the Central Valley Project."
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> § 3406(b) "The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under state and federal law, including but not limited to the federal Endangered Species Act, 16 U.S.C. § 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project. (1992 Central Valley Improvement Act, § 3406(b) (in part)), title 34 Public Law 102-575.

Given Reclamation's existing statutory responsibilities, the WIIN/DRWSIA framework is helpful. DRWSIA does, however, strike the additional general WIIN language <u>that WIIN should not be interpreted</u> to preempt state law, a helpful, emphasizing provision of the WIIN.

Please note that Reclamation takes a rather pugnacious attitude against its obligations to comply with the anti-preemption portions of at this time. For example, it is moving to construction on the Shasta Dam raise, which it found to be in conflict with state law in 2104–15 and now, curiously, finds the issue unresolved.[7]

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[7] https://www.friendsoftheriver.org/wp-content/uploads/2019/05/Huffman-tussles-with-USBR-on-Shasta-Dam-raise-EE-News-5-19-2019.pdf. https://www.friendsoftheriver.org/wp-content/uploads/2019/07/Questions-for-the-Record-Shast

However, there is at least one potentially quite meaningful change from the WIIN. DRWSIA effectively repeals the WIIN obligation not to interpret the storage provisions of the WIIN in a manner not to cause additional adverse impacts on fisheries. The removal of the not-to-cause-additional-adverse-impacts-to-fisheries is a clear weakening of the WIIN Act in a number of venues. For example, Reclamation's Shasta Lake Water Resources Investigation final EIS found that its proposed Shasta Dam would have potential adverse effects on state-protected McCloud River fisheries. Nevertheless, Reclamation intends to award construction contracts by December 2019. This project is illegal under the California Wild & Scenic Rivers Act and, as described in part above, thus also illegal under the WIIN, DRWSIA, and Reclamation law.

WIIN and DRWSIA determinations

The WIIN (§ 4007(b)(3) and § 4007(c)(2) and the DRWSIA § 3(c) and § 3(d) appear to have established similar conditions on Secretarial determinations for commencement of construction.[8] One of the prerequisites for the determination is feasibility under Reclamation law. I provided some commentary in my 2016 WIIN analysis memo that follows:

> Feasibility — Projects must be determined to be feasible, although this concept is not defined in the WIIN except in reference to Reclamation law. We do have a recent example of a feasibility determination in Reclamation's Shasta Lake Water Resources Investigation final feasibility report. In chapter six, starting at page six, they divide the feasibility determination of the National Economic Development (NED) alternative into four parts: technical, environmental, economic, and financial.[9] They appear to find this project feasible in each of the four parts. This

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a-Dam-raise-2.pdf. https://www.friendsoftheriver.org/wp-content/uploads/2019/04/Trumps-cold-water-war-turns-hot-Legal-Planet-April-9-2019.pdf

[8] My 2016 WIIN memo discusses the conditions necessary for these determinations. Interestingly, for DRWSIA federal water projects, the May DRWSIA draft distinguished between determinations for federal participation and federal construction. The draft as introduced only did this for non-federal "state-led" projects.

[9] • Technical feasibility, consisting of engineering, operations, and constructability analyses verifying that it is physically and technically possible to construct, operate, and maintain the project.
• Environmental feasibility, consisting of analyses verifying that constructing or operating the project will not result in unacceptable environmental consequences.
• Economic feasibility, consisting of analyses verifying that constructing and operating the project would result in net NED benefits.
• Financial feasibility, consisting of examining and evaluating project beneficiaries' ability to

> is a project where the U.S. Fish and Wildlife Service (pre-Trump) was unable to support any alternative, where the cost to construct is equal to the unpaid reimbursable debt of the Central Valley Project but with a project yield of only 1% of current CVP yield, where the Secretary is unable to make any recommendation on the project because of unresolved key issues, where there does not appear to be any project cosponsors, and is illegal under California's Wild & Scenic Rivers Act. Apparently, Reclamation feasibility determinations are not particularly rigorous**.**

This "feasibility determination" was made before the WIIN was created, but as noted in the footnote below, legal feasibility did not appear to be included in the analysis. Neither WIIN nor DRWSIA provide information on what feasibility means under Reclamation law. The current Administration reported in early 2018 that they had made a determination for commencement of construction, although not providing any information on the basis of the determination,[10] although the WIIN required that such determinations can only be made for feasible projects (among other reasons). It is thus difficult to determine whether legal feasibility, whether directly or indirectly, played a role in the Administration's determination for commencement of construction under the WIIN. It should also be noted that California law prohibits Reclamation's likely non-federal partners from cooperating or assisting Reclamation in the planning and construction of this project. According to current understandings, at the apparent time of determination, Reclamation had not fully secured a cost-sharing agreement with such a partner (they had expired agreements-in-principle to cost share). A cost-sharing agreement is also one of the prerequisites for such a determination. Apparently, implementing the WIIN has not been particularly rigorous.[11]

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repay their allocated portion of the Federal investment in the project over a period of time, consistent with applicable law.

[10] https://www.friendsoftheriver.org/wp-content/uploads/2019/07/Adm-rprt-on-2018-CA-reservoir-enlargement-approps-request-ocr.pdf

[11] Here's the WIIN language: § 4007(b) Federally Owned Storage Projects
(3) COMMENCEMENT. — The construction of a federally owned storage project that is the subject of an agreement under this subsection shall not commence until the Secretary of the Interior—

> (A) determines that the proposed federally owned storage project is feasible in accordance with the reclamation laws;
> (B) secures an agreement providing upfront funding as is necessary to pay the non-Federal share of the capital costs; and
> (C) determines that, in return for the Federal cost-share investment in the

Given the immediately following language in the WIIN and DRWSIA that the Secretary shall comply with all applicable environmental laws, which surely would include the California Wild & Scenic Rivers Act, something appears to be amiss, either the WIIN being clear enough to the Secretary or in his willingness to follow federal law. The discretion afforded the Secretary, in practice, has not been warranted.

Deletion of California Water Commission Consistency Determinations

This brief section examines the implications of the DRWSIA in deleting the WIIN provisions requiring that state-led (that means non-federal) storage projects not receive WIIN construction funding until the California Water Commission (CWC) makes a consistency determination with the California Water Storage Investment Program (WSIP) established by California's Proposition 1 bond measure.

Let's start with this WIIN language proposed to be deleted by the DRWSIA:

> (f) COMPLIANCE WITH CALIFORNIA WATER BOND.-
> (1) IN GENERAL.-The provision of Federal funding for construction of a State-led storage project in the State of California shall be subject to the condition that the California Water Commission shall determine that the State-led storage project is consistent with the California Water Quality, Supply, and Infrastructure Improvement Act, approved by California voters on November 4, 2014.
> (2) APPLICABILITY.-This subsection expires on the date on which State bond funds available under the Act referred to in paragraph (1) are expended.

In the present circumstances, this gives the California Water Commission and, by extension, the state generally some influence over non-federal WIIN projects proposed to be partially (up to 25%) funded by the Department of the Interior. Such state participation is desirable.

> federally owned storage project, at least a proportionate share of the project benefits are Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges.
> (4) ENVIRONMENTAL LAWS. — In participating in a federally owned storage project under this subsection, the Secretary of the Interior shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

As far as I know, the CWC has never made a formal consistency determination for WIIN purposes concerning the "State-led" projects. As of yet, since none of the WSIP projects are eligible for construction funding (under the bond act they need completed environmental reviews and permits), such consistency determinations are premature. Presumably the CWC will make determinations for projects that have been determined to qualify for WSIP construction funding, are seeking WIIN construction funding, and request CWC consistency determination letters. If confined to current WSIP projects, we know the aspiring projects that might seek and be awarded CWC determination letters.

Parenthetically, Governor Brown has made the other WIIN-required (for state-led projects) request/determination to the Secretary for the WSIP projects with allocations, even including the one WSIP federal project.[12] (The CWC determined that the federal Shasta Dam raise project was ineligible for WSIP funding because it was illegal under the California Wild and Scenic Rivers Act and thus provisions of the bond.[13]) At present, no CWC consistency determination is required for the other WSIP federal project.

It should be noted, however, the DRWSIA intends to fund canal-infrastructure projects, something that the WIIN did not clearly envision (although last year the Administration did mark the Friant Canal as a WIIN project, seeking and I believe receiving study funds[14]). The existing WIIN consistency-determination language only applies to storage projects, so canal infrastructure projects funded by DRWSIA would not currently need the CWC consistency determination.

Conclusions

It would seem that the most significant provisions related to storage of the DRWSIA is the elimination of the storage program sunset clauses. This would hijack a "drought emergency" WIIN statute to make the WIIN/DRWSIA storage-construction and federal subsidy program permanent. Said another way, DRWSIA would result in (1) a revitalized Great Depression/post-war-era federal program for federal storage dams and canal infrastructure and (2) federal loan and grant assistance for non-federal

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[12] https://www.friendsoftheriver.org/wp-content/uploads/2018/09/8.27.18-Gov-ltr-to-Secretary-Zinke-ocr.pdf

[13] https://cwc.ca.gov/-/media/CWC-website/Files/Documents/2015/07_July/July2015_Agenda_Item_13_Attach_2_Summary_of_SAC_Comment_Letters.pdf

[14] https://www.friendsoftheriver.org/wp-content/uploads/2019/07/Adm-rprt-on-2018-CA-reservoir-enlargement-approps-request-ocr.pdf

entities wishing to participate in federal and non-federal storage and canal projects. Other than controlling the total program-authorized ceiling, the WIIN/DRWSIA storage program would be outside of the control of the Congressional authorizing committees. Indeed, once a project is funded by name in any amount by Congressional appropriators, DRWSIA provides near complete discretion to the Secretary to tap general DRWSIA accounts created by the appropriations committees, assuming that such activities are lawful under state and federal law (§ (3)(g)(2) and § (3)(g)(3)). In practice, it will be up to the courts to exercise effective oversight over the Secretary of the Interior.

The proposed tripling of the WIIN funding ceiling is also troubling, speaking to the intentions of its sponsors to make the WIIN/DRWSIA storage programs permanent, bumping up the authorization ceiling whenever the Secretarial determined projects run short of federal authorization for appropriations.

There is probably substantial danger in the extensive financing parts of the DRWSIA, but they are yet unanalyzed in this memo.[15]

The WIIN anti-preemption and requirements to comply with existing state and federal obligations, although arguably strong, have so far been abused by the Secretary, something that should spark a serious reevaluation, dismantling, or reform of the WIIN/DRWSIA storage program.

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[15] https://www.friendsoftheriver.org/wp-content/uploads/2019/07/926F5F72B56D275F07BE1409EF5045B6.drought-bill-loan-program.pdf