FRIENDS OF THE RIVER

1418 20 TH STREET, SUITE 100, SACRAMENTO, CA 95811

PHONE: 916/442-3155 • FAX: 916/442-3396

WWW.FRIENDSOFTHERIVER.ORG

To: Files, from Ron Stork *(revision of four earlier pre-passage and four post-passage memos)* January 26, 2021

Regarding: Storage Provisions of the "Water Infrastructure Improvements for the Nation Act[1]" (WIIN, P.L. 114-322) mostly Title 1, the Water Resources Development Act of 2016, and Subtitle J of Title 3 — an initial careful analysis. More analyses of some subsections are still needed, however.

Purpose of the legislation:

This legislation (S. 612) became law on December 16, 2016, and was a hybrid of a federal program for lead pollution management legislation for Flint Michigan, the 2016 Water Resources Development Act (WRDA), a slimmed-down version of the California Emergency Drought Relief Act of 2015 (S. 1894) from Senator Feinstein (D-CA), and other miscellaneous water matters. The purpose of this memo is to focus on storage provisions of the WIIN relevant to California.

What this memo is not about:

As before, what is not included in this memo is much discussion on the bill's impacts to Central Valley Project (CVP) and State Water Project (SWP) Delta operations. But I will say that there is mischief in this bill for the Delta. The bill attempts to require changes in Federal operations of Delta export projects desired by state and federal contractors and other water agencies. These provisions are not infrequently in conflict with each other or conflict with other law and environmental provisions contained in the WIIN.

Exporters characterize these changes as imposing obligations to maximize exports, defining and accelerating how federal decisions are made, and not changing obligations

[1] Formerly known as "S. 612, to Designate The Federal Building and United States Courthouse Located at 1300 Victoria Street in Laredo, Texas, as the ''George P. Kazen Federal Building and United States Courthouse.'' http://docs.house.gov/billsthisweek/20161205/CPRT-114-HPRT-RU00-S612.pdf https://www.friendsoftheriver.org/wp-content/uploads/2020/12/PLAW-114publ322.pdf.

to comply with the Endangered Species Act (ESA). Others note that the provisions of Subtitle J require Federal agencies to violate at least some provisions of existing biological opinions under the Endangered Species Act and could conflict with orders by the State Water Resources Control Board (SWRCB). Reclamation updated its operations in a 2019 Long Term Operations plan (LTO, formerly OCAP) under a revised non-jeopardy Biological Opinion under the authority from the WIIN. It also renegotiated a new Coordinated Operations Agreement with the State Water Project at about the same time.

Interestingly, for drought legislation, the Delta-related and some other provisions of Subtitle J expire in five years, and are not tied to any declared drought emergency in California.

This memo is not about legislation introduced in the 116th Congress to make revised storage provisions a permanent part of Reclamation law. This legislation was not enacted but is expected to be reintroduced in the 117th Congress.

Implications and Effects Summary

The storage provisions of § 4007 Subtitle J have been embodied in previous "drought relief" bills offered by Senator Feinstein. The provisions of the WIIN continue to break traditional notions of which projects are authorized and which are not; break the President Reagan rules that require project descriptions, completed studies, and financing arrangements before Congressional authorization; as well as provide Federal financing for purposes that are unexamined by the Congress. It also dedicates advanced payments from Federal water service contracts to a Reclamation Water Storage Account to finance dams and dam expansions Reclamation wide. It provides considerable incentives to contribute to the account: permanent water contracts and freedom from acreage ownership limitations long sought by westside corporate farmers.

With regard to the storage dams that Senator Feinstein has expressed interest in, § 4007 (authorizations) and § 4011 (Reclamation storage slush fund) give them a boost by providing them a Secretarial "authorization" path and some limited ($335 million) funding, but it may not be enough to get any major dams built if the Secretary is responsible (something we may not see during the next four years), more federal money is not kicked in by the Congress, state law isn't pre-empted or 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.

Provisions of Title 1, the Water Resources Development Act

The WRDA is the biennial (sometimes) U.S. Army Corps of Engineers policy and program authorization bill for the country — although the trend has been to give rather vague authorizations and has had a bad patch of years not being biennial. The Corps civil-works program mostly does rivers and harbors navigation projects, floodwater management dams and levees, and some ecosystem restoration work. This memo focuses on the dams of interest in California in the WIIN. I'll try to go sequentially based on the order of the sections and subsections as they appear in the WIIN.

Let's first look at the WRDA authorizations and policies. You can skip to the Subtitle J California "drought" projects on page thirteen, but recognize that the WRDA also provides the Secretary of the Army new generic permission to expand California dams as well (in the WRDA, Secretary refers to the Secretary of the Army). So here we go.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml *This URL is a link to the enrolled bill, which has hot links to the individual bill sections. If this hot link doesn't work, copy and past it in your browser. Very handy!*

§ 1115. Reservoir Sediment

> This section in Title 1 (the WRDA) authorizes a ten-project pilot program to accept the services of commercial companies or others to remove sediment from Corps Reservoirs. The Corps may not charge for the value of the sediment. It requires the contractor to conduct pre- and post-removal sediment profile and quality surveys.
>
> *Commentary:* It is not clear whether this is an attempt to avoid pre-removal environmental reviews of these pilot projects.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H2D8DEFB869534A97BC44AD9BDFBD408E
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1116. Water Supply Conservation

> The Secretary is authorized to study and have non-federal interests implement water storage ("conservation") or delivery projects that enhance the water supply benefits to others of Corps of Engineers projects. Among the eligible projects are "Other conservation measures that enhance usage of a Corps of Engineers project

for water supply."[2] This authority applies permanently to states such as California with a drought emergency in effect within a year of the passage of the WIIN. There is some guidance to the Secretary that limits conflicts with existing authorized purposes.

Commentary: An example of such authority might be to quasi convert a single-purpose flood control dam such as Seven Oaks Dam on the Santa Anna River to a multipurpose dam to "enhance usage…for water supply." If the Corps of Engineers had constructed its Auburn dam several decades ago, this provision would allow the Secretary to work with others to convert it into a multipurpose dam without specific Congressional authorization. Depending on how this statute is interpreted, the lack of Congressional oversight in this section is a major change in federal water project policy.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H18FFAA2A6BEE4D51849489672D861D0D
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1117. Drought Emergencies

Again in states with a drought emergency in effect within a year of bill passage (or any state during a declared drought emergency), the Secretary is directed to prioritize the updates to water control manuals to implement seasonal water "conservation" (storage) and supply operations. Request of Governor is required. These actions, as in the section above, aren't supposed to modify authorized purposes. There is not guidance to improve floodwater-management operations.

Commentary: This language, like the language in the previous section seems to authorize new or additional water storage and delivery operations at Corps reservoirs while at the same time not affecting authorized purposes. It is unclear what the authors intended here, but there are Corps reservoirs such as Seven Oaks on the Santa Ana and the string of Corps reservoirs in the southern San Joaquin Valley that may be affected by this section.

[2] The other measures are stormwater capture, releases for ground water replenishment or aquifer storage and recovery, and releases to augment water supply at another Federal or non-Federal storage facility. A limitation of the authority is that it neither affects, modifies, or changes the authorized purposes of a Corps of Engineers project. The question is whether "adding" to the authorized purposes is prohibited.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HE67C6E63292F4B80950B0318BAE9CACB. If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1118. Leveraging Federal infrastructure for increased water supply

This section authorizes the Secretary to study and approve modifications to Corps dams or operations or delivery infrastructure proposed by others for additional storage or new or enhanced delivery infrastructure to increase water supply benefits to others. This also applies to the elements of Corps projects at Reclamation or other federal dams. The separable costs would be born by the non-federal party.

Commentary: As an example, the Corps of Engineers owns and to some extent operates a string of southern Sierra Nevada multipurpose flood-control dams from Lake Isabella Reservoir on the Kern River to Hensley Lake Reservoir on the Fresno River. This authority would permit the Secretary to expand these reservoirs without Congressional authorizations if others assume the marginal costs. There has been some interest in this area to expand reservoirs for water-supply purposes, but we don't at this time know which reservoirs can be feasibly targeted for dam raises. Please contact us if you have information.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HE67C6E63292F4B80950B0318BAE9CACB
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

Isabella Dam dam safety work is scheduled to begin in 2017.

http://www.spk.usace.army.mil/Missions/Civil-Works/Isabella-Dam/

Lake Success on the Tule River may be the dam raise contemplated in the WRDA.

http://www.spk.usace.army.mil/Missions/Civil-Works/Success-Dam/
http://www.visaliatimesdelta.com/story/news/local/2015/12/23/capacity-slated-lake-success/77864174/

And Terminus Dam forming "Lake" Kaweah on the Kaweah River was raised 21 feet recently.

http://www.kdwcd.com/kdwcdweb_002.htm
http://bondaccountability.resources.ca.gov/Project.aspx?ProjectPK=8380&PropositionPK=5

§ 1127. Non-federal Construction of Authorized Flood Damage Reduction Projects

This section continues to clarify the circumstances in which a non-federal party can seek credit or reimbursement for segments of a project they construct before the completion of the Corps-constructed project or separable element of the project.

Commentary: Non-federal interests have found Corps of Engineers projects to have slow design and construction phases and are often in a hurry to finish the job more quickly. They may thus construct a part of these usually cost-shared projects early with their own funds. I don't know who sought this bill language, but Stockton and Sacramento area flood control agencies have completed portions of projects before the Corps was ready to begin. These agencies have sought credit or reimbursement of their costs on the basis that the project was supposed to be cost shared with the Corps. In the past, the Department of the Army has been concerned about loss of control of their civil works program and budget programming if too many of their projects end up being substantially built by others who then seek reimbursements from the federal treasury.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H122EB7587D404174BB5CD4AAA8CED6BE
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1139. Dam Safety Repair Projects

The Secretary is directed to provide more guidance on design requirements for dam safety projects and to work more with cost-sharing partners to better assess project costs.

Commentary: Presumably, this section responds to a December 2015 Government Accounting Office (GAO) report on the Corps' dam safety program.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H226BE7772B0C42D19074E31B74EE6377
If the above sublink doesn't work, go back to the links to the bill on pages 1 or 3.
http://www.usace.army.mil/Missions/Civil-Works/Dam-Safety-Program/
http://gao.gov/products/GAO-16-106

§ 1144. Prioritization of Certain Projects

The Secretary is directed to give priority in its flood risk management projects to projects with executed project partnership agreements and in areas where there

has been loss of life from flooding, there has been a Presidential disaster or emergency declaration, or there is risk of catastrophic flooding.

Commentary: The cost of authorized but still unconstructed or incomplete projects far exceeds the Corps' annual civil works construction budget. This list (especially the incomplete list) is known as the backlog. This section provides some prioritization direction, direction that may be similar to the Corps' and Office of Management and Budget priority setting already in place. California's alluvial fans and especially its deep floodplains are likely to qualify for priority consideration on the basis of catastrophic flood risk.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H99B6117C9B5D4FA1B367FC27A215063D
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1146. Initiating Work on Separable Elements

The Secretary is directed to consider that for projects that have received construction funding in the previous six years, the initiation of the next separable element of the project is not to be considered to be a "new start" or require a "new investment decision." Rather, the separable element is to be considered to be ongoing work.

Commentary: The Corps budgets for and constructs projects sequentially, even to the extent of doing new benefit/cost analyses for the remaining project segments, a practice that can result in long delays in project completion or even the cancellation of later phases of the project. Also, ongoing work tends to get higher priority in the Corps' budget and with the appropriation committees (the latter when they actually produce appropriations bills). This section is intended to increase the chances of funding lower priority elements of Corps construction projects.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H3A05F144552A418F959DD9B1BAB9714D
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1155. Management of Recreation Facilities

The Secretary is authorized to use private contractors to collect recreation fees at Corps of Engineers projects. The contractor can retain all of the fees collected and use it for fee collection and operation and maintenance (O&M) of the recreation facility.

Commentary: This practice would allow the Corps to get around the Constitutional requirement that Federal spending be appropriated by the Congress.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HBE16469C35534B2DAFC0160471809B3E
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1156. Structures and Facilities Constructed by Secretary

Directs the Secretary to participate to the maximum extent possible as a cooperating agency in National Environmental Policy Act (NEPA) reviews of proposed modifications to Corps civil works projects ("§408 reviews") by other federal agencies and to use NEPA reviews by others or to conduct NEPA reviews concurrently. To the extent that the Corps is conducting a "discharge into the waters of the U.S." review ("§ 404 review"), similar direction is given. The Secretary is directed to make timely reviews of applications, issue guidance, and make implementation of this section a priority.

Commentary: Modifications to Corps projects (levees usually) require Corps approvals. In some circumstances the federal lead for such a project will not be the Corps, and this section directs the Secretary to the extent possible not conduct duplicative NEPA reviews. It is unclear to me what federal coordination problems this portion of this section is intended to address, but one might imagine that Reclamation might propose changes to a Corps project or that aspiring Federal Energy Regulatory Commission hydropower licensees may encounter sequential Federal NEPA reviews. It is also possible that the purpose of this section is to reduce sequential federal reviews of oil pipelines or transmission lines that may affect Corps of Engineers navigation and floodwater management projects.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H264711786F4F408D8FA7E5BBA29024F0
If the above sublink doesn't work, go back to the links to the bill on pages 1 or 3.
http://www.usace.army.mil/Missions/Civil-Works/Section408/
https://www.epa.gov/cwa-404/section-404-permit-program

§ 1174. Conversion of Surplus Water Agreements

The Secretary is authorized to convert water supply agreements for water deliveries surplus to a no longer authorized purpose of Corps of Engineers projects to permanent storage agreements. This section is limited to contracts with a term of 30 years or greater and are associated with the Corps implementation of the California Debris Commission 1910 plan.

Commentary: The Corps project here is probably the 1944 authorization (plus subsequent reauthorizations) of the Sacramento River Flood Control Project. I have no idea what contracts this section is designed to convert.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HB228F27DCF10496B9CB503558FB8E885
If the above sublink doesn't work, go back to the links to the bill on pages 1 or 3.
http://codes.lp.findlaw.com/uscode/33/15/703

§ 1176. Rehabilitation Assistance

The Chief of the Corps of Engineers is authorized to repair damaged project works (levees mostly) enrolled in the Corps' P.L. 84-99 program to a higher level of protection at the request of a non-federal sponsor that agrees to assume the marginal cost of a repair to a higher standard.

Commentary: This section provides authorization for the Corps of Engineers (interestingly, not the Secretary) to rebuild damaged federal project features (typically levees) at an improved condition (or "betterment," technically) of flood control facilities enrolled in the Rehabilitation and Inspection program of the P.L. 84-99 Flood Control and Coastal Emergencies program. This program has a current "target" of repairing only to the immediate before-disaster project condition. Under this section the Corps could choose to rebuild beyond the original condition of the project — so long as the non-federal party bears the marginal cost of improvement.

This is likely to increase the popularity and cost of the federal program as nearly all of the current P.L. 84-99 repairs are federal, and the marginal cost of improvements likely to be small in relation to the current federal obligation. We could use some background analysis on this.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HB45E26BE171946F896677C1703E68E5E
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1177. Rehabilitation of Corps of Engineers constructed dams

The Secretary is authorized to reconstruct Corps-constructed dams built before 1940 for flood control purposes (in whole or in part), designated by state dam safety programs as "high hazard potential" dams, and are operated by a non-federal entity. Non-federal cost share would be 35%, there is a $10 million limit per dam, and the authorization of funds is from 2017 to 2026.

Commentary: I am not sure which dams prompted this section, but the cost limitation means that they are reasonably small ones.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H5E27D1A8CA204CC7B4474C3AA94A37AA
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1184. Consideration of Measures

The Secretary is authorized, subject to the approval of the non-federal sponsor, to participate in studies for flood risk reduction, hurricane, and storm damage reduction to consider natural features and nature-based alternatives, as well as non-structural and structural solutions.

Commentary: Nice new authority, although it is limited to projects with a willing non-federal sponsor.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H42E13D27047D4F49A53BEB2069A54773
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1201. Authorization of proposed feasibility studies

California studies authorized include the following: Cache Creek Settling Basin (flood damage reduction and ecosystem restoration), Coyote Valley Dam (add ecosystem restoration as a project purpose, increase water supply and improve reservoir operations), Del Rosa Channel in the City of San Bernardino (ecosystem restoration and flood damage reduction), and the Merced County Streams Project (flood damage reduction).

Commentary: WRDAs traditionally have a list of studies that are specifically authorized in addition to new Corps generic study authorizations, the latter usually for smaller projects, which may or may not be listed project by project. I would appreciate getting a briefing on each of these study proposals from folks working on them. I worked on the Merced County Streams Project in the late 1970s. It had vernal pool endangered species and non-federal sponsor funding shortfall problems, requiring a downsizing redesign of the project.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HB609318E6F7544E98C0F8CC7E3CB0F9A
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§1301. Deauthorization of Inactive Projects.

This long section modifies the automatic deauthorization process for long inactive projects in order to allow other projects to be prioritized.

Commentary: It has been easier for Congress to authorize Corps projects than to fund them or the Corps to build them. Theoretically, Corps projects remain authorized until they are deauthorized, although inactive projects often require reauthorization because even an inflation-adjusted authorization spending cap exceeds the estimated costs to complete the project. In such cases the Anti-Deficiency Act prevents the Corps from spending money on them.

To help Congress prune away the dead wood, since at least WRDA 1986 (or 1996?) there has been an automatic deauthorization process for unstarted or incomplete Corps projects that have not received construction funds for certain time periods. I need a briefing on whether this WRDA 2016 process is expected to improve or impede the existing automatic deauthorization process. The Water Protection Network (formerly the Corps Reform Network) recently held a webinar on this subject that I missed and perhaps will be repeated.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H5680919977254E7A94A9EE61A053C7F2
If above sublink doesn't work, go back to the links to the bill on pages 1 or 3.
http://www.usace.army.mil/Portals/2/docs/civilworks/Project%20Planning/wrda/2014/2014_sec_6001_6003.pdf
https://en.wikipedia.org/wiki/Antideficiency_Act

§ 1302. Backlog Prevention

Water resources development projects authorized in this Act that do not have funds obligated for, done a post-authorization change report, or have been reauthorized within ten years would no longer be authorized. Requires reports to the Corps authorizing committees.

Commentary: Another example of Congressional concerns about the ability of Congress to deauthorize projects that should not or are unlikely to be built. Arguably, this language applies to Reclamation Projects "authorized" by actions of the Secretary of the Interior in Title 3, Subtitle J of the WIIN, but that might not have been the original intent of the drafters of the WRDA.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HF6D1C32170C947859BA8968B037DD85D
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1304. Los Angeles County Drainage Project, Los Angeles California

The Secretary shall prioritize the update of this project's operations manual and is directed to integrate and incorporate seasonal storage and water supply missions into this project.

Commentary: This project is best known for turning the Los Angeles River into a concrete channel after the floods of 1932 (and yes, it has been used in Hollywood movies). This project (LACDA) apparently will have a new mission. I do not know what changes are contemplated and would appreciate a briefing on this.

http://ladpw.org/wmd/watershed/LA/LACDA_Drainage.cfm
https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HC2D92A352A6149BCA75095A332693314
If the above sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1305. Sutter Basin, California

A separable element of the locally preferred plan authorized in WRRDA 2014 is deauthorized. The deauthorization does not affect the National Economic Development (NED) plan separable element authorization.

Commentary: Sounds like some trueing up of the authorities and planned levee project on and near the Feather River north of Sacramento.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H53BA214CE814495FBBD22D80BC84EF80
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1322. Expedited Consideration

The Secretary is directed to expedite the completion of some flood damage reduction projects including the following in California: Los Angeles and San Gabriel Rivers, Napa Valley watershed, and Santa Clara Basin. The Secretary is also directed to prioritize the studies for flood risk management in the Lower San Joaquin River, including Reclamation District (RD) 17, and studies for ecosystem restoration and flood risk management of the Sacramento River Flood Control Project.

Commentary: Most of us in California working the floodwater management and ecosystem restoration beats are familiar with these projects. The prioritization probably reflects the significant flood damages that may occur here and Senator

Barbara Boxer's involvement as ranking member of the Senate authorizing committee.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H4F589A1279AD4ED380E28EFBD52103A7
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 1406. Project Authorizations

The WRDA contains tables of different project types that contain the projects described by the Chief's reports that are authorized by WRDA 2016. The tables contain the state, name, date of completed Chief's report, and estimated federal and non-federal costs of these projects. The California projects include the following: American River Common Features, West Sacramento (two billion-dollar-plus bank-protection, levee, and levee setback projects), South San Francisco Bay Shoreline (flood risk management, ecosystem restoration, and recreation at $177 million), and Los Angeles (ecosystem restoration and recreation at $1.4 billion, although mostly non-federal costs).

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HCCC630E7ABA645128E05AFF67B02F46E
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

Provisions of Title 3, Subtitle J — California Water

Now we move on to Title 3, Subtitle J — California. This subtitle emerged from Senator Feinstein's discussions with then House Majority Leader Rep. 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.

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.

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.

§ 1401 & 1403. Operations and Reviews & Temporary Operational Flexibility During Storm Events

> *Commentary by Another:* These sections, in part, amend sections 3404 and 3406 of the 1992 Central Valley Project Improvement Act (CVPIA) to replace the mandate to operate the Central Valley Project (CVP) to carry out all the fish & wildlife goals and provisions of CVPIA and replaces them with mandates to operate the CVP to "maximize deliveries" to contractors, subject to a few conditions that fail to adequately protect CVPIA fishery goals.

https://www.congress.gov/bill/114th-congress/senate-bill/612/text#toc-H87C6D46B2001495E806EF9EAD29E858A
https://www.congress.gov/bill/114th-congress/senate-bill/612/text#toc-HBD834DA3BDC440C89FE92FC8ADE5FC0A

§ 1402 & 1403. Scientifically supported implementation of OMR flow requirements & Consultation on coordinated operations

> *Commentary by Another:* These amend CVPIA's mandate to operate CVP to fully comply with the ESA by carving out express new exceptions to ESA for CVP pumping during storm events, for CVP pumping of transferred water during certain months and years, and by creating new procedures to give Westlands and other contractors additional access, influence, and enforceable rights when Interior and NMFS are implementing the ESA in the CVP.

https://www.congress.gov/bill/114th-congress/senate-bill/612/text#toc-H117679A01B50492791B6924EEDFEE5A3
https://www.congress.gov/bill/114th-congress/senate-bill/612/text#toc-HBD834DA3BDC440C89FE92FC8ADE5FC0A

§ 1406. New Melones Reservoir

> The Secretary of the Interior is directed to work with local water and irrigation districts to ascertain the water available for various purposes in New Melones

Reservoir to maximize storage and other water available for uses in the Stanislaus River Basin.

Commentary: Diverters from the Stanislaus River have been unhappy with Reclamation's decisions to meet outflow requirements for water quality and fishery flows in the Delta with releases from New Melones Reservoir. Whether this section will have any real effect will remain unclear until the SWRCB takes actions to protect these resources under their authority to require Reclamation to comply with water quality and water rights requirements.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HADFE2C19316E4FF9B1BFD908A4A4C7E6
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 4001. Storage

Let's take this in pieces and look carefully in some cases at the actual, quite simple bill language.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H36779F712E5B4AB1BC4589070FDDC774
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 4007(a) (in part) Definitions — In this subtitle:

(1) Federally Owned Storage Project. — The term "federally owned storage project" means any project involving a surface water storage facility in a Reclamation State—

(A) to which the United States holds title; and

(B) that was authorized to be constructed, operated, and maintained pursuant to the reclamation laws.

§ 4007(b) Federally Owned Storage Projects

(1) AGREEMENTS. — On the request of any State, any department, agency, or subdivision of a State, or any public agency organized pursuant to State law, the Secretary of the Interior may negotiate and enter into an agreement on behalf of the United States for the design, study, and construction or expansion of any federally owned storage project in accordance with this section.

(2) FEDERAL COST SHARE. — Subject to the requirements of this subsection, the Secretary of the Interior may participate in a federally owned storage project in an amount equal to not more than 50 percent of the total cost of the federally owned storage project.

(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 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.).

Commentary: Authority — This section authorizes the Secretary of the Interior (within the Reclamation states) to study, design, and build any storage project he or she chooses that the Department wishes to own. This is a complete departure from traditional Reclamation projects, which must be authorized by Congress once the key matters are resolved and therefore known to the Congress. In this brave new world, the concept of authorization seems not exist. The world is owned by the Secretary and the appropriations committees.

Cost-sharing — The non-federal interest must contribute 50% of the cost of the project. Construction cannot commence until the Secretary determines that a project is feasible according to Reclamation law and upfront financing is secured ("Determination for commencement of construction"). Traditional Reclamation projects are financed by allocation of project purposes, design and construction costs fronted by Reclamation, and the reimbursable costs at least theoretically

recovered by Reclamation in water and power sales or other financing mechanisms over time. This section requires financing similar to Corps of Engineers projects, where the non-federal sponsors co-finance the project before or as the construction costs come due. This is a major change in Reclamation law.

At this writing, no federal storage project has achieved this cost-sharing commitment goal. The federal reconstruction of the Friant-Kern Canal, uneasily shoehorned into being a "storage" project, may have achieved this goal, but we have not seen the official documentation that it has achieved this status.

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 pre-WIIN example of what could probably be described as a Regional Director-level 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.[3] They find this project feasible in each of the four parts. This 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.

---

[3] • 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 repay their allocated portion of the Federal investment in the project over a period of time, consistent with applicable law. (Chapters 6 & 8, SLWRI final Feasibility Report, U.S. Bureau of Reclamation, 2015)

NRDC et al. in 2020 comments on Reclamation's 2015 SLWRI Feasibility Report, disputed the 2015 financial, technical, and enironmental feasibility of the project.
https://www.friendsoftheriver.org/wp-content/uploads/2020/10/NRDC-et-al-letter-re-feasibility-study-10-5-20.pdf

At this writing, one, perhaps two, Federal projects in California have received Secretarial feasibility determination letters: the B.F. Sisk Dam/San Luis Reservoir dam raise and reservoir expansion project.[4] The second, the reconstruction of the Friant-Kern Canal, may have received a Secretarial feasibility determination letter, but that is unconfirmed at this writing

Savings and Preemption — In participating in federal storage projects, the Secretary must comply with environmental laws. Clearly, that means federal *and* state law. However, this is apparently disputed by Reclamation. In Reclamation's response to comments in its 2020 Supplemental EIS for the Shasta Dam raise, Reclamation noted that commentors asserted that it had to comply with state environmental law. Reclamation replied that it had to comply with §8 of the Reclamation Act, apparently confining its obligations in state law to matters concerning its water rights.[5] This is in conflict with WIIN sections 4007(j) and 4012. These WIIN provisions should spell trouble for the for the proposed Temperance Flat dam[6] and the proposed illegal Shasta Dam raise. According to

---

[4] https://www.friendsoftheriver.org/wp-content/uploads/2021/01/B_F_Sisk_FFR_Transmittal_Reclamation_12302020_Grijalva.pdf

[5] Reclamation's Supplemental EIS was aimed, in part, at disputing that California's Wild & Scenic Rivers Act said what it said, and nowhere in either the 2015 final EIS or the 2020 final supplemental EIS does Reclamation concede that § 3406(b) of the 1992 Central Valley Project Improvement Act ("The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under state and federal law") is an existing obligation of Reclamation to comply with the California Wild & Scenic Rivers Act or other state environmental law. Neither does it concede that under Central Valley Project Improvement Act or the WIIN Section 4007(j) or 4012 that these state statutes apply to Reclamation. Rather, Reclamation tries to narrow the scope of its obligations:

> "[C]ommenters asserted the WIIN Act requires strict compliance with all state environmental laws, and that the SEIS therefore failed to explain how the project specifically adheres to all relevant state environmental laws. However, the WIIN Act does not expand Reclamation's obligation to comply with any state law beyond that which is already required under § 8 of the Reclamation Act, which requires consistency with state water law—those laws addressing the control, appropriation, use, or distribution of water. 43 U.S.C. § 373." (Appendix G, p. 1.3-2, final SLWRI Supplemental EIS, U.S. Bureau of Reclamation, November 2020)

https://www.friendsoftheriver.org/wp-content/uploads/2020/10/FOR-et-al-SLWRI-DSEIS-comments.pdf. https://www.friendsoftheriver.org/wp-content/uploads/2020/12/SLWRI-Final-Supplemental-EIS_toEPA.pdf.pdf

[6] See FOR Temperance Flat Dam fact sheet: http://www.friendsoftheriver.org/our-work/rivers-under-threat/san-joaquin-threat/#docs

the State Water Resources Control Board, the former (which is on a completely fully appropriated stream for the availability of new state water rights[7]) would require unavailable water rights to operate,[8] the latter requiring renewal of Reclamation's expired water rights permits to operate the CVP.[9]

§ 4007(a) Definitions (in part).— In this subtitle:

(2) STATE-LED STORAGE PROJECT. — The term "State-led storage project" means any project in a Reclamation State that—

(A) involves a groundwater or surface water storage facility constructed, operated, and maintained by any State, department of a State, subdivision of a State, or public agency organized pursuant to State law; and

(B) provides a benefit in meeting any obligation under Federal law (including regulations).

§ 4007(c) State-led Storage Projects. —

(1) IN GENERAL. — Subject to the requirements of this subsection, the Secretary of the Interior may participate in a State-led storage project in an amount equal to not more than 25 percent of the total cost of the State-led storage project.

(2) REQUEST BY GOVERNOR.— Participation by the Secretary of the Interior in a State-led storage project under this subsection shall not occur unless—

(A) the participation has been requested by the Governor of the State in which the State-led storage project is located;

(B) the State or local sponsor determines, and the Secretary of the Interior concurs, that—

---

[7] http://www.swrcb.ca.gov/waterrights/water_issues/programs/fully_appropriated_streams

[8] http://www.friendsoftheriver.org/wp-content/uploads/2016/01/SWRCB-8-7-14-ltr-on-TFD-water-rights-Adobe-OCR.pdf

[9] https://www.friendsoftheriver.org/wp-content/uploads/2019/01/CEQA-2018-0321_SHA_TEH_WWD_Shasta-Dam-Raise-Project_NOP-ocr.pdf

(i) the State-led storage project is technically and financially feasible and provides a Federal benefit in accordance with the reclamation laws;

(ii) sufficient non-Federal funding is available to complete the State-led storage project; and

(iii) the State-led storage project sponsors are financially solvent;

(C) the Secretary of the Interior determines that, in return for the Federal cost-share investment in the State-led storage project, at least a proportional share of the project benefits are the Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges; and

(D) the Secretary of the Interior submits to Congress a written notification of these determinations within 30 days of making such determinations.

(3) ENVIRONMENTAL LAWS. — When participating in a State-led 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.).

(4) INFORMATION.— When participating in a State-led storage project under this subsection, the Secretary of the Interior—

(A) may rely on reports prepared by the sponsor of the State-led storage project, including feasibility (or equivalent) studies, environmental analyses, and other pertinent reports and analyses; but

(B) shall retain responsibility for making the independent determinations described in paragraph (2).

Commentary: Authority — This section gives the Secretary of the Interior authority to fund up to 25% of non-federal water storage projects in the Reclamation states subject to some conditions, the first being that the Governor of the state must request funding. A nice little subsidy for some aspiring dam owner in the west. In California, Governor Brown provided a letter of support for the eight projects

that received funding allocations from the California Water Commission.[10] Governor Newsom also provided a letter of support for the proposed Del Puerto Canyon Dam.[11] Neither Governor provided a letter of support for the expansion of Shasta Reservoir. Funding subsidies for non-federal water storage projects is a considerable expansion of federal authority and tugs on the federal purse strings. The proposed Sites, Del Puerto, and Pacheco dams[12], and the expansion of Los Vaqueros Reservoir have supplicants for this federal subsidy. Reclamation has undertaken environmental impact statements or is in the process of undertaking environmental impact statements to support award of Secretarial subsidies for each of these four proposed State-led projects.

Cost-Sharing — Theoretically, Reclamation would be providing cost-sharing to some other dam owner's project on the basis of purchasing some benefits that are a federal interest. Although the Corps of Engineers has done this for floodwater management benefits for so-called § 7 reservoirs for many decades, the Corps is purchasing a flood-control manual that defines operations in someone else's dam. Reclamation's new authority here just feels like a subsidy for someone else's dam. It remains uncertain what kind of operational arrangements or project works Reclamation is expected to be buying or how it will be accomplished and enforced.

Feasibility — It is interesting that the feasibility finding for state-led projects is limited to technical and financial feasibility. Environmental and economic feasibility considerations, apparently embodied in Reclamation's feasibility reviews, are not required, although the latter exclusion may be understandable because it is an NED analysis, something typically only done for federal projects.

---

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

[11] https://www.friendsoftheriver.org/wp-content/uploads/2021/01/2020-03-13-Governor-Newsom-Letter-of-support-DPCR-Signed.pdf

[12] See the FOR Sites dam fact sheet: http://www.friendsoftheriver.org/our-work/rivers-under-threat/sacramento-threat/#docs

The proposed Sites reservoir[13] and the proposed Los Vaqueros Reservoir expansion project[14] have received Secretarial feasibility determinations subsequent to final Reclamation feasibility reports, the latter, however, on an earlier version of the project currently undergoing redesign. At this writing, there are no other Secretarial feasibility determinations for any other California State-led storage projects, although the sponsors of the proposed Pacheco and Del Puerto Canyon dams might be expected to seek Secretarial determinations outside of the current WIIN determination deadlines.

Savings — The Secretary has to follow environmental laws in carrying out this subsidy program. It will probably take a comprehensive review of federal law to determine what federal laws might apply to providing a subsidy to non-federal dams. I am unaware if this has been done, although perhaps the water districts working to craft this language have done one.

§ 4007(d) Authority to Provide Assistance

"The Secretary of the Interior may provide financial assistance under this subtitle to carry out projects within any Reclamation State."

Commentary: Wow! Broad and undefined, this is everything a dam-building wanna-be Secretary of the Interior, supplicant water districts, and the federal appropriations committees could want. It appears that the Del Puerto Water District has been the beneficiary of direct financial assistance in appropriations acts.

§ 4007 (e) Rights to Use Capacity

"Subject to compliance with State water rights laws, the right to use the capacity of a federally owned storage project or State-led storage project for which the Secretary of the Interior has entered into an agreement under this subsection shall be allocated in such manner as may be mutually agreed to by the Secretary of the Interior and each other party to the agreement."

---

13 https://www.friendsoftheriver.org/wp-content/uploads/2021/01/NODOS_FR_Transmittal_Letter_12222020_Grijalva.pdf

14 https://www.friendsoftheriver.org/wp-content/uploads/2021/01/Kaptur-LVE-2-Feasibility-Transmittal-Letter.pdf

Commentary: It can come in handy for water users to use someone else's reservoir space, especially if it comes cheap. A nice federal subsidy if you can get it.

§ 4007(f) Compliance with California Water Bond

(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.

Federal funding for state-led water storage projects have to be consistent with the Water Bond as determined by the California Water Commission. Presumably this means that the project has received allocations for California Water Bond funding. That means the Shasta Dam raise here is disqualified because of the bond language.[15] It is unclear if other water projects that did not receive allocations can receive consistency determinations. The Water Commission has been requested to provide these consistency determinations for requesters who have received allocations for Proposition 1 (California Water Bond) funding — and the Commission has already done so. Commission staff intend to prepare regulations on how this should be done procedurally.[16]

§ 4007(g) Partnerships and Agreements

(g) PARTNERSHIP AND AGREEMENTS.—The Secretary of the Interior, acting through the Commissioner, may partner or enter into an agreement regarding the water storage projects identified in section 103(d)(1) of the Water Supply, Reliability, and Environmental Improvement Act (Public Law 108–361; 118 Stat. 1688) with local joint powers authorities formed pursuant to State law by

[15] For a detailed discussion of Shasta Dam Water Commission funding eligibility, see https://cwc.ca.gov/Documents/2016/2016_Correspondence/24_WSIP_Quant_30Day_FriendsOfTheRiver_etal_100316.pdf

[16] Personal communication with senior Commission staff.

irrigation districts and other local water districts and local governments within the applicable hydrologic region, to advance those projects.

Commentary: This subsection authorizes Reclamation to partner with joint powers authorities to advance the CALFED projects such as the Shasta Dam raise, Temperance Flat Dam, Sites Dam. I'm not sure why the joint powers authorities (JPAs) thought they needed this subsection, but apparently they think so. This subsection does not countervene state law, so the JPAs are likely to be prohibited by state law from partnering with Reclamation for the Shasta Dam raise. The word "advance" is undefined and could cover a multitude of sins.

§ 4007(h) Authorization of Appropriations

(h) AUTHORIZATION OF APPROPRIATIONS.—

(1) $335,000,000 of funding in section 4011(e) is authorized to remain available until expended.

(2) Projects can only receive funding if enacted appropriations legislation designates funding to them by name, after the Secretary recommends specific projects for funding pursuant to this section and transmits such recommendations to the appropriate committees of Congress.

This subsection authorizes $335 million dollars to be placed in a Water Storage Account and be used until expended. This account is to be formed from advance payments to retire CVP debt diverted from Treasury receipts according to the detailed provisions of § 4011. See § 4011 for an explanation of the considerable incentive to prepay on the CVP water service contracts. Projects can receive appropriations only if the appropriations are by name from a list of projects recommended by the Secretary of the Interior.

Commentary: Presumably, appropriations for § 4007 storage projects are limited to funds available in the Water Storage Account, although that is not explicitly stated in the statute. The requirement that projects be recommended for funding by the Secretary of the Interior in ordinary times would be a significant hurdle for any trigger-happy appropriators. In subsequent practice, funds have been appropriated by appropriations committees on the routine recommendations from the Secretary in correspondence with appropriators. The appropriators have, predictably, expanded the initial authorized ceiling of the account. In most cases, appropriators have appropriated funds for specific purposes (study, pre-construction and design, construction) and for specific projects. Appropriators have also appropriated unspecified WIIN funds, which the Secretary has

presumed that are his to spend at his discretion for WIIN storage and canal projects, the latter a Secretarial expansion of the WIIN project-type eligibility, supported at his request by the appropriators.

All CVP contractors have sought and many received advance-payment contract conversions.

§ 4007(i) Sunset

"This section shall apply only to federally owned storage projects and State-led storage projects that the Secretary of the Interior determines to be feasible before January 1, 2021."

Commentary: A feasibility determination seems to be a very low hurdle. To date the Shasta Dam raise has been found feasible by Reclamation (arguably at the Regional Director level) in spite of being illegal and having no cosponsors. In part because of these problems, there has been no Secretarial Record of Decision and recommendation on this project,[17] but Reclamation had a Secretarial feasibility finding and Record of Decision on its 2020 schedule. Obviously, it failed to meet that deadline. It also had a Regional Director feasibility finding for Temperance Flat Dam on its 2020 schedule — although the recent move to deferral status appears to have delayed or scuttled this. To summerize, there has been no Secretarial Record of Decision or feasibility determination for either California proposed federal storage project. In contrast, the Friant-Kern Canal, shoehorned into being a "storage" project, may have timely met these milestones.

As described in this memo's earlier commentary on §4007(b) and §4007(c) on the proposed California projects, the proposed B.F. Sisk Dam raise/San Luis Reservoir expansion project, the proposed Sites Reservoir project, the proposed Los Vaqueros Reservoir expansion project, and likely the Friant-Kern Canal reconstruction project received Secretarial feasibility determinations before the §4007(i) deadline. It is unlikely that there were others. A later provision, § 4013, sunsets the Subtitle J five years from date of enactment except for projects already under construction. If the WIIN is not extended, I wonder if we will see some ceremonial groundbreakings to get around this latter sunset.

[17] See FOR SLWRI Unresolved Issues Memo and the Shasta Dam raise fact sheet: http://www.friendsoftheriver.org/our-work/rivers-under-threat/sacramento-threat/#docs

§ 4007(j). 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."

Commentary: This means that the ability of the state to require actions or non actions by Reclamation remains unchanged. Under existing Reclamation law, Reclamation must comply with state law unless it is clear that Congress intended Reclamation to do otherwise, although, as discussed earlier in this memo's commentary on §4007(b), Reclamation is taking a narrow view of its obligations (just confined to its §8 Reclamation Act state water rights). Fortunately and in addition, political subdivisions of the state such as public water districts are creatures of the state and presumably must follow state law unless a judicial order compels them to do otherwise.

The illegality of the Shasta Reservoir expansion should hit Reclamation (although, given Reclamation's post-2016 stated positions, it may have to be enforced by Federal courts) and already has hit potential non-federal sponsors. Regardless of Secretarial wishes, the Temperance Flat and Sites dams will require water rights from the SWRCB. The San Joaquin River at Temperance Flat is fully appropriated, making the prospect of legal operations unlikely.

It is unclear at this time what obligations Reclamation has under state law if it intends to partially fund a dam being sought by others. However, the non-federal sponsors are subject to state law.

§ 4008 Losses Caused by the Construction and Operation of Storage Projects.

This section only applies to federally owned CALFED storage projects. It provides considerable detail to the nature of compensation owed to marinas and hydroelectric projects.

Commentary: The Temperance Flat reservoir would inundate and thus eliminate two PG&E San Joaquin River power houses and be a net energy loss after construction of the new reservoir. Presumably this subsection was negotiated with PG&E. This subsection would permit the Reclamation to pay for lost power generation and permit PG&E to construct and operate replacement hydropower generation at the new Reclamation storage project (essentially make the power production facility a PG&E operation). The precise nature of PG&E's potential mitigation package from Reclamation is not known at this time (it probably has

not been negotiated). But PG&E should be wary. Generation at Temperance Flat dam would depend on a high pool, something that nature and water rights may conspire against.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H6CE8115E815D447AA12E141BBCEAB892
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 4011. Offsets and Water Storage Account

Subsections (a, b, c, & d) of this section provide details of a program to allow the diversion of advanced payments of CVP contract obligations from the treasury general fund to a Water Storage Account set up in subsection (e). Deposits there can be expended for § 4007 water storage projects. § 4011(e)(4)(B) notes that § 4007 funding can come from the Water Storage Account or other appropriations made under any other provision of law.

§ 4011 repeals most of CVPIA's contract reform provisions, so that all 2-year or 25-year CVP water service contracts can be converted to permanent CVP contracts simply by prepaying a generously discounted capital amount and negotiating terms and conditions "agreeable" to the Secretary of the Interior. This section also repeals part of the 1982 Reclamation Reform Act (RRA) which expressly prohibited such accelerated prepayment, and also waives all acreage limitations for all farms in the CVP for any and all contractors who make use of this easy conversion option.

Commentary: There are several stories here that have yet to be told. Presumably there is a Pay-Go Congressional budget-rule reason for this account, although the diversion of these revenues represents an actual hit to the Treasury. The pre-payment provisions created in this bill that fund the Water Storage Account could be popular. Permanent contracts escape CVPIA renewal provisions; permanent contracts will increase the value of farms with such contracts; permanent contracts eliminate the risk that Reclamation would reduce the contract amount at renewal; and escaping the 960-acre acreage ownership limit (already raised from 160 acres in 1982) has been the goal of corporate farmers in the CVP since very early in Reclamation's history — although they have often found innovative ways to escape the actual reach of this historic provision of Reclamation law. Subsequently, every CVP contractor has sought conversions of their water service contracts to permanent repayment contracts.

Another commentator notes that "although those expenditures are ultimately supposed to be repaid back into this new 'Fund' based on traditional concepts of Reclamation law, those details are not spelled out, so it is not clear how the CVPIA and RRA rules on contracts and repayment would apply to this whole new storage building program."

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H225AE50224ED44759A09CB0D7EE4FEF8
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 4012. Savings Language

(a) IN GENERAL.—This subtitle shall not be interpreted or implemented in a manner that—

(1) preempts or modifies any obligation of the United States to act in conformance with applicable State law, including applicable State water law;

(2) affects or modifies any obligation under the Central Valley Project Improvement Act (Public Law 102–575; 106 Stat. 4706), except for the savings provisions for the Stanislaus River predator management program expressly established by section 11(d) and provisions in section 11(g); (3) overrides, modifies, or amends the applicability of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the application of the smelt and salmonid biological opinions to the operation of the Central Valley Project or the State Water Project;

(4) would cause additional adverse effects on listed fish species beyond the range of effects anticipated to occur to the listed fish species for the duration of the applicable biological opinion, using the best scientific and commercial data available; or (5) overrides, modifies, or amends any obligation of the Pacific Fisheries Management Council, required by the Magnuson Stevens Act or the Endangered Species Act of 1973, to manage fisheries off the coast of California, Oregon, or Washington.

(b) SUCCESSOR BIOLOGICAL OPINIONS.—

(1) IN GENERAL.—The Secretaries of the Interior and Commerce shall apply this Act to any successor biological opinions to the smelt or salmonid biological opinions only to the extent that the Secretaries determine is consistent with—

(A) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), its implementing regulations, and the successor biological opinions; and (B) subsection (a)(4).

(2) LIMITATION.—Nothing in this Act shall restrict the Secretaries of the Interior and Commerce from completing consultation on successor biological opinions and through those successor biological opinions implementing whatever adjustments in operations or other activities as may be required by the Endangered Species Act of 1973 and its implementing regulations.
(c) SEVERABILITY.—If any provision of this subtitle, or any application of such provision to any person or circumstance, is held to be inconsistent with any law or the biological opinions, the remainder of this subtitle and the application of this subtitle to any other person or circumstance shall not be affected.

In a nutshell, Subtitle J, California, should not be interpreted on implemented in a manner that preempts state law, affects obligations of the Central Valley 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.

Commentary: This is important language and might be revisited many times by the courts for the life of the statute and beyond.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-H477DAE41854A476199AE22855EC9DA94
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.

§ 4013. Duration

This subtitle shall expire on the date that is 5 years after the date of its enactment, with the exception of—

(1) section 4004, which shall expire 10 years after the date of its enactment; and (2) projects under construction in sections 4007, 4009(a), and 4009(c).

Commentary: In other words, for the purposes of this memo, Subtitle J, California, expires five years from the date of enactment with the exception of § 4007 storage projects already under construction. That would mean an expiration date of December 16, 2021.

Thank heavens! But, of course, legislation appeared in the 116th Congress to make a revised WIIN program permanent. The same is expected in the first session of the 117th Congress.

https://www.congress.gov/114/bills/s612/BILLS-114s612enr.xml#toc-HCC07E89AD8A8461186DC4CB4326413E7
If this sublink doesn't work, go back to the links to the bill on pages 1 or 3.