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H.R. 3964: Analysis of Key Provisions

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Summary

For most of the last 20 years, some water contractors in California's Central Valley have received less than their full contract water supplies from federal and state water resource facilities. Although such allocations are in part the result of the prior appropriation doctrine in western water law and are consistent with the expectation of a "junior" water user in times of drought, tensions over water delivery reliability have been exacerbated by reductions in deliveries even in non-drought years. Such reductions are significant because much of the California urban and agricultural economy operates under junior water rights, and reductions in water allocations can cause significant disruption and economic losses, particularly in drought years. At the same time, fish populations throughout the Central Valley have dramatically declined due to water diversions and other factors, and this has been accompanied by significant losses for fishing communities and others dependent on fish and wildlife resources. The state and federal governments have been working to address water supply reliability and ecosystem issues through the Bay-Delta Conservation Plan (BDCP); however, the plan is not complete and remains controversial.

On February 5, 2014, the House enacted H.R. 3964, the Sacramento-San Joaquin Valley Emergency Water Delivery Act. It is similar to a bill in the 112th Congress that also passed the House (H.R. 1837, the Sacramento-San Joaquin Valley Emergency Water Reliability Act). The bill would, among many other things, amend the Central Valley Project Improvement Act of 1992 (CVPIA) to potentially reduce some water allocations for fish and wildlife and redirect them to other purposes (i.e., agricultural and municipal and industrial uses). It would preempt "any" (including state and federal) law pertaining to operation of the federal Central Valley Project (CVP) and California's State Water Project (SWP). It would also substitute for those laws operational principles from a 1994 interim agreement, known as the Bay-Delta Accord, which some believe would provide more reliable water supplies for federal and state water contractors. It would also repeal certain components of a 2010 law authorizing a settlement agreement for the San Joaquin River, and would make numerous other changes.

Proponents of H.R. 3964 argue that implementation of the CVPIA and the San Joaquin River Settlement, coupled with state and federal environmental laws (e.g., the federal Endangered Species Act, its state equivalent, and state regulations implementing the federal Clean Water Act), have compounded the impact of drought on water deliveries. Opponents argue that the bill would harm the environment and resource-dependent local economies, particularly coastal communities. Some also argue that it would undermine efforts to resolve environmental and water supply reliability issues through development of the BDCP.

Issues for Congress include the extent to which the bill changes decades of federal and state law, including state and federal environmental laws, and at what benefit and cost. For example, there are tradeoffs embedded in the bill's preemption of state water law, including fish and wildlife protections, as a means to increase the water deliveries to some irrigation contractors and municipalities. These changes might benefit water contractors in some areas, but potentially reduce environmental protections and improvements and the industries they support (e.g., recreational and fishing industries) in others. Congress may also consider the potential extent to which the bill would relieve water supply shortages, particularly in drought years. While much attention has been paid to the effects of federal and state environmental laws on reductions in water supplies south of the Bay-Delta, many factors affect pumping restrictions and the overall water allocation regime for CVP contractors. How H.R. 3964 would in practice affect these factors is uncertain.

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This report provides summary and analysis of H.R. 3964, the Sacramento-San Joaquin Valley Emergency Water Delivery Act, as passed by the House of Representatives on February 5, 2014. It contains an update of information contained in a CRS report on a bill in the 112th Congress (CRS Report R42375, *H.R. 1837—The Sacramento-San Joaquin Valley Water Reliability Act*, by Betsy A. Cody). It includes a brief summary overview of H.R. 3964, followed by a more in-depth discussion of each title, including some of the key provisions within each section and analysis of some of these provisions.

Summary of H.R. 3964

H.R. 3964, the Sacramento-San Joaquin Valley Emergency Water Delivery Act, was introduced on January 29, 2014. It passed the House on February 5, 2014. H.R. 3964 is similar to H.R. 1837 (introduced in the 112th Congress) with some notable additions.[1] Below is a summary of each title in H.R. 3964. Each title addresses a different aspect of California water policy.

- **Title I, Central Valley Project Water Reliability.** Overall, Title I would make numerous changes to management and operation of the federal Central Valley Project (CVP),[2] primarily by amending the Central Valley Project Improvement Act (CVPIA).[3] Among other things, it would alter CVPIA in the following ways: broaden the purposes for which water previously dedicated to fish and wildlife can be used (by removing the directive to modify CVP operations to protect fish and wildlife with dedicated fish flows and making this action optional); add to the purposes a provision "to ensure" water dedicated to fish and wildlife purposes is replaced and provided to CVP contactors by the end of 2018 at the lowest "reasonably achievable" cost; changing the definitions of fish covered by the act; broaden purposes for which Central Valley Project Restoration Fund (CVPRF) monies can be used; reduce revenues into the CVPRF; mandate that the CVP be operated under a1994 interim agreement, the Bay-Delta Accord; and mandate development and implementation of a plan to increase CVP water yield by October 1, 2018.
- **Title II, San Joaquin River Restoration.** Title II would direct the Secretary to cease implementation of the San Joaquin River Restoration Settlement Agreement, which was agreed to in 2006 and authorized under the San Joaquin River Restoration Settlement Act (SJRRS) in 2010.[4] It would declare that the new legislation satisfies all obligations of the Secretary and others to keep in good condition any fish below Friant Dam, including obligations under the California Fish and Game Code, the state public trust doctrine, and the federal ESA. It would also remove the salmon restoration requirement in the SJRRS that was authorized in P.L. 111-11.

[1] In Title I of the bill, Sections 101 – 111 are nearly identical to H.R. 1837. New sections include Sec. 112 and Sec. 113 specifying certain Warren Act Contracts; Sec. 114, Pilot Program to Protect Native Anadromous Fish in the Stanislaus River; and, Sec. 115, San Luis Reservoir Rescheduled Water Operations. Titles II, III, and IV of the bill are also very similar to H.R. 1837, as is Section 501 of Title V. Sections 502-504 of the bill are new.

[2] The Central Valley Project is one of the largest water resources projects built and operated by the U.S. Bureau of Reclamation, Department of the Interior. The project spans hundreds of miles and delivers water stored in mountain reservoirs to farms and cities throughout California's vast Central Valley.

[3] Central Valley Project Improvement Act (Title 34 of P.L. 102-575).

[4] San Joaquin River Restoration Settlement Act (Title X of P.L. 111-11).

- **Title III, Repayment Contracts and Acceleration of Repayment of Construction Costs.** This title would direct the Secretary of the Interior, upon request from water contractors, to convert utility-type water service contracts to repayment contracts, and then allow accelerated repayment of those outstanding repayment obligations. Irrigation repayment obligations for the CVP for 2012, the last year for which such data are readily available, total approximately $1.18 billion; municipal & industrial (M&I) repayment obligations for 2012, the last year for which such data are readily available, total approximately $121 million.[5] Allowing this accelerated (or early) repayment would allow irrigators to be exempt from certain Reclamation requirements sooner than under current repayment schedules.
- **Title IV, Bay-Delta Watershed Water Rights Preservation and Protection.** Title IV would provide assurances of water rights protections for those with water rights senior to the CVP, including Sacramento River Valley Settlement Contractors. It would also direct a new shortage policy for certain north-of-Delta CVP water service contracts, which would aim to limit maximum reductions to these supplies.[6]
- **Title V, Miscellaneous.** Title V declares that the unique circumstances of coordinated operations of the CVP and California State Water Project (SWP) "require assertion of Federal supremacy to protect existing water rights throughout the system" and that as such shall not set precedent in any other state.[7] Title V also declares that nothing in the act shall "affect in any way" the State of California Proclamation of State Emergency and associated executive order issued by the Governor on January 14, 2014. It would also adjust a Wild and Scenic River boundary, potentially allowing for increased storage at Exchequer Dam.

Title I—Central Valley Project Water Reliability

Background

Title I of H.R. 3964 would make numerous changes to the CVPIA, and includes other provisions that are not alterations to CVPIA but relate to water availability in California's Central Valley. When enacted, the CVPIA made broad changes to the operations of the Bureau of Reclamation's Central Valley Project. The act set protection, restoration, and enhancement of fish and wildlife

[5] U.S. Bureau of Reclamation, Dept. of the Interior, Central Valley Project Schedule of M&I Capital Costs to be Repaid by Component and/or Facility as of September 30, 2012 (2014 M&I Water Rates), Mid-Pacific Region, CVP ratebooks, Sacramento, CA, Oct. 30, 2013, p. 2, http://www.usbr.gov/mp/cvpwaterrates/ratebooks/mi/2014/2014_mi_sch_a-4.pdf; and Central Valley Project Schedule of Irrigation Capital Costs to be Repaid by Component and/or Facility as of September 30, 2012 (2012 Irrigation Water Rates), Mid-Pacific Region, CVP ratebooks, Sacramento, CA, Nov. 5, 2013, p. 3, http://www.usbr.gov/mp/cvpwaterrates/ratebooks/irrigation/2014/2014_irr_sch_a-4.pdf.

[6] Like many other western states, California uses a system of prior appropriation as part of its hybrid water rights system. Under a prior appropriation system, water rights permits are issued on a first-come, first-served basis (also known as first-in-time, first-in-right), resulting in senior and junior water rights based on their priority under the system. For more information on California water law, see CRS Report RL34554, *California Water Law and Related Legal Authority Affecting the Sacramento-San Joaquin Delta*, by Cynthia Brougher.

[7] There is concern from some western states that the state and federal preemptions contained in H.R. 3964 might be used as precedent in other western states and threaten their allocation of state water rights.

on par with other project purposes (such as delivering water to irrigation and M&I contractors), dedicated a certain amount of water for fish and wildlife purposes (e.g., 800,000 acre-feet of Sec. 3406(b)(2) water and certain levels for valley refuges), established fish restoration goals, and established a restoration fund (Central Valley Project Restoration Fund) to pay for fish and wildlife restoration, enhancement, and mitigation projects and programs. It also made contracting changes and operational changes. The CVPIA was quite controversial when enacted and has remained so, particularly for junior water users whose water allocations were ultimately limited due to implementation of the act and other subsequent factors, such as revised biological opinions protecting certain threatened and endangered species. Compounding the controversy over CVP water allocation are other factors that limit water deliveries—namely state water quality control requirements, variable hydrological conditions, the state system of water rights priorities,[8] and implementation of other laws.[9]

Summary of Title I Provisions

Title I of H.R. 3964 addresses many of the provisions of the CVPIA that are opposed by some irrigators, namely dedication of project water to address fish and wildlife purposes, enhancement and mitigation activities, water transfer limitations, tiered pricing formulas, and other restoration and mitigation charges. Some of these changes are controversial. A summary of the main changes in the bill is provided below.

New CVPIA Purposes, Definitions

Section 101 would add two purposes to the CVP under CVPIA: to ensure that the water used for fish and wildlife purposes is replaced and available for CVP water contractors, and to facilitate water transfers under the act. Existing CVP purposes as identified by CVPIA include protection, restoration, and enhancement of fish and wildlife habitats in the Central Valley and Trinity River basins, operational flexibility of the CVP, expanded use of water transfers, achieving balance among competing demands, and related uses.

Section 102 would narrow the scope and definition of fish stocks provided protection under CVPIA. It would change the definition of "anadromous fish" to limit coverage to those found in the Sacramento and San Joaquin Rivers as of October 30, 1992 and eliminate coverage for non-native species, including striped bass and shad. Some stocks were already absent or in severe decline by 1992,[10] including winter run Chinook salmon, which were listed as endangered under the Endangered Species Act (ESA) in 1990, and some (San Joaquin River runs) had become extinct by the 1950s. Thus, the section would change the baseline for fish protection and restoration, to set restoration goals at population levels after some species were already listed as endangered.

Section 102 would also add a new term, "reasonable flows," which as used in Section 105 could potentially lead to flows for fish and wildlife under the CVPIA being constrained due to the inclusion of other considerations. (See below section, "Facilitated/Expedited Water Transfers").

[8] For information on water rights and California water law see CRS Report RL34554, *California Water Law and Related Legal Authority Affecting the Sacramento-San Joaquin Delta*, by Cynthia Brougher.

[9] For more information on the hydrological and regulatory restrictions on CVP water supplies, see CRS Report R40979, *California Drought: Hydrological and Regulatory Water Supply Issues*, by Betsy A. Cody, Peter Folger, and Cynthia Brougher.

[10] See CVPIA salmon "doubling graphs" at http://www.fws.gov/stockton/afrp/.

CVP Contracts

Section 103 of the bill would make a number of changes to contracting provisions under CVPIA. Specifically, Section 103(1) would remove a qualified limitation under CVPIA that prohibits the signing of new CVP contracts until a number of other conditions are satisfied. This would allow new contracts to be issued without some of these conditions being met. Section 103(2) would increase the maximum contract term, from 25 years to 40 years, thereby returning the duration of these contracts to pre-CVPIA levels, if requested by contractors.[11] It would also direct the Secretary to renew these contracts successively over a 40 year term. It is not clear if such a renewal would be subject to negotiation or review (as is done now), or whether such direction would preclude further National Environmental Policy Act (NEPA) review and Endangered Species Act consultation on contract renewal.

Section 103(2) would direct that existing long-term repayment of water service contracts be administered under the Act of July 2, 1956. The 1956 act provides for contracts to have a provision allowing conversion of water service contracts (9(e) contracts) to repayment contracts (9(d) contracts), and provides that contractors who have repaid obligations shall have a "first right" to a stated share of project water for irrigation "(to which the rights of the holders of any other type of irrigation water contract shall be subordinate) ... and a permanent right to such share or quantity ... ", subject to state water rights laws and provided "[T]hat the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."[12] This would give water service contractors long-term certainty over water supplies from the CVP. Finally, this section would also direct that all projects include a provision that parties are charged only for water actually delivered. Currently, some contractors pay for water based on acreage irrigated under certain contracts with the Bureau of Reclamation (or Reclamation) and must pay whether water is delivered or not, which, in case of drought years can be onerous.

Facilitated/Expedited Water Transfers

Several provisions of Section 104 deal with water transfers. Section 104(1) would direct the Secretary to "take all necessary actions" to facilitate and expedite water transfers in the CVP and would add a provision requiring a determination by reviewing parties as to whether the proposal is "complete" within 45 days.[13] Further, it would add a new section that would prohibit environmental or mitigation requirements as a condition to any transfers. These mitigation requirements are sometimes employed for transfers that have been determined to affect third parties. This section would also add a new subsection to Section 3405 of CVPIA, which would allow for transfers that could have been made before enactment of CVPIA to go forward without being subject to the requirements of that act's requirements for water transfers. Section 104 would also add language that specifies that water use related to the CVP must only be measured by contracting district facilities up to the point where surface water is commingled with other water supplies. It would also eliminate the tiered pricing requirement and other revenue streams that fund fish and wildlife enhancement, restoration, and mitigation under the CVPRF, thus reducing CVPRF revenue collections.

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[11] CVPIA reduced the contract term from 40 years to 25 years, although as originally introduced the legislation would have reduced the maximum term to 10 years.

[12] 43 U.S.C. §485h-1-485h-5.

[13] Pursuant to Section 3405(a)(2)(A) of CVPIA, decisions on water transfers must be approved within 90 days, and must meet other requirements.

Changes to Fish, Wildlife, and Habitat Restoration

A number of provisions in Section 105 address fish, wildlife, and habitat restoration under CVPIA. First, Section 105 would remove the existing mandate that the Secretary modify CVP operations to provide flows to protect fish, making this action optional rather than required and stipulating the new term "reasonable water flows" to provide further guidance for this authority.[14] Section 105 would further direct that any such flows shall be provided from the 800,000 acre feet of water for fish and wildlife purposes under Section 3406(b)(2) of the CVPIA (also known as "(b)(2) water").[15] Thus, flows in excess of this amount for fish and wildlife purposes would appear to not be authorized under this legislation. The 800,000 acre feet for fish and wildlife purposes would be a "ceiling," rather than a floor under this provision. The section would remove the requirement that the Secretary of the Interior consult with the California Department of Fish and Game regarding modification of CVP operations for fish and wildlife, and substitute instead, consultation with the U.S. Geological Survey.

Section 105 of H.R. 3964 would also allow (b)(2) flows to be used for purposes other than fish protection. Under this section, fish and wildlife purposes would no longer be the "primary" purpose of such flows. It would also adjust accounting for (b)(2) water, by directing that all water used under that section be credited based on a methodology described in the legislation. It appears that state water quality requirements, ESA, and all other contractual requirements would now need to be met via use of the (b)(2) water; however this is not entirely clear in the language. This section also would direct that (b)(2) water be reused.[16]

Section 105 would alter the provisions of the CVPIA related to reductions in deliveries for (b)(2) water. It would mandate an automatic 25% reduction of (b)(2) water when Delta Division water supplies are forecast to be reduced by 25% or more from the contracted amounts.[17] Currently under CVPIA, the Secretary is allowed to reduce (b)(2) deliveries by up to 25% when agricultural deliveries of CVP water are reduced. Thus, whereas as the reduction was optional under CVPIA and can be up to 25%, under this section there would be a mandatory trigger for reductions, and said reductions would be required to be 25%.

Finally, Section 105 would deem *pursuit* (as opposed to accomplishment) of fish and wildlife programs and activities authorized by the amended Section 3406 as meeting the mitigation, protection, restoration, and enhancement purposes of Section 2 of the CVPIA, as amended.

Central Valley Project Restoration Fund (CVPRF)

Section 106(a) would strike the CVPIA direction that not less than 67% of funds made available to the Central Valley Project Restoration Fund (CVPRF) be set aside to carry out habitat restoration and related activities. The funds would presumably be made available for any purposes under the act. The section would also prohibit as a condition to providing for the storage or conveyance of non-CVP water, delivery of surplus water, or for any water that is delivered for

[14] As discussed above, "reasonable water flows" is new term added to CVPRF under this legislation, and is defined in Section 102(n) of H.R. 3964 to mean "capable of being maintained taking into account competing consumptive uses of water and economic, environmental, and social factors".

[15] The 800,000 acre-feet of water under §3406(b)(2) of CVPIA that is dedicated and managed primarily for fish and wildlife purposes is often simply referred to as "(b)(2) water."

[16] This water typically is reused – that is, once it is used (or even during use) for temperature control, habitat support or other fish and wildlife purposes, the water can be "reused" by agricultural and municipal and industrial contractors – but reuse is not currently mandated under CVPIA.

[17] The Delta Division is a unit of the CVP that serves some water districts that often receive less water than under their full contract amount.

groundwater recharge, the requirement of donations or other payments or any other environmental restoration or mitigation fees to the CVPRF. Finally, it would amend Section 3407(c) of CVPIA to strike the requirement for the collection of payments to recover mitigation costs. The Secretary would retain general authority to collect and spend payments as provided for other activities under Title I of CVPIA.

Section 106(d) of the legislation would set a limit of $4 per megawatt hour for payments made to the CVPRF by CVP power contractors. Historically these payments have fluctuated. It also would require completion of fish, wildlife and habitat mitigation and restoration actions by 2020, thus shortening the likely time such payments would be in place and thereby reducing water and power contractor payments into the CVPRF. Currently, the CVPRF payments will continue until such actions are complete; then payments would be cut substantially.[18] Section 106(d) would also establish an advisory board responsible for reviewing and recommending CVPRF expenditures. The board is to be primarily made up of water and power contractors (10 of 12), with the other two members designated at the discretion of the Secretary.

Bay-Delta Accord as Operational Guide

Section 108(a) would direct that the CVP and the State Water Project (SWP) be operated per principles outlined in a previous agreement, the 1994 Bay-Delta Accord.[19] Among other things, that agreement set maximum restrictions on water which were, in some cases, less restrictive than those in place today. This section of the legislation provides that the accord should be implemented, "without regard to the [ESA] or any other law pertaining to operation of the [CVP] and [SWP]."[20] However, pursuant to Title IV, Section 401 of the bill, states water rights priorities would remain intact (See below section, "Title IV—Bay-Delta Watershed Water Rights Preservation and Protection"). How these two sections would be reconciled is unclear.

Section 108(b) would prohibit federal or state imposition of any condition restricting the exercise of valid water rights in order to conserve, enhance, recover, or otherwise protect any species that is affected by operations of the CVP or SWP. It also prohibits the state of California, including any agency or board of the state from restricting water rights to protect any "public trust value" pursuant to the state's "Public Trust Doctrine." Section 108(c) would provide that no costs associated with this section may be imposed on CVP contractors, other than on a voluntary basis. Finally, Section 108(d) would preempt state law regarding catch limits for nonnative fish that prey on native fish species (e.g., striped bass) in the Bay-Delta.

Non-Project Water Deliveries and Replacement Water Plan

Section 107 would make a number of other changes, including amending the CVPIA to provide the Secretary with authority to utilize CVP facilities to transfer, impound, or otherwise deliver

[18] As noted above, section 105 of H.R. 3964 would also deem "pursuit" of such actions as meeting the obligations to do so, which may also trigger reduced payments.

[19] The Bay-Delta Accord, previously in effect from 1994-1997, set varying maximum restrictions on water exports from the Delta depending on the time of year, guaranteed a reliable supply of water for the three main groups of stakeholders, ensured real time monitoring of water levels, and promised to comply with all environmental regulations through restoration efforts. It has subsequently lapsed and has been replaced with other efforts. See *Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government*, Washington, DC, December 15, 1994, http://www.calwater.ca.gov/content/Documents/library/SFBayDeltaAgreement.pdf.

[20] It is unclear whether the language waiving the ESA would also waive the ESA provisions of the Bay-Delta Accord itself.

nonproject water for "beneficial purposes." It also provides that rates charged for this water shall not be provided to the CVPRF.

Section 107 would also require a least-cost plan by the end of FY2015 to increase CVP water supplies by the amount of water dedicated and managed for fish and wildlife purposes under CVPIA, as well as to otherwise meet all purposes of the CVP, including contractual obligations.[21] This section would also require implementation of the increased water plan (including any construction of new water storage facilities that might be included in the plan), beginning on October 1, 2015, in coordination with the state of California. If the plan fails to increase the water supply by 800,000 acre feet by the end of FY2016, implementation of any non-mandatory action under Section 3406(b)(2) would be suspended until the increase is achieved.

Section 107(e) would authorize the Secretary to partner with local joint power authorities and others in pursuing storage projects (e.g., Sites Reservoir, Upper San Joaquin Storage, Shasta Dam and Los Vaqueros Dam raises) authorized for study under P.L. 108-361 (also known as "CALFED"), but would prohibit federal funds to be used for financing and constructing the projects. It would authorize non-federal construction of these facilities (so long as no federal funds are used).

Removal of Non-Native Fish Species in the Stanislaus River

The fishing of non-native anadromous fish in California is regulated by the state of California. State regulations limit the size of fish that can be caught as well as number of fish caught per season, among other things. Some popular non-native anadromous fish in state include striped bass and largemouth bass. In the past few years, there have been proposals to loosen restrictions for fishing non-native anadromous fish, such as striped bass. Those in favor of lowering regulations (e.g., increasing bag limits and decreasing size limits for striped bass) contend that non-native anadromous fish are harming native species such as salmon and Delta smelt, both listed on the Endangered Species List.[22] Those opposed to changing limits are concerned that without limits, these sport fisheries could decline.

Section 114 of H.R. 3964 would establish a pilot program to remove non-native predator fish in the Stanislaus River and eliminate any state restrictions on catch, take, or harvest of any non-native or introduced aquatic or terrestrial species that preys upon anadromous fish that is found in the Stanislaus River. Specifically, Section 114 would direct the Commissioner of Reclamation, along with Oakdale and South San Joaquin Irrigation Districts, to develop and implement a pilot program to remove non-native striped bass, smallmouth bass, largemouth bass, black bass, and other non-native predator fish from the Stanislaus River. The program is to be scientifically based; include methods to quantify fish removed and impact of non-native anadromous species on native species; use specific control methods such as electrofishing; obtain relevant permits; and be implemented for seven years; among other things. The Commissioner and two districts are

[21] Contractual obligations are currently approximately 9.3 million acre feet (maf). Actual deliveries ranged from 4.9 maf in 2009 (a drought year) to 6.2 maf over the last five years, and are closer to 7 maf in normal hydrologic years. Thus, a gap exists between CVP contractual obligations and average or normal deliveries.

[22] A review of scientific papers related to fish predation in the Bay Delta suggested that predation by non-native anadromous fish (e.g., striped bass) is one of several factors that affect juvenile salmon mortality. According to the review, models predict that predation by striped bass could be high, but there are limited data sets available to support this conclusion. Further, the report stated that it was unclear how much of an effect predation had on salmon populations in comparison to other stressors. See Gary D. Grossman et al., *Effects of Fish Predation on Salmonids in the Sacramento River San Joaquin Delta and Associated Ecosystems*, California Department of Fish and Game and National Oceanic and Atmospheric Administration, Panel Report, September 25, 2013, p. 2, https://www.dfg.ca.gov/erp/predation.asp.

to manage the program jointly. The Districts would be responsible for 100% of the funding for this program. Costs for Reclamation are to be deposited in the Reclamation Fund by the Districts. Reports are to be made annually on the fishery data and a final report describing the program's effectiveness is to be provided at the end of the program. The permits are to be issued in the name of Reclamation and the Districts. Further, this provision is largely similar to H.R. 2705 (The Stanislaus River Native Anadromous Fish Improvement Act), introduced July 2013.

Under subsection (i), anadromous fish as applied to the Stanislaus River and New Melones Dam, would be defined as those native stocks of salmon (including steelhead) that were present in the Stanislaus River as of October 30, 1992, among other conditions. This sets a baseline number for native salmon population stocks in the Stanislaus River. The section further states that the definition of anadromous fish under Section 3403(a) of CVPIA does not apply to the operation of New Melones Dam and Reservoir, or any federal action in the Stanislaus River. This would alter the application of actions for anadromous fish under CVPIA for the Dam and River.

Other Miscellaneous Provisions

Title I of the bill contains several other significant provisions which are summarized below:

- Section 109 would mandate that hatchery fish be included in making determinations regarding anadromous fish covered by H.R. 3964 under the ESA. Currently, hatchery fish are not included in population estimates of protected species, due largely to their different genetic makeup from wild fish. The inclusion of these fish could lessen some ESA restrictions compared to current levels.
- Section 110 would expand the CVP service area to cover a portion of Kettleman City. The Secretary is directed to enter into a long-term contract with the Kettleman City Community Services District for up to 900 acre-feet of CVP water; however, similar to other areas, actual deliveries would depend on annual allocations by Reclamation. Under this section, the district would be responsible for additional infrastructure and costs to implement this section. Section 111 would deem compliance under the California Environmental Quality Act to suffice for compliance with NEPA for any project related to the CVP or related deliveries, including permits under state law. This would allow CVP projects and deliveries that conform to state law to circumvent traditional NEPA requirements. A potential benefit of this approach might be to speed up project approval processes. A potential downside might be a less thorough – or at least different – assessment of the environmental impacts of the proposed project or action.
- Section 112 would direct the Secretary to offer a contract under its authorities in the Warren Act for impoundment and storage of up to 200,000 acre-feet of Oakdale Irrigation and South San Joaquin Irrigation districts' Stanislaus River water rights in New Melones Reservoir.[23] The Secretary must first determine that such storage will not adversely affect other CVP water contractors with regard to operation of the CVP to meet legal obligations related to ESA, CWA, or state water quality laws. This section also provides other conditions for the provision of these contracts, including minimum storage requirements, and that contracts must be for at least 10 years.

[23] The Warren Act of February 21, 1911 (43 U.S.C. §§523-524.) authorized the United States to execute contracts for the conveyance and storage of non-project water in Federal facilities when excess capacity exists.

- Section 113 would direct the Secretary to offer a Warren Act contract for impoundment and storage of up to 100,000 acre-feet of Calaveras County Water District Stanislaus River water rights in New Melones Reservoir. This section also includes other conditions for the provision of these contracts, including minimum storage requirements, and requires that contracts must be for at least 10 years.
- Section 115 directs the Secretary to allow certain south-of-Delta water service or repayment contractors to reschedule unused CVP water for storage and subsequent use in the following year. The section also includes timelines and conditions, including that such rescheduling shall not interfere with CVP operations in the contract year into which the water has been rescheduled. This direction appears to be consistent with the approach of Reclamation in recent years in making available rescheduled water from the San Luis Reservoir, subject to that year's CVP operations.

Analysis

Many of the provisions in Title I have tradeoffs embedded in them. For example, provisions in Section 102 limiting the scope and definition of fish stocks receiving protection by the act may benefit some stakeholders, but are strongly opposed by others. Similarly, expanding the use of dedicated fish flows and funding for fish and wildlife restoration under Section 105 may provide more water to irrigators or other water users, but may contribute to the decline of salmon and other fish populations. This tradeoff may also be applicable to some of the more controversial sections of the bill, such as directing renewal of existing contracts (Section 103), which could be viewed on one hand as an attempt to circumvent future NEPA review, but on the other hand as a way to guarantee supplies of water and streamline the regulatory process. Section 108 of H.R. 3964, which directs the Secretary to operate the CVP and SWP according to principles outlined in the 1994 Bay-Delta Accord, also would benefit some water users (e.g., to the extent that more water would be made available for use than under current law), but may harm other stakeholders (e.g., to the extent such operation would negatively affect Delta water quality or fish viability)

The provisions of the bill under Title I raises several key questions regarding CVP water supplies for users and the environment. Selected questions include: How much more water would be available to CVP water users under H.R. 3964 in various scenarios? Specifically, how much more water would be available for export from the Delta, and how would the bill affect reservoir releases? Would there be more water also available at desirable times for CVP and SWP contractors in the Sacramento watershed (and if so, how much)? How would the bill affect the viability of listed species? What effects would it have on water quality, recreation, and commercial and sport fishing?

Title II—San Joaquin River Restoration

Background[24]

Historically, Central California's San Joaquin River supported large Chinook salmon populations. Since the Bureau of Reclamation's Friant Dam on the San Joaquin River became fully operational

[24] For information on San Joaquin River Restoration legislation, see CRS Report RL34237, *San Joaquin River Restoration Settlement*, coordinated by Betsy A. Cody and Pervaze A. Sheikh, and CRS Report R40125, *Title X of H.R. 146: San Joaquin River Restoration*, by Betsy A. Cody and Pervaze A. Sheikh.

in the late 1940s, much of the river's water has been diverted for agricultural uses. As a result, approximately 60 miles of the river became dry in most years, making it impossible to support Chinook salmon populations upstream of the Merced River confluence. In 1988, a coalition of environmental, conservation, and fishing groups advocating for river restoration to support Chinook salmon recovery sued the Bureau of Reclamation.[25] A U.S. District Court judge subsequently ruled that operation of Friant Dam was violating state law because of its destruction of downstream fisheries. Faced with mounting legal fees, considerable uncertainty, and the possibility of dramatic cuts to water diversions, the parties agreed to negotiate a settlement instead of proceeding to trial on a remedy regarding the court's ruling.

A settlement agreement was reached in the fall of 2006. Implementing legislation was debated in the 110th Congress (H.R. 4074, H.R. 24 and S. 27) and 111th Congress and became law in the spring of 2010 (Title X of P.L. 111-11). The Settlement Agreement and its implementing legislation call for new releases of water from Friant Dam to restore fisheries (including salmon) in the San Joaquin River and for efforts to mitigate water supply losses due to the new releases, among other things. As of 2014, Reclamation (with partners) had undertaken a number of implementation actions, including reintroduction of spring-run Chinook salmon in the San Joaquin River for the first time in more than 60 years.

Because increased water flows for restoring fisheries (known as restoration flows) reduce diversions of water for off-stream purposes, such as irrigation, hydropower, and municipal and industrial uses, the settlement and its implementation have been controversial. The quantity of water used for restoration flows and the quantity by which water deliveries would be reduced are related. However, the relationship would not necessarily be one-for-one due to flood flows in some years and other factors that affect water flows. Under the Settlement Agreement, no water would be released for restoration purposes in the driest of years; thus, the Settlement Agreement would not reduce deliveries to Friant contractors in those years. Additionally, in some years, the restoration flows released in late winter and early spring may free up space for additional runoff in Millerton Lake, potentially minimizing reductions in deliveries later in the year—assuming Millerton Lake storage is replenished. Consequently, how deliveries to Friant water contractors might be reduced in any given year depends on many factors.

Regardless of the specifics of how much water might be released for fisheries restoration versus water diverted for off-stream purposes (such as irrigation), there will be impacts to existing surface and groundwater supplies in and around the Friant Division Service Area. Although some opposition to the Settlement Agreement and its implementing legislation remains, the largest and most directly affected stakeholders (i.e., the majority of Friant water contractors, their organizations, and environmental, fisheries, and community groups) supported the Settlement Agreement and publicly supported the implementing legislation. On the other hand, others opposed the Settlement Agreement and have continued to oppose its implementation.

Summary of Title II Provisions

Title II of H.R. 3964 would address the ongoing controversy associated with the San Joaquin River Restoration Settlement (SJRRS) by declaring that the Title "satisfies and discharges" all obligations of the Secretary and others to keep in good condition any fish below Friant Dam, including obligations under Section 5937 of the California Fish and Game Code, the state public trust doctrine, and the federal ESA. While many of the underlying authorities provided for in the

[25] NRDC v. Patterson, 333 F. Supp. 2d 906, 925 (E.D. Cal. 2004).

P.L. 111-11 would remain, Title II of H.R. 3964 would remove most references to the Settlement Agreement itself, and would amend the San Joaquin River Restoration Settlement Act's purpose to be restoration of the San Joaquin River, instead of implementation of the Settlement Agreement.[26] A summary of some of the key provisions in each section is provided below.[27]

General Repeal and Amended Purposes of San Joaquin River Restoration Settlement

Sections 201-203 provide for the general repeal of the San Joaquin River Restoration Settlement Act (SJRRSA), and make changes to the purposes and definitions of P.L. 111-11. Section 201 of H.R. 3964 would repeal the San Joaquin River Restoration and direct the Secretary of the Interior to "cease any action" to implement the stipulated Settlement Agreement on San Joaquin River Restoration. Section 202 would amend the "Purpose" section of P.L. 111-11 to change the purpose of that act from "implementation of the Settlement" to "restoration of the San Joaquin River." Section 203 makes alterations to the definitions in P.L. 111-11, including adding new terms for 'Restoration Flows,' 'Water Year' and 'Critical Water Year' that are referenced in other sections (see below). It also strikes most of the other terms originally defined in P.L. 111-11.

Restoration Implementation

Section 204 of Title II would make a number of significant changes to the restoration settlement authorized under Section 10004 of P.L. 111-11. Among other things, it would remove several provisions from P.L. 111-11 that authorize physical restoration of the San Joaquin River such as channel and structural improvements. It also employs the new definition for "Restoration Flows" provided in Section 203. Pursuant to the new definition, the additional water released or bypassed from Friant Dam must not result in a target flow entering the Mendota Pool below 50 cubic feet/second (cfs), except in a Critical Water Year (also defined in Section 203). This approach contrasts with the Settlement, which calculates Restoration Flows based on a water year type.

Section 204 would also direct the Secretary to develop and implement within one year a "reasonable plan" to fully recirculate, recapture, reuse, exchange, or transfer all restoration flows (defined as a target of 50 cfs entering Mendota Pool, 62 miles below Friant Dam). It would also provide such flows to contractors within the units of the CVP that relinquished such restoration flows.[28] This would allow for restoration water supplies to be replenished for users, thus potentially increasing their water supplies. However, it is unclear where this replenished water would come from and how it would be distributed to users. It would also direct the Secretary to identify impacts associated with implementation of modified restoration flows and create and implement mitigation actions to address those impacts before restoration flows begin. It is not clear how impacts would be defined, nor how they would be addressed by this section.

Finally, Section 204 would also preempt and supersede state law from providing more restrictive requirements than what is contained in the bill. It includes a qualified preemption of Section 8 of the Reclamation Act of 1902 (which establishes deference to state law, as long as state law is not inconsistent with the act's purposes) and specifically "preempts and supersedes any State law, regulation, or requirement that imposes more restrictive requirements or regulations on the

[26] As discussed below, most references to the "settlement agreement" that were included in P.L. 111-11 would be removed.

[27] Changes that would simply remove reference to the settlement agreement (as discussed above) are included throughout this title and are not discussed for each individual section. Additionally, similar sections under this title have been combined.

[28] Section 204.

activities authorized under this part." It does, however, make an exception for certain state water quality rules. Section 207 of the bill would provide that certain obligations under California state law and the federal ESA as they pertain to fish below Friant Dam are satisfied by carrying out P.L. 111-11. This provision refers to the basis of the Stipulated Settlement Agreement, in that a federal court had found that Reclamation was in violation of state law by not protecting and keeping in good condition fish below Friant Dam. This language would deem those state obligations, as well as those under the federal ESA, to be met.

Several other provisions would make significant changes to the implementation of the SJRRSA. Examples of these changes include:

- Section 208 would amend Section 10008(a) of the P.L. 111-11 to provide protections to third parties and allow CVP contactors to bring action against the Secretary for injunctive relief or damages, or both, for failure to comply with the new requirements of Section 10004(a)(3) of P.L. 111-11.[29] In addition to creating a mechanism to mitigate impacts, this section would also set up a process for filing claims for damages. Both provisions would provide support to water users affected by a reduction in flows.
- Section 209 would significantly alter the authorization of appropriations under Section 10009 of P.L. 111-11, including repealing the authorization of $250 million in discretionary appropriations for implementation of the settlement. It would also remove other directions and references to repealed sections of P.L. 111-11.
- Section 210 would make limited changes to Section 100010 of P.L. 111-11, which pertain to repayment contracts and accelerated repayment. It would remove references to the settlement and conform references to changes made under Sections 203 and 204 of H.R. 3964 pertaining to the new definition for "restoration flows."
- Section 211 would repeal in its entirety Section 10011 of P.L. 111-11, which addresses implementation issues associated with the re-introduction of Central Valley spring run Chinook salmon. Under that section, Congress had previously provided specific instructions in regards to congressional intent for the introduction of these fish under the Endangered Species Act.
- Section 212 would alter the authority provided in P.L. 111-11 for the Secretary to provide financial assistance for certain water supply projects related to San Joaquin River restoration. The authority would be amended as to reference the newly defined restoration flows defined under Section 203.
- Section 213 would repeal P.L. 111-11's authorization of appropriations for the Secretary to provide financial assistance to the California Water Institute for a study to conduct a study regarding the coordination and integration of sub-regional integrated regional water management plans into a unified Integrated Regional Water Management Plan.

[29] This section refers to the newly required "reasonable plan" added under Section 204 of this title.

Analysis

It is not clear how the proposed changes to SJRRSA would affect the Stipulated Settlement Agreement itself. Parties who helped author the settlement's implementing legislation have opposed Title II of the bill. They have argued that the benefits of restoration are just beginning to accrue, and that the settlement itself has not in practice resulted in significantly reduced water deliveries.[30] However supporters of these provisions disagree, and argue that the settlement has harmed irrigators. Limited information from both sides is available that indicates how exactly enactment of the bill would affect ongoing restoration efforts.

Title III—Repayment Contracts and Acceleration of Repayment of Construction Costs

Background

Since the passage of the Reclamation Act of 1902, reclamation law has been based on the concept of project repayment—reimbursement of construction costs—by project water and power users (also known as project beneficiaries). Typical "repayment contracts"[31] were made for terms of 40 or 50 years, with capital costs amortized over the long-term period and repaid in annual installments (without interest for irrigation investments and with interest for M&I investments). According to one account, because the CVP is a "financially integrated" system, a different type of contract was used, known as a "water service contract."[32] Under water service contracts, contractors pay a combined capital repayment and operations and maintenance (O&M) charge for each acre-foot of water actually delivered.[33] This water service payment is different from repayment contracts, in that under repayment contracts the annual repayment bill is due regardless of how much water is used in a given year. Repayment contracts tend to be the norm outside of California; however, some other projects do have some water service contracts. Water service contracts in the CVP were also typically written for 40-year terms. However, in 1992, with the passage of the Central Valley Project Improvement Act (CVPIA, Title 34 of P.L. 102-575), contract terms were reduced to a maximum of 25 years.

Another early tenet of reclamation law still in existence is a limit on how much land one can irrigate with water provided from federal reclamation projects. The idea behind the limitation was to prevent speculation and monopolies in western land holdings and to promote development and expansion of the American West through establishment of family farms. Over the ensuing decades, several attempts were made to increase the acreage limitation, and in 1982, pursuant to the Reclamation Reform Act (RRA, P.L. 97-293), the original acreage limitation of 160 acres was raised to 960 acres. Scholars and others have written extensively on enforcement issues resulting from the 960-acre limit. It has remained, on one hand, an unpopular provision among large landholders who do not want limits on their land, particularly in the Central Valley where large

[30] See for example, http://www.mercurynews.com/opinion/ci_25867361/feinstein-water-legislation-will-weaken-delta-conservation-efforts#disqus_thread.

[31] Repayment contracts are also known as 9(d) contracts, so named for the provision of the 1939 Reclamation Projects Act provision under which they are authorized.

[32] Richard W. Wahl, *Markets for Federal Water, Subsidies, Property Rights, and the Bureau of Reclamation*, ed. Nancy Winchester (Washington DC: Resources for the Future, 1989), p. 52.

[33] Ibid.

industrial farms are more common than other areas of the West. On the other hand, it is a key rallying point for taxpayer groups, environmentalists, and others who have opposed using federally subsidized water[34] to irrigate large swaths of land. Under current law, once a repayment contract is paid out, the contractor no longer is subject to the 960-acre limit or other provisions of RRA (e.g., full-cost pricing for water).

Summary

Title III contains one section: Section 301. Section 301 would authorize and direct the Secretary, upon request, to convert any agricultural water service contracts (known as 9(e) contracts) to repayment contracts (known as 9(d) contracts), as well as M&I water service contracts to repayment contracts. It would direct that under such conversions, the Secretary would require repayment either in lump sum or accelerated prepayment of a contractor's remaining construction costs, thus accelerating the process and advantages associated with full project repayment. It would also authorize the Secretary to similarly convert contracts for municipal water. The section would reiterate current law regarding the elimination of an obligation to pay full-cost pricing rates or abide by the acreage (ownership) limitations of Reclamation law once the repayment obligation is met.

Analysis

It is not clear how many contractors within the CVP might take advantage of these provisions and opt to prepay or accelerate their payments. Current CVP contract rates are based on a target repayment date of 2030; however, because the project is technically not complete, adjustments are made annually to capital cost obligations. Current CVP rate books (updated in 2012) show outstanding repayment obligations of approximately $1.15 billion for irrigation contracts and $147 million for M&I contracts. Presumably, districts interested in prepaying or accelerating repayment would need to obtain a loan or issue a bond to raise capital to make the payment, unless they have cash or other relatively liquid assets on hand. Because the federal repayment amount in agricultural contracts is akin to a no-interest loan for irrigation contracts, a district would have to weigh the financial costs of new financing with the operating and opportunity costs of continuing to remain under reclamation ownership and full-cost pricing rules. The added permanency of the water contract provided for under proposed Title I of this bill (i.e., directed renewal of 40 years, upon request, and potentially without NEPA review), might make such prepayment more attractive. On the other hand, if under Title I a water service contractor could also enjoy such benefits anyway (due to the renewal language and administration under the 43 U.S.C. 485h-1), it is not clear that the added benefits of being able to use Bureau of Reclamation water on more land and elimination of other requirements would outweigh the financial and administrative costs of new financing. One other incentive to prepay is the reporting requirements required for landowners. Those that own many properties throughout the West would no longer have to report acreage irrigated.

[34] Irrigation contractors do not pay interest on the federal investment in reclamation water works. Additionally, some repayment levels are reduced further by farmers' "ability-to-pay." In these cases, power revenues are typically used to make up the allocated irrigation repayment.

Title IV—Bay-Delta Watershed Water Rights Preservation and Protection

Background

Section 8 of the Reclamation Act of 1902[35] requires Reclamation to comply with state law, including requiring the agency to acquire water rights for its projects, such as the CVP.[36] For the CVP, Reclamation found it necessary to enter into "settlement" or "exchange" contracts with senior water users who had rights pre-dating the project, and were thus senior water rights holders. "Sacramento River Settlement Contractors" are one such class. They entered into Sacramento River Settlement Contracts with Reclamation, which guarantee these contractors a certain amount of "base supply water" (some users also contract out for "project water"). "Exchange Contractors" are the other primary class of senior water rights holders. This refers to water users (south of the Delta) who diverted water from the San Joaquin River prior to construction of Friant Dam. These users exchanged their direct diversion of river water for water delivered from the Delta via the CVP Delta-Mendota canal. Both classes of contractors (as well as wildlife refuges) are generally limited as to the maximum reductions to their water supplies based on hydrological conditions (e.g., no less than 75%).[37] These same limits on reductions are not currently provided for water service contractors.

Summary

Title IV of H.R. 3964 aims to protect senior water rights and what are known as "area-of-origin" priorities that are currently embedded in state law. The Title also includes specific language protecting Sacramento River Settlement Contracts from potential reductions due to ESA implementation and to protect such contractors from adverse consequences of H.R. 3964's Section 108 preemption of state and federal law on CVP and SWP Delta operations.[38]

Following is a summary of a few key provisions of Title IV:

- Section 401 would direct the Secretary to strictly adhere to state water rights by honoring senior water rights, "regardless of the source of priority." This would stipulate that state water rights are to remain intact, and aim to prevent any use of the authority provided for under Section 108 to alter any existing water rights.

[35] 43 U.S.C. §383.

[36] The U.S. Supreme Court has held that Section 8 "requires the Secretary to comply with state law in the 'control, appropriation, use or distribution of water'" by a federal project. See *California v. United States*, 438 U.S. 645, 674-75 (1978). This requirement to comply with state law applied so long as the conditions imposed by state law were "not inconsistent with clear congressional directives respecting the project." See id. at 670-73; see also *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963). In the context of the CVP, a court has held that the permit conditions were consistent with the project purpose of river regulation. *Racanelli*, 182 Cal. App. 3d at 135. See also *United States v. State Water Resources Control Board*, 694 F.2d 1171 (9th Cir. 1982).

[37] Because of the extent and severity of the drought this year, Reclamation for the first time ever reduced water deliveries to these senior contractors below the typical 75% minimum supply.

[38] As first introduced in the 112th Congress, some northern contractors feared that the preemption language in §108 of H.R. 1837 might place the burden of meeting ESA and CVPIA obligations onto project contractors and others who do not rely on water pumped from the Delta (e.g., non-CVP in-Delta water diverters and northern Sacramento Valley and area-of-origin water users).

- Section 402 would provide that in implementing the ESA, water supply reductions for Sacramento Valley Settlement Contractors must adhere to water rights priorities as stipulated in those contacts.
- Section 403 would place new limits on water supply reductions for Sacramento River watershed water service contractors, subject to the seniority provided to Settlement Contractors under Section 402. These limits on reductions would be similar to those provided to senior water contractors and wildlife refuges. For example, under this section, the Secretary of the Interior in operation of the CVP would have to deliver not less than 75% of Sacramento River watershed water service contractors' contracted water supply in a "dry" year (no such protection would be provided for water service contractors outside of this area). Currently, these water service contractors have no minimum guarantee of water deliveries in dry years.[39] The section also provides protections for M&I water contractors.
- Section 404 would direct the Secretary to ensure "that there are no redirected adverse water supply or fiscal impacts to those within the Sacramento River watershed or to the State Water Project arising from the Secretary's operation of the [CVP]" to meet legal obligations imposed by or through a state or federal agency, including but not limited to the ESA or H.R. 3964, or actions or activities implemented to meet "the twin goals of improving water supply or addressing environmental needs of the Bay Delta." The latter clause appears to be a reference to ongoing state and federal efforts to develop a Bay-Delta Conservation Plan [BDCP] and the state's implementation of a Delta action plan.

Analysis

While Title IV would protect northern and other senior water rights holders (senior to those rights or permits belonging to the CVP), it does not appear to provide the same level of protection to water users in the Delta or others whose water rights may be more junior to the CVP, but perhaps senior to others.[40] Additionally, to the extent the bill would not provide new water to junior contractors beyond what might be garnered from prohibition on environmental restrictions beyond those contained in the Bay-Delta Accord, it is not clear the bill would end water supply shortages until new water supplies or other increases in yield anticipated by the bill were developed or accomplished.

It is not clear how some sections of Title IV square with the broad preemption language of Section 108 and Title V, or how such legislation would be implemented in practice. Some of the sections in Title IV appear to conflict with the goals of Title I. It is unclear how much new water would be available to junior contractors, beyond water used for environmental purposes that would no longer be allowed under H.R. 3964.

[39] For instance, in 2009 (during the last drought), north-of-Delta agricultural water service contractors received 40% of their contracted supply, but were projected to receive 0% during the first allocation in February. The allocation grew to 5% in March, 10% in April, and finally to 40% in May. http://www.usbr.gov/mp/cvo/vungvari/water_allocations_historical.pdf.

[40] As noted earlier, much of the California urban and agricultural economy depends on water rights that may be junior to the CVP or other senior water rights. Thus, it has been in the interest of the state to find ways to improve water reliability to all water users.

Title V- Miscellaneous

Summary

Title V has three sections. Section 501 includes findings of Congress that the unique circumstances of coordinated operations of the CVP and SWP "require assertion of Federal supremacy to protect existing water rights throughout the system" and that as such shall not set precedent in any other state. As noted above, there has been concern from some western states that the state and federal preemptions contained in H.R. 3964 might be used as precedent in other western states and threaten their allocation of state water rights, and this provision attempts to address these concerns.

Analysis

Some might question if provisions in the bill conflict with certain emergency authorities provided to the State Water Resources Control Board (SWRCB), and how the competing provisions are to be reconciled. Section 502 attempts to reconcile those concerns by declaring that that nothing in the act shall "affect in any way" the Proclamation of State Emergency and associated Executive Order (Emergency Order); issued by Governor Brown on January 17, 2014,[41] or the authorities granted by the Proclamation. Further, the bill would not limit the authority provided by the Proclamation to allow the SWRCB to modify and standards or operational constraints adopted to implement the Bay-Delta Accord so as to make additional water supplies available to service areas during a state of emergency. Under the Emergency Order, the Governor authorizes the SWRCB to expedite and streamline water transfers, expedite funding for water supply projects and water conservation projects, notify water right holders that they might be directed to cease or reduce diversions based on water shortages, modify requirements as they relate to reservoir releases and to implementing a water quality control plan, among other things. Section 503 includes language that would adjust a Wild and Scenic River boundary for the Merced River, potentially allowing for increased storage at Exchequer Dam. The removal of sections of the Merced River from the Wild and Scenic Rivers Act[42] would remove that section of the river from restrictions in the act aimed at protecting river segments from certain types of development and adverse effects of water management regimes (notably the requirement that the river segment remains in a free flowing condition).

Section 504 would direct that a January 17, 2014 Proclamation of State Emergency and Executive Order by the Governor of California shall be considered a request for a fisheries disaster declaration under the Magnuson-Stevens Act.[43]If it is determined that such a disaster as occurred, these areas would potentially be eligible for disaster assistance.[44]

Concluding Remarks

H.R. 3964 would make extensive changes to implementation of federal reclamation law under the Central Valley Project Improvement Act, the contracting provisions under the 1939 Reclamation Project Act, restoration efforts under the San Joaquin River Restoration Settlement Act, and state

[41] The Proclamation of State of Emergency and associated Executive Order can be found at http://gov.ca.gov/news.php?id=18368.

[42] Wild and Scenic Rivers Act of 1968 (P.L. 90-542; 16 U.S.C. §§1271 et seq.).

[43] 16 U.S.C. §1861a.

[44] For more information, see CRS Report RL34209, *Commercial Fishery Disaster Assistance*, by Harold F. Upton.

and federal relationships under Section 8 of the Reclamation Act of 1902. The bill would also alter the way the state of California implements its own state laws with regard to operation of the CVP and SWP and non-native fisheries.

H.R. 3964 is primarily aimed at addressing decreased water deliveries to California's CVP and SWP contractors, particularly those south of the Delta, since passage of the CVPIA in 1992. The bill would allow water to be delivered to contractors that would likely become available due to changes in restrictions in environmental and other laws. It would result in greater water deliveries by preempting federal and state law, including fish-and-wildlife protections and other CVP operational mandates, which are all tied to the coordinated operations of the CVP and SWP. It is unclear what impacts such changes would have on other water users in the state. Title IV of the bill attempts to provide protections for California's senior water right holders, particularly those in the Sacramento Valley watershed and in "area-of-origin" areas. A key remaining unknown consequence is the significance of the bill's use of the fixed 1994 Bay-Delta Accord as a basis rather than current (and evolving) in-Delta water quality standards and biological opinions under the federal ESA. The current water quality standards impose water flow restrictions and appear to be a contributing factor to annual pumping restrictions in the Delta, along with ESA requirements.

The exact amount of water the bill would make available to certain users under various scenarios is unclear. While much attention has been paid to the effects of federal and state environmental laws on reductions in water supplies south of the Delta, the extent to which the bill would relieve current and ongoing water supply shortages, particularly in drought years, is uncertain. Limited increases in deliveries for water contractors may be garnered from a prohibition or alteration of some state and federal environmental restrictions (including the State's Public Trust Doctrine and other laws proposed under the bill. However, the legislation does not appear to fundamentally change some of the other factors driving water shortages and delivery curtailments in the Delta, including the fundamental tenet of state water rights during times of shortage.[45] Indeed, under some drought scenarios junior water rights holders may face curtailed water deliveries (i.e., regardless of environmental restrictions), while senior water rights holders continue to receive water.[46]Additionally, another significant factor in recent pumping restrictions in the Delta is the state water quality control plan, which includes salinity and flow requirements under California State Water Resources Control Board Decision 1641 (also known as "D-1641").[47] This decision in some cases dictates the timing and quantity of water deliveries south of the Delta. It is unclear the extent to which water quality standards that would be required under the Bay-Delta Accord would correlate with the current requirements under D-1641. Such correlation (or lack thereof) could have a potentially significant effect on the extent of water exports in a given year.

Difficulties Estimating the Sources of Pumping Restrictions

It is not clear how much of any given year's pumping restrictions are due to state water quality control requirements, ESA requirements, and other factors. Estimating these figures can be difficult for a number of reasons. That said, in recent years it appears that flows for federal endangered species protections have accounted

[45] Title IV states that states water rights are to be adhered to; however, as noted earlier, it is not clear how some sections of Title IV square with the broad preemption language of Section 108 and Title V, or how such legislation would be implemented in practice.

[46] Another factor affecting deliveries to south-of-Delta CVP contractors may be the difference in SWP and CVP pumping and canal capacities. For an analysis and discussion of the many hydrologic and regulatory factors involved in CVP water allocations, see CRS Report R40979, *California Drought: Hydrological and Regulatory Water Supply Issues*, by Betsy A. Cody, Peter Folger, and Cynthia Brougher.

[47] D-1641 is the implementation plan, initially finalized in 1999, for the 1995 Bay-Delta Water Quality Plan (Bay-Delta Plan), which serves as the water quality control plan for the Delta.

for a fraction of overall restrictions. For instance, in 2009 (a drought year, with 40% of average annual exports) the Department of the Interior estimated that approximately 25% of the water supply reductions south of the Delta were due to federal endangered species protections. The rest of the restrictions that year were due to lack of water and other factors (including state water quality requirements and CVPIA purposes). For 2011 (a "wet" year), the Department estimated that pumping restrictions for endangered species and CVPIA purposes totaled 90,000 acre feet (62,000 and 28,000 respectively), or approximately 1.4% of the 6.9 million acre feet that were exported from the Delta that year. It is not clear what percentage of water supply reductions in the 2014 water year will have been made due to implementation of ESA biological opinions.

Longer term consequences of the legislation may also be of interest to Congress. Unlike some other proposals, H.R. 3964's provisions would be in effect beyond the current drought, and would continue in perpetuity absent future changes to the statute. Effects of the legislation on other ongoing plans, such as the Bay Delta Conservation Plan (BDCP), are unknown but could be significant. Some have argued that if ESA and state protections in the Bay-Delta are removed as proposed, there would be less need for the BDCP, a habitat conservation plan.[48] The precedent of legislation may be of interest, as well. Among other things, the waiver of ESA and state laws in order to provide increased water deliveries for federal project contractors would be a significant departure from the previous deference to these laws.[49]

H.R. 3964 goes to the heart of the water supply issue in California by proposing to prohibit "any" state or federal law (including the public trust doctrine) from reducing water supplies beyond those allowed in the Bay-Delta Accord. It would also declare federal supremacy over water management to "protect existing water rights throughout the system." However, some argue that the bill would undermine efforts to achieve the "co-equal" goals of "providing for a more reliable water supply for California and protecting, restoring, and enhancing the Bay-Delta ecosystem," which is the foundation of state and federal efforts in development of the Bay Delta Conservation Plan. Therefore the overall approach of the legislation, as well the extent to which it would alter the existing water management regime in California, may elicit ongoing debate.

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[48] http://switchboard.nrdc.org/blogs/kpoole/hr_1837_and_the_death_of_the_b.html.

[49] Section 501 of the bill states that the assertion of Federal supremacy in the bill is unique and thus should not serve as a precedent for any other state, but does not include the same finding for the waiver of ESA, for example. Thus, it is unclear whether the bill's authors intend for the waiver of environmental laws to be similarly unique to the assertion of federal supremacy.

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