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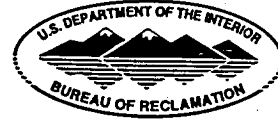

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Region 1
911 N.E. 11th Avenue
Portland OR 97232-4181

U.S. Bureau of Reclamation
Mid-Pacific Region
2800 Cottage Way
Sacramento CA 95825-1898

Subject: **Final CVPIA Administrative Proposal on Water Transfers**

Dear Interested Party:

In September 1995, the Department of the Interior (Interior) invited the public to identify their concerns regarding implementation of the Central Valley Project Improvement Act (CVPIA). To facilitate public input and discussion, Interior representatives held a series of public meetings between September 1995 and April 1996. During these meetings, 12 major areas of concern were identified, and individuals volunteered to form work teams and discuss the specific issues pertaining to those areas. In April 1996, Interior committed to the preparation of an Administrative Proposal to address the principal issues raised by stakeholders during the public forum and work team meetings.

To that end, Interior circulated the draft Administrative Proposal on Water Transfers on June 14, 1996, for review by interested parties, and received written comments from 14 parties. Enclosed is the final Administrative Proposal on Water Transfers which has been revised to reflect key comments received, as well as previously raised concerns.

Copies of this final proposal can be accessed on the Mid-Pacific Region's home page at **http:/www.mp.usbr.gov** or can be obtained by calling Ms. Alisha Sterud at 916/978-5195 or TDD 916/978-5608.

Sincerely,

Michael J. Spear
Regional Director
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Region 1

Roger K. Patterson
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Mid-Pacific Region

Enclosure

INTRODUCTION

In September 1995, the Department of the Interior (Interior) invited the public to identify their concerns regarding implementation of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575 (CVPIA). To facilitate input and discussion, representatives of Interior held a series of public meetings between September 1995 and April 1996. During these meetings, 12 major areas of concern were identified, and individuals volunteered to form working groups to discuss specific issues pertaining to those areas. In April 1996, Interior committed to the preparation of "Administrative Proposals" to address the principal issues raised by stakeholders during the public forum and working group meetings. To that end, Interior has issued final administrative proposals on the following six issue areas: Water Conservation, Trinity River, San Joaquin River, Stanislaus River, Urban Reliability, and Management of Section 3406(b)(2) Water (800,000 acre-feet.)

BACKGROUND

Section 3405(a) of the CVPIA authorizes all individuals or districts who receive Central Valley Project (CVP) water under water service, repayment, water right settlement, or exchange contracts to transfer all or a portion of the CVP water they receive under contract to any other California water user for any purpose recognized as beneficial under applicable state law.

Following enactment of the CVPIA, Interior prepared "Interim Guidelines for the Implementation of Water Transfers." Reclamation released the draft interim guidelines for public review and comment on January 14, 1993. The interim guidelines were finalized on February 25, 1993. As stated in the final interim guidelines (hereafter, "water transfer guidelines"), Reclamation and the U.S. Fish and Wildlife Service (Service) each have unique roles in reviewing and processing any proposed water transfer prior to final approval.

SUMMARY OF THE ISSUES

There were 22 issues initially identified by the water transfer team.[1] The major issues have been consolidated into six major topics. These topics include the review and approval process, third-party impacts, applicability of the CVPIA to water transfers, transferable water, clarification of the right of first refusal, and area of origin.

Review and Approval Process

The concerns raised in this area included: defining the proper role of the contracting district in reviewing and approving proposed water transfers, streamlining the water transfer process to accelerate approvals, and clarifying calculation of the 20-percent threshold in section 3405(a)(1).

[1] See Appendix B for a list of all the issues.

The Role of Water Districts in Reviewing and Approving Water Transfers. Section 3405(a)(1) requires that transfers involving more than 20 percent of the CVP water subject to long-term contract within any contracting district shall be subject to the district's review (see below for a further discussion of this requirement). The water transfer guidelines invite district comment on the impacts that a proposed transfer, regardless of the quantity, may have on a district, even though this is not required by the CVPIA. Section 3405(a)(1)(K) specifies that the Secretary of the Interior (Secretary) shall not approve a water transfer ". . . unless the Secretary determines . . . that such transfer will have no unreasonable impact on the water supply, operations, or financial conditions of the transferor's contracting district . . . or its water users." The water transfer guidelines direct individuals who wish to complete a water transfer to notify their district about the proposed transfer. The water transfer guidelines give the district 45 days to notify Reclamation of the impacts on its water supply, operations, or financial conditions, and further direct that any impacts identified by the district as being "unreasonable" be documented in writing.

Because of practical limitations on Reclamation's ability to independently inquire as to each district's circumstances, Reclamation has been placing considerable weight on the comments it receives from a district when making the determination required by section 3405(a)(1)(K) as to whether or not a proposed transfer would have an "unreasonable impact." Furthermore, the water transfer guidelines have not attempted to define the criteria upon which the Secretary would determine if impacts on a district's water supply, operations, or financial conditions are "unreasonable."

Urban and environmental interests are concerned about the role the district has in this process. Urban and environmental interests support a district-sensitive approach whereby the district's input and concerns are addressed. However, without objective criteria having been specified for determining what constitutes "unreasonable impacts," urban and environmental interests are concerned that they could spend a significant amount of time negotiating water transfers only to have a district recommend that Reclamation determine that the water transfer has unreasonable impacts on the district.

Agricultural interests believe that the district should be given the first level of approval on water transfers because the district has the technical capability to understand the impacts to the district. Furthermore, agricultural interests believe that it would be difficult to specify objective criteria for determining "unreasonable impacts" because most water transfers are unique as to time, place, and hydrologic conditions. Finally, agricultural interests are concerned that if a district can only comment on proposed water transfers and has no approval authority, then Reclamation may approve proposed water transfers that the district believes have unreasonable impacts on the district.

Interior Response. Interior acknowledges the unique concerns raised by the interest groups. Technical meetings were held by a subgroup of the water transfer team to try to develop specific objective criteria that a district would use when documenting unreasonable impacts. The

technical team was not able to reach consensus on specific objective criteria. Further attempts to draft general principles also proved unsuccessful. In the near future, Reclamation will again attempt to reach consensus on district criteria. While this process goes forward, Reclamation will continue to solicit technical input from the contracting district as to the potential impacts of water transfers on it and will require that districts provide sufficient evidence to support their views that a proposed transfer would have "unreasonable" impacts on the water supply, operations, or financial conditions of a district. However, Reclamation will retain, as it always has, the authority to make the determination required by section 3405(a)(1)(K).

How Can the Water Transfer Process Be Streamlined? There was strong support, although not complete consensus, among the interest groups that the water transfer approval process needed to be accelerated. Examples were given that demonstrated that the process could be cumbersome and time-consuming. The team came to recognize that a streamlined process could be developed to allow for accelerated consideration of water transfer proposals while at the same time ensuring that environmental protections are in place.

Interior Response. Both Reclamation and the Service have been working since 1995 on a process to accelerate the water transfer approval process. During 1995, Interior tested a concept called programmatic review of agricultural water transfers in four CVP divisions (see next paragraph). In essence, this programmatic review required Interior to develop a list of parameters that agricultural water transfers within a division would have to meet to be included in the programmatic review document. Then, environmental documentation was completed on the programmatic review document. In practice, a contractor requests that a water transfer be approved, Interior personnel determine whether the proposed water transfer falls within the programmatic review document, and, if so, the transfer is approved immediately. If the proposed water transfer does not fall within the parameters of the programmatic review document, then a separate analysis of the proposed transfer and a separate environmental document must be completed prior to the water transfer being approved.

Programmatic reviews have been accomplished for agricultural water transfers within the Friant Division, San Luis/Delta-Mendota Division, Tehama-Colusa/Corning Canals Division, and Sacramento River Division. Reclamation would consider applying the programmatic review and approval process to other types of water transfers, such as agricultural water transfers, between the East and West sides of the basins and North and South of the Sacramento-San Joaquin Delta, and from agricultural use to municipal and industrial (M&I), or environmental use if the volume of projected water transfers indicates such a need. The programmatic review process developed specific criteria that agricultural water transfers must meet before such transfers are eligible to be approved under this program. The programmatic review criteria for agricultural water transfers, along with the completed environmental documentation, have been made available to interested parties and will continue to be made available for public review and comment in the future.

Clarification of the 20-Percent Rule Contained in Section 3405(a)(1). The issues identified are: (1) the role of the contracting districts and agencies in reviewing water transfers exceeding

20 percent of water supply, and (2) how the 20-percent threshold of section 3405(a)(1) should be calculated. Section 3405(a)(1) directs that transfers involving more than 20 percent of the CVP water subject to long-term contract within a contracting district be subject to approval by the district, in addition to approval by the Secretary, with the district applying the same criteria as the Secretary. When the CVPIA was signed into law, then-President Bush expressed concerns that section 3405(a) might be "construed to permit the exercise of Federal executive power by the districts or agencies," in a manner that would raise constitutional concerns. To avoid such concerns, President Bush interpreted the section as creating an advisory role for the districts, rather than a mandatory approval role. Because of the continuing questions over the section, however, Reclamation has asked the Solicitor's Office for advice regarding its implementation. Reclamation will release the results of that review when completed and will notify stakeholders and the public of any changes in implementation that the results of the legal review may require.

In calculating the threshold, agricultural interests believe that a district should have the option of comparing the amount of a transfer to either an individual transferor's entitlement or to a contracting district's total CVP contract supply. If a district used the first option, then a proposed transfer which would exceed 20 percent of an individual transferor's entitlement would be subject to the district's review and comment, regardless of the proportion of a district's total CVP contract supply that would be involved in the transfer. However, if a district used the second option, then a transfer could be for 100 percent of a given transferor's entitlement, but it would only be subject to review and comment by a district under the 20-percent rule if the proposed transfer exceeded 20 percent of the district's total CVP contract supply. Urban and environmental interests believe that the threshold should only be calculated based upon the second option.

Interior Response. Section 3405 (a)(1) states: "Transfers involving more than 20 percent of the Central Valley Project water subject to long-term contract. . . ." Interior interprets this section to mean that the 20-percent rule applies to the water provided through the district's contract with the United States and not to the individual transferor's entitlement. There are two reasons for this interpretation. First, the legislative language "Central Valley Project water subject to long-term contract." It is questionable whether members of a district receive CVP water subject to a long-term contract. More often, they receive an allocation of CVP water subject to a district charter/rules. Secondly, from a practical standpoint, in order for Reclamation to determine if the 20-percent rule was exceeded on individual transfers, Reclamation would have to monitor each district's charter and rules as to each individual's water entitlement. Such oversight would severely hinder and constrain the movement of water and frustrate one of the purposes of CVPIA to expand the use of water transfers. Thus, an individual may transfer 100 percent of his/her water allocation from a district and not exceed the 20-percent threshold as long as the total water supply being transferred is 20 percent or less of a district's CVP contract supply. While this results in a district not being invited to comment on whether such a proposed transfer meets all 13 conditions set forth in section 3405(a)(1)(A) through (M), the district would be asked, under Section 3405(a)(1)(K), to comment on whether such an individual proposed transfer would have

unreasonable impacts on the district. Therefore, Interior believes that the districts are afforded a sufficient mechanism for protecting their interests.

Third-Party Impacts

Third-party impacts are those impacts on water users, other entities, or individuals who are not a party to a water transfer arrangement. For example, third-party impacts may include impacts to groundwater basins and their users, economic and social impacts to communities and individuals in the area from which water is moved and in the area to which the water is proposed to be transferred, and environmental impacts of water transfers.

Few people question that third-party impacts can occur from water transfers. However, the degree of impacts and the appropriate mitigation for third-party impacts is what would likely be contested. CVPIA does contain some provisions that, to a degree, limit the extent of third-party impacts. These include: (1) the 20-percent rule discussed above, (2) the right of first refusal, (3) conditions imposed on ground-water transfers, (4) determination of impacts on district operations, water supply, and financial conditions, (5) mitigation of adverse impacts to fish and wildlife resources, and (6) consistency with Federal and State law.

Interior Response. Interior believes that third-party impacts need to be quantified and mitigated, as appropriate. Third-party impacts should be addressed when evaluating both short- and long-term water transfers. Additionally, Interior has proposed establishing a water transfer clearinghouse that would be operated jointly by Interior and the State of California Resources Agency. This clearinghouse would track water transfers and provide data that could be used to quantify and evaluate third-party impacts. Terms and conditions on long-term water transfers could be developed to ensure that third-party impacts, as they become known, are appropriately addressed. Although third-party impacts are difficult to quantify on short-term water transfers, successive short-term water transfers would be treated as long-term water transfers under this analysis. Information generated from the clearinghouse could also be used in accomplishing long-term trend analysis on ground-water conditions as well as environmental analysis on the changes in water use. Interior believes that any appropriate third-party impacts incurred because of water transfers that are not mitigated by the CVPIA should be mitigated by the parties to the water transfer. Interior also realizes that third-party impacts are a significant concern to all stakeholders and, as such, recognizes that its commitment to addressing third-party impacts is not completed in this Administrative Proposal. This is an issue that will evolve as more information becomes known.

Interior envisions that the water transfer clearinghouse will provide a unique opportunity for the water user community to monitor the availability and use of transferred CVP water. The clearinghouse will provide data for State and Federal agencies to monitor trends and movement of water to assist in ecosystem reviews and analyses. The water transfer clearinghouse could also list individual water transactions, thereby assisting, to some extent, other interest groups such as agricultural lending institutions.

Applicability of the CVPIA to Water Transfers

Three areas of concern on the applicability of the CVPIA water transfer provisions to existing contractors were identified: (1) historical water transfers approved under separate authorities, (2) Sacramento River settlement contracts, and (3) Exchange Entity contracts.

Historical Water Transfers Approved under Separate Authorities. Water transfers have been accomplished historically throughout water projects. Pre-CVPIA water transfers were mostly intra-division area transfers for periods of 1 year or less, and were made for water management/efficiency purposes. When the CVPIA was enacted, the conditions imposed on water transfers by section 3405(a) were perceived by some water contractors as an impediment to the accomplishment of those types of water transfers. Additionally, Interior's new review and approval process under section 3405(a) appeared cumbersome to districts that were accustomed to quick turnaround approval on water transfers.

Agricultural interests would like the water transfers which were historically made (pre-CVPIA) to continue to be handled as they were in the past, rather than being subject to the CVPIA water transfer requirements. Environmental interests believe that a blanket exception to section 3405(a) for historical transfers cannot be given since many historical transfers may have had adverse environmental impacts. However, the environmental community generally agrees that some historical transfers could be approved on a pro forma basis, subject to specific criteria consistent with section 3405(a).

Interior Response. Interior believes that the programmatic review process on historical water transfers will encompass the majority of the water transfer issues raised as a concern. For those water transfers that are outside of the programmatic review process criteria, separate evaluations will be made on a case-by-case basis.

Sacramento River Settlement Contracts.[2] Sacramento River settlement contracts contain two types of water supply -- base supply and CVP water.[3] These contracts were negotiated to settle

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[2] Sacramento River settlement contracts refer to those contracts along the Sacramento River that were negotiated to settle water right disputes and are titled, "Contract between the United States and [entity], diverter of water from the Sacramento River sources providing for project water service and agreement on diversion of water."

[3] CVP, or "Project water," is defined in such contracts as ". . . all water diverted or scheduled to be diverted each month during the period April through October of each year by the contractor from its source of supply which is in excess of the base supply."

[4] The term "Central Valley Project water" as defined in section 3403(f) means all water that is developed, diverted, stored, or delivered by the Secretary in accordance with the statutes authorizing the Central Valley Project and in accordance with the terms and conditions of water rights acquired pursuant to California law.

water right disputes along the Sacramento River and are not a recognition of water right claims or entitlement of either party. Base supply is the amount of water that the parties to the contract agree that the contractor can divert at its own diversion point free of charge. CVP water is that quantity of water that must be paid for under the terms and conditions of the contract and in accordance with Federal Reclamation laws.

Environmentalists believe that "CVP water," as that term is defined in section 3403(f) of the CVPIA[4], should be interpreted to include the base supply. Therefore, they argue the water transfer provisions of the CVPIA would be applicable to both base supply and CVP water. Sacramento River settlement contractors do not believe that base supply is "CVP water" as that term is defined in section 3403(f) of the CVPIA. Therefore, Sacramento River settlement contractors do not believe that base supply water is subject to the CVPIA water transfer provisions, although they acknowledge that project water diverted under their contract is subject to the CVPIA transfer provisions.

Interior Response. Reclamation believes that base supply, as that term is defined in the Sacramento River settlement contracts, is not CVP water within the meaning of section 3403(f) of the CVPIA. Therefore, base supply water is not subject to the water transfer provisions of the CVPIA. However, base supply water is subject to the water transfer provisions of California State law. Furthermore, all Sacramento River settlement contracts contain a provision that requires the Contracting Officer to approve any transfers of base supply water or CVP water. Reclamation is working with the Sacramento River settlement contractors to develop water transfer guidelines for base supply water.

Exchange Entities Contract.[5] The Exchange Entities claim that water provided by Reclamation to the Exchange Entities pursuant to their contract is not CVP water and, therefore, such water is not subject to the water transfer provisions of the CVPIA. The Exchange Entities state that their contract is, in effect, a water rights settlement contract. They believe that Judge Wanger, in Stockton East WD v. Oakdale Irrigation District/South San Joaquin Irrigation District, held that water rights settlement water is not subject to the CVPIA because it is not CVP water.[6] Therefore, by logical extension, the Exchange Entities believe that their contract water also is not CVP water and is not subject to CVPIA transfer provisions, but only to California law. Under

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[5] The United States and the Contracting Entities (Central California Irrigation District, Columbia Canal Company, San Luis Canal Company, and the Firebaugh Canal Company) entered into a contract titled, "Second Amended Contract for Exchange of Waters," dated September 15, 1967, revised December 6, 1967, that superseded and replaced various Purchase Agreements, Exchange Contracts, and deeds for the uses of water of the San Joaquin River. These Contracting Entities are commonly referred to as the Exchange Entities.

[6] Interior does not agree with the Exchange Entities' interpretation of this judicial decision.

California law, Exchange Entities argue that they may transfer their water outside of the permitted place of use so long as no other water user would be harmed by the transfer (California Water Code § 1706).

A second issue raised by the Exchange Entities is whether a provision in their contract restricting place of use may be enforced by Reclamation. The Exchange Entities believe that only California water law should govern transfers of exchange contractor water, and that California law places approval authority squarely with the districts. However, regardless of the above statements, the Exchange Entities are willing to comply with the CVPIA water transfer provisions that have been issued. Environmentalists believe that the Exchange Entities are receiving CVP water and, therefore, are subject to the water transfer guidelines.

Interior Response. The only water that the United States has authority to "exchange" with the Exchange Entities is CVP water. Therefore, the water transfer provisions of section 3405(a) of the CVPIA apply to water provided under the Exchange Entities contract.

Transferable Water

The major issue is how Interior interprets the applicability of CVPIA water transfer provisions to water banking arrangements and conjunctive use programs. The concern is that voluntary actions to store water for later use may not be possible if such water banking arrangements are required to follow the water transfer provisions of the CVPIA. For example, if a water district that historically used 85 percent of its CVP water supply elects to enter into an underground storage program in another district to store the remaining 15 percent of its CVP water, will this transaction be subject to the water transfer provisions of the CVPIA? If it is treated as a transfer, then the conditions of section 3405(a) concerning historic and consumptive use could preclude the arrangement.

Agricultural and urban interests believe that water banking and conjunctive use programs were designed to take advantage of "wet year water" availability and to store such water as needed for future years. Environmentalists view water banking and conjunctive use programs as tools that can be and should be used to meet a host of present and future water supply needs. Environmentalists see the possibility of diverting and storing "wet year water" for the purposes of water banking arrangements and conjunctive use programs.

Interior Response. Interior would suggest that the water transfer guidelines not be the basis for determining whether CVP water can be banked pursuant to sections 3408(c) and (d) of the CVPIA for water banking or conjunctive use programs. Interior supports the development of separate criteria for water banking and conjunctive use programs that will encourage and facilitate such programs for effective water management.

Clarification of the Right of First Refusal

Section 3405(a)(1)(F) states that any transfer of CVP water for use outside the CVP ". . . service area shall be subject to a right of first refusal on the same terms and conditions by entities within the Central Valley Project service area." Stakeholders raised the following questions and general concerns: (1) whether the category of entities that may claim a right of first refusal includes both CVP and non-CVP contractors within the CVP service area, (2) what criteria should be used when multiple entities request to exercise the right of first refusal, (3) whether a CVP contractor who elects to claim the right of first refusal is required to pay the $25 M&I surcharge fee if that fee would have been required under section 3407 of the CVPIA from the entity displaced by the CVP contractor's exercise of the right of first refusal, (4) whether a right of first refusal must apply to all or may apply only to a portion of a proposed water transfer, and (5) whether the right of first refusal, which is a statutory requirement until September 30, 1999, should be made a permanent requirement for water transfers.

Urban contractors generally recognize that the right of first refusal applies to all entities within the CVP service area. CVP contractors believe that if they claim a right of first refusal they are not subject to paying the $25 M&I surcharge. CVP contractors believe that the $25 M&I surcharge is essentially a connection fee to the CVP. Because they already are customers of and connected to the CVP, they believe the surcharge does not apply if they exercise a right of first refusal. Urban interests also believe that the right of first refusal should be clarified to apply to all or a part of a proposed water transfer. This would allow smaller contractors to participate on an equal footing with larger contractors. Lastly, although the right of first refusal only applies through September 30, 1999, CVP contractors would like the right of first refusal to be made a permanent condition for water transfers.

Environmentalists generally believe that the right of first refusal requirement should be interpreted to keep the CVPIA Restoration Fund whole. In other words, any exercise of this right must meet the same terms and conditions included in the original transfer proposal including the $25 M&I surcharge fee, if it would have applied. Environmentalists generally agree with the urban interests in that the right of first refusal could be clarified to apply to all or a part of a proposed water transfer. Environmentalists also would support the extension of the right of first refusal beyond September 30, 1999, in implementing regulations as a recognized mitigation measure for third-party impacts.

Interior Response. First, Interior agrees that any entity, including both CVP and non-CVP contractors, in the CVP service area can claim a right of first refusal. On an interim basis, we have interpreted an entity to be an individual, any legal organization (e.g., trust, partnership, corporation), or any government organization (e.g., local, state, or federal agency). Second, by definition the water transfer process is a voluntary action. Therefore, for multiple requests on the exercise of first refusal, the transferor should determine who can exercise such a right, provided that this action should not be used to stop the exercise of first refusal and the exercise of first refusal must be completed in the 90 days from the date the transfer was first noticed as available

for the right of first refusal. For example, if an entity exercises the right of first refusal on the 40th day after the water transfer is noticed as available for the right of first refusal, then the transferor and such entity must complete all necessary actions to exercise such right of first refusal by the 90th day from the date the water transfer was noticed.

Third, if the $25 M&I surcharge per acre-foot would have been required under section 3407 of the CVPIA from the entity being replaced by the exercise of the right of first refusal, then Interior believes that the $25 M&I surcharge still applies because it is a term and condition of the water transfer proposal which must remain in place, as required by section 3405(a)(1)(F). Fourth, Interior agrees that the right of first refusal could apply to all or a portion of the proposed transfer provided that the remaining portion of the transfer still would be viable. Lastly, application of the right of first refusal from date of enactment (October 1992) until September 30, 1999, gives the state and the interested public the opportunity to review the merits of this water transfer condition and to pursue this water transfer condition through an amendment of the State Water Code, if they so desire. Therefore, Interior would not support legislation to modify the CVPIA to allow this water transfer condition to continue beyond September 30, 1999.

Area of Origin

Reclamation has drafted a paper on the applicability of area of origin statutes under California water law to the CVP. That draft paper was distributed and Reclamation is reviewing the comments received. Reclamation does not consider the area of origin issue to be a CVPIA implementation issue, and, therefore, will not address it further in this paper.

APPENDIX A -- RESPONSE TO COMMENTS

Comment: The express and obvious intent of the CVPIA water transfer provisions is to encourage transfers of CVP water by removing institutional barriers to such transfers. In an attempt to minimize the chance of uneven or unfair treatment in considering and approving water transfer proposals, Reclamation should work with stakeholders to develop reasonable and objective criteria for the evaluation of district impacts under section 3405(a)(1)(K) of the CVPIA. For example, all transfer impacts should be evaluated on a "with" versus "without" transfer basis. Reclamation should develop a set of criteria for districts to use in developing water transfer programs. As an incentive to districts that establish water transfer programs using such criteria, districts would then be eligible for some "special treatment" within Reclamation's water transfer approval process.

Response: Reclamation agrees that an objective of the CVPIA is to encourage water transfers. The programmatic water transfer approval approach is one way for Reclamation to eliminate perceived institutional barriers to approving and reviewing water transfers. Another way to eliminate institutional barriers would be for water districts to provide their members with the criteria they will use in evaluating member-initiated water transfers. Some water districts have developed such water transfer criteria. As mentioned in the Administrative Proposal, the water transfer team did attempt to develop objective criteria to be used by districts in evaluating district member water transfers; however, no consensus within the group could be reached. Subsequent efforts to obtain consensus on general principles to be used by districts in evaluating water transfers were also not fruitful. In the near future, Reclamation will again attempt to pursue the generation of district water transfer criteria, possibly using dispute resolution techniques to reach agreement.

Comment: A principal concern is how, when, and to what degree will impacts of a water transfer upon a district and its other customers will be analyzed and addressed. It is counterintuitive and inefficient to propose that this issue be resolved by having the district review a transfer proposal that Reclamation has already, or is prepared to, approve. This places the district in the position of having to prove (fully document and explain) why the transfer would be harmful to the district or its customers almost after the fact. It would be more appropriate if Reclamation and the transfer proponent were obligated to demonstrate affirmatively that the proposed transfer will have no significant adverse impacts on the district or third parties. In this way, the approval authority remains with Reclamation, but no decision is made until all parties are fully apprised of all the facts.

Response: The process of having the district review proposed water transfers for impacts on its operations is critical information that Reclamation needs in evaluating and approving water transfers. Reclamation cannot determine affirmatively that the proposed transfer will have no significant adverse impacts on the district or third parties without (1) incurring significant costs that would be recovered from the transferor, and (2) obtaining access to the district's records to

review the district's water supply, operations, or financial conditions. Additionally, such a method would further delay the processing and water transfer approval process. As stated in the Administrative Proposal, Reclamation must rely on its contractors— the districts—to provide such information documenting such impacts which will be used by Reclamation in evaluating water transfers. This evaluation must be completed prior to Reclamation approving a water transfer, as section 3405(a)(1)(K) of Public Law 102-575 directs the Secretary not to approve any water transfers unless the Secretary "...determines ... that such transfer will have no unreasonable impact on the water supply, operations, or financial conditions of the transferor's contracting district or agency or its water users."

Comment: The collection and application of charges resulting from water transfers needs clarification. Reclamation should provide an appendix that outlines what revenues will be collected for specific types of transfers, and where the revenues will be credited (e.g., transfer of CVP agricultural water to a CVP M&I contractor), transfer of Exchange water to a CVP M&I contractor, or to a non-CVP M&I water user, etc.).

Response: Reclamation will include, in an appendix to the water transfer guidelines, a discussion of the methodology used in computing water transfer fees and how the funds will be credited. This methodology should be completed by December 1998 and will be available to all interested parties.

Comment: We conceptually agree with the programmatic approach to reviewing historic (pre-CVPIA) water transfers. However, the criteria for programmatic review of such transfers must ensure that only those historic transfers which will have a "net environmental benefit" will be subject to the expedited review process. In addition, the criteria must ensure that streamlined review and approval of historic transfers does not increase the water supply demands on the CVP.

Response: Reclamation does not agree that the expedited review process should be limited to water transfers that have a "net environmental benefit." However, the programmatic approach to reviewing and approving water transfers must meet the terms and conditions required under the CVPIA and all environmental requirements under law.

Comment: The Administrative Proposal should also clarify how Reclamation will respond to a district's comments which assert that negative impacts will result from a proposed water transfer. As part of the district's documentation of their claims, districts should be required to submit objective, compelling evidence, and to identify reasonable mitigating measures that would address impacts. Reclamation should establish a timely mechanism to ensure that the transferring parties receive copies of the district's comments, including all supporting material, and that those parties have adequate opportunity to respond before the Secretarial decision is made.

Response: A water district wishing to prevent a water transfer under section 3405(a)(1)(K) has the obligation to demonstrate that a water transfer will unreasonably impact its water supply, operations, or financial conditions. The Administrative Proposal has been changed to clearly state that the district must provide sufficient evidence to support any impacts under section 3405(a)(1) (K) that would preclude water from being transferred. Reclamation would then provide the district's documentation to the transferor. The water transfer guidelines have established a 45-day period for a district to respond to a water transfer proposal. If the district does not respond with comments within the 45-day period, Reclamation will start notifying the district in writing that no impacts have been determined and Reclamation will continue to process the water transfer proposal, unless Reclamation is aware of information that would support the conclusion that transfer would have an unreasonable impact.

Comment: Issue is taken with the statement in the draft Administrative Proposal that there was general consensus among the interest groups that the water transfer approval process needed to be accelerated. One of the interest groups in this process does not consider itself to be a part of any such consensus. While the group does not advocate unnecessary delays or bureaucratic complications, it also believes that water transfers have potentially profound consequences and must be pursued carefully and deliberately. Acceleration of the process is not an unqualifiedly desirable end.

Response: Reclamation would agree with the statement that while there were some outstanding concerns, there was a general consensus in the group that "acceleration of the process is not an unqualifiedly desirable end." As such, Reclamation's programmatic water transfer approval process is limited to specific types of water transfers that meet the predetermined criteria. We have modified the Administrative Proposal to make clear that the group did not reach consensus on this issue.

Comment: Interior's proposal of divisional programmatic review has the potential for serving an important function in the determination and avoidance or mitigation of potential impacts from transfers while serving a streamlining function as well. What administrative authority do the already completed programmatic review documents carry? In Interior's proposal, the programmatic review document carries very great weight in the approval of water transfers. By creating a division-wide "one-stop" approval mechanism incorporating environmental review, the proposed programmatic review document is effectively serving as a sort of Programmatic Environmental Impact Statement (PEIS). Any document of such significance should be subject to at least the same level of comment and review as a PEIS, yet it appears that programmatic reviews have already been accomplished for large portions of the Central Valley with little or no input from interest groups or the public.

Response: Interior believes that there is merit in disseminating the programmatic review documents and supporting environmental analysis to the public for review and comment and will do that in the future. The Administrative Proposal has been rewritten to make this commitment. It should be noted that the programmatic water transfer documents prepared for the major

divisions of the CVP are designed to address specific types of water transfers such as agricultural-to-agricultural movement of water under specific conditions. Proposed water transfers within those divisions outside the specific conditions identified are still required to complete separate environmental documentation.

Comment: Interior's proposed solution of developing programmatic review and approval documents for water transfers to help streamline the approval process is appropriate. Programmatic reviews that were accomplished in 1996 appear to have been limited to transfers for agricultural purposes only. The Administrative Proposal should include a specific commitment to schedule and undertake programmatic reviews of transfers from agricultural uses to urban and environmental uses. There should also be some discussion of ways in which Reclamation can streamline the process for those transfers which require specific review.

Response: Interior supports the general concept of programmatic review of water transfers from agricultural agencies to M&I customers and/or environmental users. However, to date, there have not been a significant number of such water transfers. As the number of water transfers are projected to increase, programmatic approval will be considered. It should be noted, however, that the parameters used in agricultural water transfers to M&I users may be more difficult to analyze on a programmatic level.

Comment: We generally agree with Interior's efforts to streamline the transfer process, although we are concerned that the public has not had sufficient opportunity to review the programmatic review documents. We would suggest that these programmatic review documents utilize and require broad stakeholder input, be limited in size/duration/scope, and be linked with the water transfer clearinghouse (so that programmatic documents can be adjusted as more information becomes available).

Response: Interior has included a commitment that the programmatic water transfer review and supporting environmental documents receive public review and comment in the Administrative Proposal. It is our hope that in making these documents available for public review and comment, we will receive broad stakeholder input. The size, duration, and scope of the water transfers are part of the key parameters now in the water transfer documents. Reclamation already has stated that information obtained from the water transfer clearinghouse will be used in determining impacts of water transfers.

Comment: It remains unclear how Interior's approach to allowing the districts to review and comment on water transfers will serve to promote the expanded use of voluntary, market-based, user-initiated transfers; address reasonable district concerns; and give real meaning to the CVPIA's 20-percent threshold. The key to this issue lies in the "public process" that the CVPIA requires be used for transfers involving more than 20 percent of the total district CVP allocation in any year. But for transfers involving less than 20 percent, some means must be found to limit the overall scope of review by and, inherent therewith, potential arbitrary interference from the districts.

Response: Allowing districts to review water transfers neither promotes nor interferes with the expanded use of voluntary, market-based, user-initiated transfers. It does, however, provide Reclamation with valuable information needed to make its statutory determination that such a transfer will not have an unreasonable impact on the water supply, operations, or financial conditions of a district or its water users. In addition, it hopefully will address reasonable district concerns. As stated in your comment "real meaning to the CVPIA's 20-percent threshold" will occur in the public review process.

Comment: The discussion of successive short-term transfers in the draft Administrative Proposal raises the question of cumulative impacts. Significant third-party impacts could be precipitated by a single short-term CVPIA transfer that combines with prior, non-CVPIA-caused conditions, as well as by successive short-term CVPIA transfers.

Response: Interior agrees that adequate analysis of proposed water transfers must include an analysis of cumulative impacts, such as from successive short-term water transfers.

Comment: There should be a more complete discussion of the fact that the 20-percent threshold in section 3405(a)(1) for district review and approval of transfers was designed to limit the potential impact of water transfers on third parties. If the water transfer falls in the range of 20 percent or less of the district's CVP contract quantity, the underlying assumption in the CVPIA was that impacts on third parties would be nonexistent, negligible, or indistinguishable from other economic influences.

Response: Interior agrees that the statute calls for public review for all water transfers exceeding the 20-percent threshold. Interior, however, neither finds support in the statute or its legislative history for the assertion that the 20-percent limit in the statute was designed solely to limit the potential impact of water transfers on third parties, nor agree that transfers of less than 20 percent necessarily result in no third-party impacts.

Comment: The draft Administrative Proposal states that Reclamation believes a contractor's role in connection with proposed transfers exceeding the "20-percent threshold" described in section 3405(a) is "an advisory one." This assumption by Reclamation ignores the plain language of section 3405(a)(1). That subsection provides that proposed transfers shall be subject to review and approval by the contractor if the 20-percent threshold is exceeded. By using precisely the same language, Congress clearly intended for Reclamation and contractors to have the same authority for transfers falling (respectively) below or above the 20-percent threshold. Nevertheless, the Administrative Proposal concludes that, no matter how large the transfer, the affected contractor need only be asked for his opinion. Reclamation should solidify, not weaken, contractor involvement in proposed water transfers and should recognize the Congressional mandate included in section 3405(a)(1) relative to transfers exceeding the 20-percent threshold. To do otherwise violates the CVPIA and taints the Administrative Proposal.

Response: In the Presidential signing document to Public Law 102-575, the President of the United States cited constitutional concerns and therefore, interpreted the language of section 3405(a)(1) to be authorizing an advisory role. Consequently, Interior was directed to follow such an interpretation. [A copy of the Presidential signing document is available upon request.]

Comment: The draft Administrative Proposal also apparently concludes that the definition of the 20-percent threshold is to be based on the cumulative total of all water transfers involving a contractor's CVP water supply rather than based on an individual transferor's entitlement. During meetings of the water transfer workgroup, a number of diverse stakeholder interests suggested that each contractor should have the option of defining the 20-percent threshold as either applying to that contractor's overall water supply or each individual transferor's entitlement. The Administrative Proposal should explain why Reclamation has declined to pursue an approach which received support from different stakeholder groups during the meetings of the water transfer workgroup.

Response: The Administrative Proposal has been revised to clarify why Interior's proposed solution is 20 percent of contract entitlement rather than individual transferor's entitlement. Interior does not agree that districts should have the "option" of choosing one interpretation versus another. Clearly, there should only be one interpretation of a legislative statute.

Comment: A water transfer clearinghouse is a good idea, but its role should be expanded to include an "electronic bulletin board" feature to facilitate transfers involving, at a minimum, less than 20 percent of a district's contractual supply.

Response: The goals and objectives for the water transfer clearinghouse are being finalized. Reclamation does expect that an "electronic bulletin board" will be one of the features used to disseminate information.

Comment: Interior's proposal sidesteps a number of key issues: what, after all, is an impact that will be deemed "appropriate" for mitigation? How would such mitigation be provided? Should the third-party benefits associated with such transfers be taken into account? The proposed "clearinghouse" will not be sufficient to adequately address this important and complex issue. In general, the CVPIA's water transfer authorities provide important initial third-party protections (e.g., by prohibiting adverse long-term impacts to ground-water resources, by requiring detailed public review for transfers involving more than 20 percent of a district's total contractual supply, by limiting transfers to their "consumptive use" or "irretrievable loss" share, and by offering local entities a right of first refusal against off-Project transfers). With these protections in place, and in addition to the clearinghouse mechanism discussed above, Interior should commit to addressing this issue comprehensively, as a matter of substance, policy, and process, through the CALFED Bay-Delta program.

Response: The questions and specific answers are:

1. "What, after all, is an impact that will be deemed "appropriate" for mitigation?"

   Interior will attempt to identify impacts during the review of the water transfer proposal. Impacts that are deemed appropriate for mitigation will be determined at that time.

2. "How would such mitigation be provided?"

   Mitigation commensurate with the adverse impacts, if any.

3. "Should the third-party benefits associated with such transfers be taken into account?"

   Benefits at both the transferor location and the transferee location are taken into consideration.

4. "We do not believe that the proposed "clearinghouse" will be sufficient to adequately address this important and complex issue."

   The clearinghouse provides a mechanism to track water transfers. Reclamation envisions that information from the clearinghouse will be used to quantify and evaluate third-party impacts. Reclamation hopes to use this data to show correlations between impacts and the movement of water over time. The clearinghouse concept is a dynamic process that will evolve over time as more information is learned.

5. "In general, the CVPIA's water transfer authorities provide important initial third-party protections (e.g., by prohibiting adverse long-term impacts to ground-water resources, by requiring detailed public review for transfers involving more than 20 percent of a district's total contractual supply, by limiting transfers to their "consumptive use" or "irretrievable loss" share, and by offering local entities a right of first refusal against off-Project transfers). With these protections in place, and in addition to the clearinghouse mechanism discussed above, Interior should commit to addressing this issue comprehensively, as a matter of substance, policy, and process, through the CALFED Bay-Delta program."

   Interior is an active member of the CALFED Bay-Delta program and will address water transfer issues in that forum also.

Comment: The parties to a transfer should be charged with mitigating any third-party impacts of the transfer. Unfortunately, Reclamation's proposal to create a clearinghouse would simply document third-party impacts after the fact, and would not assist in addressing or mitigating those impacts in advance. Simply cataloging third-party impacts after they have occurred will do little to assist those who have suffered those impacts.

Response: The Administrative Proposal points out that the quantification and evaluation of third-party impacts is currently difficult to determine. Nevertheless, Reclamation is attempting to determine such impacts before water transfers are approved. However, as data is gathered and analyzed in the water transfer clearinghouse, we hope to improve upon our capability to predict what third-party impacts will be as water transfers occur in the future. In the interim, any long-term water transfers will be conditioned such that, as third-party impacts are identified in the water transfer clearinghouse, the parties to the ongoing long-term water transfers will be responsible for appropriate third-party impact mitigation, as applicable.

Comment: It is strongly recommended that the list of reasons that make individual water transfers unique (time, place, hydrological conditions) be expanded to include the impacts on local communities. The water transfer guidelines should be amended to invite community comment as well as district comment on potential effects of proposed water transfers. Individuals wishing to complete a transfer should be required to notify local communities, via newspapers and community government, of the proposed transfer. The communities would have the same 45-day comment period and same obligations to document unreasonable impacts that districts do. CVPIA [section 3405(a)(1)(K)] states that a transfer shall not be approved if it has an unreasonable impact on the water supply, operations, or financial conditions of the transferor's contracting district or agency or its water users.

Response: It is Interior's position that impacts on local communities should be addressed during the environmental review process, which includes the opportunity for public comment. In addition, as the water transfer clearinghouse becomes operational, an opportunity will exist for local communities to take a proactive approach in addressing the water transfer impacts. Also, on transfers subject to an exercise of a right of first refusal or involving more than 20 percent of the CVP water subject to a district's long-term contract, the existing Interim Guidelines require a transferor to publish notice of his intent to transfer in major newspaper(s) within the project service area before submitting their proposal to Reclamation. Interior remains committed, however, to making the transfer program open to public review and will explore ways to expand the opportunity for public comment and participation.

Comment: No short- or long-term water transfer which would add water to areas along the west side of the San Joaquin Valley which contributes to the salinity of the San Joaquin River should be allowed without full mitigation of both the short- and long-term cumulative impacts.

Response: As discussed in the draft Administrative Proposal and the *Interim Guidelines for Implementation of the Water Transfer Provisions of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575* (dated February 19, 1993), all proposed transfers will be evaluated on either a programmatic or case-by-case basis to ensure that third-party impacts of transfers (which would include increased salinity in the San Joaquin River) are appropriately addressed and mitigated. Interior has proposed establishment of a water transfer clearinghouse, jointly operated by Reclamation and the State of California Resources Agency, to track water

transfers and to provide and maintain a database which could be used to quantify and evaluate such impacts.

Comment: How the clearinghouse would be developed, managed, and funded is the subject of some concern, but such a database could be useful in understanding long-term trends and impacts of water marketing.

Response: The clearinghouse concept is still in its initial development. As such, the goals and objectives are currently being discussed. Once the strategy, goals, and objectives are drafted, they will be available for public review and comment before being finalized. Interior envisions that the water transfer clearinghouse will be managed and funded by each of the participants. We also envision that the water transfer clearinghouse will be a dynamic process that evolves as additional information is learned.

Comment: The draft Administrative Proposal states that the terms and conditions on long-term water transfers could be developed to ensure that third-party impacts are appropriately addressed. This implies that Reclamation considers mitigation for such impacts to be very open-ended (i.e., the cost of a transfer could increase substantially during the term of the contract). To eliminate the impact of this open-ended risk on the water transfer market, Reclamation should, as soon as possible, make clear its policies related to the use of clearinghouse data to connect claims of third-party impacts with specific water transfers.

Response: As stated in the Administrative Proposal, Interior is very concerned about identifying and quantifying third-party impacts. A long-term water transfer may be approved because no third-party impacts may be known or envisioned on the date the long-term water transfer is approved. However, as impacts become known or identified resulting from such long-term water transfers, parties to such water transfers should mitigate for such impacts. Such mitigation should not be the responsibility of the CVP contractors as a whole.

Comment: The programmatic review of water transfers proposed by Reclamation as a streamlining process should include an assessment of third-party impacts, to the extent that this can be identified at the programmatic level. The programmatic review should include an assessment of both negative and positive impacts of water transfers from the transferor's area.

Response: The programmatic review process for water transfers will comply with all applicable federal and state laws including the effect of such water transfers on the affected environment as well as including an assessment of the impacts of moving the water from one area to another.

Comment: A forum should be created to monitor impacts associated with transfers to ensure that mitigation for individual transfers is appropriate.

Response: Currently, Reclamation releases the environmental documents associated with water transfers to the public for review and comment. Additionally, Reclamation has established the

water transfer clearinghouse in order to provide the public with additional information on water trends and, hopefully, document third-party impacts. Reclamation believes that as the water transfer clearinghouse evolves, parties will see mitigation impacts, and this forum will evolve to meet the stakeholders' needs.

Comment: Any appropriate third-party impacts associated with water transfers that are not mitigated by the CVPIA should be mitigated by the parties to the water transfer.

Response: Interior agrees. Interior is very concerned that parties who benefit from water transfers mitigate for any adverse impacts of such water transfers, as necessary, and that CVP contractors as a whole are not tasked or expected to mitigate for impacts associated with water transfers.

Comment: Interior's proposal to develop a clearinghouse to track water transfers should be applauded. The clearinghouse would serve as a useful tool for counties to adequately inform parties of the type and number of water transfers being approved in the Central Valley. However, it is not clear from the draft whether the proposed clearinghouse is only an idea or a real project.

Response: Reclamation has already discussed the water transfer clearinghouse concept with the State of California Resources Agency, and they have tentatively agreed to pursue such a concept. Currently, the staff assigned to this are developing proposed goals and objectives and reviewing existing water transfer tracking systems. Reclamation envisions that, as this process matures, public workshops will be held and the water transfer clearinghouse process and procedures will be discussed and finalized.

Comment: Exception is taken to the description in the draft Administrative Proposal as to whether the Restoration Fund charges mitigate third-party impacts. In fact, the Restoration Fund Roundtable was suggested as an alternative venue to discuss third-party impact mitigation, but there was no suggestion, nor was there debate or disagreement, as to whether Restoration Fund charges already mitigated third-party impacts. The Restoration Fund clearly does not provide mitigation for community or economic impacts.

Response: The Administrative Proposal has been appropriately changed to reflect the issue of third-party impacts and the use of the Restoration Fund.

Comment: Many third-party impact issues could be most effectively addressed at the programmatic level. Most of the discussion of third-party impacts in the Administrative Proposal appears to focus on mitigation of impacts after they occur. Avoidance of third-party impacts is equally important and usually cheaper and more effective. Such avoidance can be accomplished by including consideration of potential third-party impacts in both programmatic and individual proposal review.

Response: Interior would agree that the avoidance of third-party impacts is important and usually cheaper and more effective in the long-run. Interior would also agree that, if possible, the identification and appropriate mitigation of third-party impacts should be addressed prior to the water transfer being approved. However, as pointed out in the Administrative Proposal, the quantification of third-party impacts is difficult to determine. Interior believes that data from the operation of the water transfer clearinghouse will assist in the quantification and evaluation of third-party impacts. As our understanding of such impacts grows, Interior will be better able to require that adverse third-party impacts that may result from water transfers be avoided, rather than mitigated.

Comment: How will the clearinghouse be funded? Who will make the determination of the existence and causation of a third-party impact? In response to these questions, a trust fund should be established into which the parties to a transfer would pay fees. Such a fund would require statutory authorization, which could also provide for an administrative body which could make the determination of the existence and causation of a third-party impact as well as the nature of mitigation efforts, based on information provided by the clearinghouse.

Response: Interior does not support any new statutory authorizations at this time to assess fees on water transfers to mitigate for third-party impacts. Interior believes parties wanting to participate in the clearinghouse process will be responsible for an appropriate share of the funding for clearinghouse activities. It is Interior's intent that the parties to a water transfer should be totally responsible for any applicable third-party impacts and a general assessment on all parties is neither appropriate nor equitable. Reclamation will make a determination of the existence and causation of third-party impacts as well as the nature of mitigation efforts.

Comment: We are very concerned and disappointed in how Interior is responding to agricultural lenders' concerns in the draft Administrative Proposal. This was one of the 22 issues that the work team resolved. Specifically, the proposed solution to agricultural lenders' concerns included a carefully worded notification process. Agricultural lenders were concerned that in some existing agricultural loans, the individuals/districts would be able to transfer their allocated water supply outside of their service area, thereby devaluing their properties, without the knowledge or prior consent of the agricultural lenders. The concerns of the agricultural lenders are very important, as a loss of confidence by agricultural lenders that their collateral will be protected against transfers of water supplies outside a service area could result in a less stable and more costly lending market, all to the detriment of growers. The intent of the consensus solution is to provide equal protection to asset values of existing loans. The definition of third-party impacts in the draft Administrative Proposal ignores this most important distinction and concept. The suggestion that lenders review clearinghouse lists flagrantly ignores the work team's agreed-upon concept of the transferor being responsible for an active (rather than passive) notification process. Reclamation is strongly urged to adopt the consensus reached relative to agricultural lending issues by the workgroup as part of its Administrative Proposal.

Response: Reclamation agrees that the work team did reach consensus that there should be an "active" notification process where transferors would notify existing agricultural lenders that a water transfer was being accomplished in order to protect the asset values of existing agricultural lenders' loans. However, since the inception of the Administrative Proposal process, Interior has stated that our role was to facilitate the meetings and provide information and assistance as necessary. Further, although we were not part of the "consensus process," Interior agreed to look closely at any consensus agreements that resulted from these work teams. Interior has a concern with interjecting itself in the fiduciary relationship between our contractors and their agricultural lenders. It is our belief that terms and conditions of loans between our contractors and lending institutions are private matters. Furthermore, if the concern is that lending institutions are not notified of water transfers occurring on existing loans, then the water transfer clearinghouse will provide a mechanism for agricultural lenders to monitor and obtain information concerning the movement of water in the CVP.

Comment: The draft Administrative Proposal for making the transfer process efficient does not address the central policy issue of whether the CVPIA applies to water transfers that were undertaken and approved prior to enactment of the CVPIA.

Response: The CVPIA applies to all water transfers of CVP water authorized under the statute.

Comment: Since enactment of the CVPIA, Reclamation's water transfer 'policy' and practice has significantly disrupted the CVP water customers' historical capability to execute short-term, spot-market water management transfer/exchange/banking transactions. The draft Administrative Proposal does not solve the problems associated with attempting to apply the cumbersome bureaucracy of the CVPIA to such transfers.

Response: Interior disagrees. In 1995, Interior established a process to accelerate the approval of proposed water transfers using the CVPIA water transfer approval criteria. Interior's evaluation of the 1995 process revealed that water transfers were not hindered or disrupted by implementing CVPIA water transfer procedures. This test was a success. Interior followed through with this process in 1996, and in 1997, and again, the process accelerated the approval of water transfers. Interior plans to continued this process in the future and modify and update the process as we gain added knowledge and experience.

Comment: There is strong disagreement with Reclamation's position that all transfers of CVP water must occur in accordance with section 3405(a), and Reclamation is urged to process transfers, exchanges, and banking arrangements which could have been approved prior to the CVPIA in the manner in which transfers were processed before the enactment of the CVPIA. If Reclamation refuses to acknowledge that proposals which could have been approved before enactment of the CVPIA can still be processed in a pre-CVPIA manner, a programmatic approach to streamlining transfer approval is vital and must be implemented immediately.

Response: Interior intends to apply the CVPIA criteria to all water transfers of CVP water approved by the Contracting Officer. Reclamation believes that its implementation of the programmatic review for water transfers using CVPIA criteria and individual review of unique or complex water transfers is a reasonable approach to streamlining the process. Our experience to date with the programmatic transfer approval process supports this conclusion.

Comment: Disagreement exists over Reclamation's position that Sacramento River water rights contractors' base supply water should be treated as exempt from the CVPIA water transfer provisions.

Response: As stated in the Administrative Proposal, the Sacramento River water rights contractor's base supply is water that such contractors divert free of charge and is not deemed "Project" water under their contracts. Therefore, Interior does not interpret section 3405(a) as applying to the base supply.

Comment: Whether or not the CVPIA is interpreted to apply to base supply, Reclamation must address the fundamental concern that transfers of base supply water should not increase (rather than simply reallocate) "baseline" diversions and depletions, reduce Restoration Fund revenues, or otherwise frustrate the goals of the CVPIA. If Reclamation chooses not to address this issue in the water transfer guidelines, it must do so in the base supply guidelines.

Response: Reclamation is also concerned that transfers of base supply water do not impact CVP water rights. Although CVPIA transfer conditions do not apply to base supply water transfers, Reclamation does have contractual authority to review and approve such water transfers. Restoration Fund revenues are not being reduced by stating that CVPIA water transfer provisions do not apply to base supply water. In addition, Reclamation does not believe the goals of the CVPIA will be frustrated by stating that CVPIA water transfer provisions do not apply to base supply water. Reclamation will be working with the Sacramento River settlement contractors to come to a mutual understanding on how base supply water transfers should be processed.

Comment: Sacramento River settlement contracts relate to "base supply" water and "project" water. Base supply water is not subject to the CVPIA, but is subject to the water transfer provisions of California state law. It would be helpful to the State Water Resource Control Board (SWRCB) to have all CVP water contractors receive clearance from Reclamation prior to submitting a petition to the SWRCB for transfer of base supply water.

Response: Reclamation agrees with your comment. Although base supply water transfers will be processed in accordance with state law, Reclamation does have contractual authority to review and approve such water transfers. The purpose of developing water transfer guidelines for base supply water is to reach a mutual agreement between the Sacramento River Settlement Contractors and Reclamation on the terms and conditions of base supply water transfers. Hopefully, such a base supply water transfer guideline would accelerate Reclamation's contractual review and approval of such transfers. Existing CVPIA water transfer guidelines

address the terms and conditions for processing Sacramento River Settlement contracts project water transfers.

Comment: Transfers of base supply must be accomplished consistent with the monthly amounts listed as base supply in settlement contracts.

Response: As stated in the Administrative Proposal, Reclamation will be negotiating base supply water transfer guidelines. Your comment identifies one of the key issues that will be addressed in that forum and not in this Administrative Proposal.

Comment: Serious concern remains about Reclamation's application of section 3405(a)(1)(B) to transfers of CVP water from the Exchange Contractors. That section specifies that costs for CVP water transferred to non-CVP users must be "repaid" at the "cost of service" or "full cost" rate. The obligation to "repay" CVP costs in a transfer can exist, however, only where there is an obligation by the transferor to repay CVP costs under its contract. Thus, this requirement applies only to water transferred under contracts which contain a repayment obligation; that is, water service or repayment contracts. In recognition of the Exchange Contractors' pre-existing water rights, they are not subject to any repayment responsibility. Because the contract for delivery of CVP water to the Exchange Contractors does not require that CVP costs be "repaid," the "cost of service" repayment charge should not apply to a transfer of Exchange Water. This interpretation of section 3405(a)(1)(B) is consistent with the intent of Congress. The purpose of section 3405(a)(1)(B) is clearly to make sure that federal subsidies are not transferred to non-CVP entities. When the Exchange Contractors' CVP water is transferred, no transfer of any federal subsidy occurs. The requirement of that section is clearly satisfied without any additional "cost of service" payment.

Response: Reclamation does not agree for the following reasons:

1. CVPIA states in section 3405(a)(1)(B) that, "All water under the contract which is transferred under authority of this subsection to any district or agency which is not a Central Valley Project contractor . . . shall, if used for irrigation purposes, be repaid at the greater of the full-cost or cost of service rates, or, if the water is used for municipal and industrial purposes, at the greater of the cost of service or municipal and industrial rates." Clearly, the statute requires the collection of one of the above water rates, and provides no exception for water transferred by the Exchange Contractors.

2. It is correct that the contract entered into between the United States and the Exchange Entities does not contain a repayment obligation. This is a negotiated contract between two parties; however, there are costs to the CVP for this exchange agreement and the movement of water. These costs, for the most part, are borne by all CVP contractors under the CVP financial integration system. Therefore, Congress directed the United States to recoup such costs in section 3405(a)(1)(B).

Comment: The ability to bank CVP contract water should not be limited solely to utilization of Project facilities, but should generally include banking in non-Project facilities as well.

Response: While Reclamation will address water banking in separate guidelines, Reclamation does have authority under CVPIA to store CVP water in non-CVP facilities.

Comment: Separate criteria for water banking and conjunctive use programs should be developed and Reclamation is urged to work closely with stakeholders to define water banking and to develop water banking criteria. In order to maximize the water-related benefits of these non-traditional water supply programs, water banking criteria should allow a broad range of water banking alternatives to evolve. Any proposal which involves the use of CVP allocations in wet years to create a firmer water supply in dry years should be viewed as a water banking proposal.

Response: Reclamation will be holding public workshops and soliciting public comments on the proposed criteria for water banking type arrangements. We anticipate that these workshops will be held in late 1998.

Comment: The purpose of the limitation on transferable water contained in CVPIA section 3405(a)(1)(A) was to prevent paper water transfers of unused CVP contractual entitlement. It should be recognized that some CVP contracts explicitly recognized and anticipated increases in demand, and therefore contain provisions to accommodate these planned increases. These contractors should not be prevented or restricted from transferring CVP water for which they are contractually obligated to pay, simply because they were either not receiving any deliveries in 1992 or were not at full development at that time.

Response: CVPIA is very explicit on what water is available to the CVP contractors for transfer. Section 3405 (a)(1) (M) of the CVPIA allows contractors within the watershed that had not reached full project entitlement to transfer their water supply to other CVP contractors under certain conditions.

Comment: With respect to the issues covered by the Administrative Proposal, we do not necessarily disagree that a non-CVP "entity" within the CVP service area has a right of first refusal under section 3405(a). However, we believe that the intent of the right of first refusal is best carried out if CVP contractors have a priority over others with the right in the event of competing exercises of the right.

Response: Reclamation does not interpret CVPIA to state that CVP contractors within the CVP service area have a priority over any other entity within the CVP Service Area. The Administrative Proposal has been revised to incorporate a discussion on competing exercises of the right of first refusal.

Comment: Strong disagreement exists that any party exercising its right of first refusal be obligated to pay the $25 "M&I surcharge" if that surcharge applied to the subject transfer. The purpose of the right of first refusal was to ensure that those intended by Congress to benefit from the CVP -- those in the CVP service area -- were afforded an opportunity to retain water in the CVP service area that might otherwise leave the originally intended place of use to support urban growth. Nowhere in the CVPIA is there any indication that the goal of providing money to the Restoration Fund takes priority over the goal underlying the right of first refusal.

Response: Section 3405(a)(1)(F) of the CVPIA requires that entities exercising a first right of refusal be subject to the same terms and conditions of the proposed transfer. Interior's position is that the $25 per acre-foot surcharge is a term and condition of the water transfer. Therefore, it remains applicable if a first right of refusal is exercised.

Comment: The $25 per acre-foot surcharge is not a negotiated term or condition of a water transfer contract, but an incidental fee that would have only been legally collectible had the water, in fact, been delivered to a non-CVP contractor. Just as other incidental fees (such as those for conveyance and power) vary or are not applicable when water is delivered to a different location under the right of first refusal, so does the $25 per acre-foot surcharge not apply when the water is delivered to a CVP contractor.

Response: While the $25 per acre surcharge is not a negotiated term, it is nonetheless a condition for any transfer outside the CVP service area for M&I purposes. Therefore, it is Reclamation's position that the $25 per acre-foot surcharge is a term and condition of the water transfer as such terms and conditions are used in section 3405(a)(1)(F) of the CVPIA.

Comment: The language of the CVPIA can be read to allow any entity within the CVP service area to exercise the right of first refusal. Reclamation should provide a legal definition of the word "entity" for purposes of exercising this right.

Response: The Administrative Proposal provides clarification on the definition of an "entity" that may exercise the right of first refusal.

Comment: Reclamation should articulate its policy on recognizing the right of first refusal when more than one transfer of CVP water is made to an area that has not historically been served by the CVP. The SWRCB must approve expansion of the CVP place of use to accommodate the first CVP water transfer, but it is not clear whether Reclamation interprets subsequent transfers of CVP water to the same area to be subject to the right of first refusal.

Response: The CVPIA right of first refusal under Federal law and a California SWRCB water transfer action regarding a temporary expansion of CVP water rights place of use are two separate and distinct processes. The right of first refusal under section 3405(a)(1)(F) applies to transfers of CVP water outside the CVP service area. The CVP service area is defined in section 3403(e) of the CVPIA to mean that area of the Central Valley and San Francisco Bay

Area where water service has been expressly authorized pursuant to the various feasibility studies and consequent congressional authorizations for the Central Valley Project. Each water transfer proposal, whether for a term of one year or multiple years, to an entity located outside the CVP service area is subject to the right of first refusal. If a second water transfer proposal, whether for a term of one year or multiple years, to the same or a different entity is negotiated, the right of first refusal is triggered on the second water transfer proposal as well, because the "CVP service area," as defined by law, was not modified by the first transfer.

Comment: It may sometimes be the case that exercising the right of first refusal on a portion of a transfer may reduce the benefits to the original transferee such that the transfer is no longer viable for the original transferee. In that case, the party or parties exercising the right of first refusal should compensate the original transferee for all costs incurred in developing the transfer.

Response: A fundamental premise in exercising the right of first refusal on a portion of a water transfer is that the remaining portion of the water transfer will still be viable to both the transferor and transferee. If the remaining portion of the water transfer is not viable, then the exercise of the right of first refusal cannot be accomplished on a portion of a water transfer. Reclamation would expect that the parties to a water transfer should be able to work out all the conditions for allowing a right of first refusal on a portion of a water transfer.

Comment: Reclamation should adopt the right of first refusal as a permanent element of its final water transfer policy. This will assure that demands within the CVP service area are met prior to the transfer of water outside of the service area.

Response: Section 3405(a)(3) clearly lists the conditions that apply to water transfers executed after September 30, 1999. Therefore, Reclamation cannot adopt the right of first refusal as a permanent element of its final water transfer policy in conflict with the statutory provision.

Comment: Reclamation is requested to abide by its advanced notice of proposed rulemaking (59 Fed. Reg. 67265 (Dec. 29, 1994)), and ensure that formal rulemaking for the CVPIA water transfer provisions (CVPIA Section 3405(a)) will occur as soon as possible, and in compliance with the National Environmental Policy Act requirements.

Response: Interior is currently drafting rules on water transfers and is well into the rulemaking process. Interior expects the rules and regulations to be published sometime in 1999.

Comment: The draft Administrative Proposal addressing water transfers does little to resolve the very real implementation issues which have arisen relative to section 3405(a). Instead of action items, the Administrative Proposal effectively offers only the prospect of continuing dialogue. While more dialogue is preferable to litigation or confrontation, the various stakeholders all seek action, not discussions. Additionally, and as noted in the Administrative Proposal, at least 22 concerns were raised by members of the water transfer workgroup. While it is true that certain of those issues are interrelated, the Administrative Proposal makes no effort whatsoever to address

many of them -- even where they were discussed by the workgroup and progress towards consensus was achieved. While work should continue with other stakeholders to address implementation issues arising in connection with section 3405(a), all issues should be displayed and addressed.

Response: In Appendix B, Reclamation provides comments as to how each of the 22 issues has been addressed or will be addressed in other forums.

Comment: The area of origin issue is not a CVPIA implementation issue. However, one issue -- an asserted area of origin priority over other entities within the CVP service area in exercising a CVPIA-authorized right of first refusal -- still needs to be addressed by Reclamation.

Response: Reclamation does not agree that an asserted area of origin priority would take precedence over any other exercise of right of first refusal in a water transfer. Area of origin statutes and any relative priorities are addressed in the California Water Code and Reclamation, as a water right holder under California law, is complying with these statues of the California Water Code.

Comment: Water transfers which directly or indirectly deprive a 'Watershed of Origin' user of needed water is both bad policy and contrary to law. Like the focus on transfers within a division, Reclamation should also focus on 'Watershed of Origin' areas
Response: Reclamation complies with State of California water codes such as the area of origin statutes. Reclamation does not consider the area of origin issue to be a CVPIA implementation issue and has prepared and distributed a draft paper discussing the applicability of area of origin under California law to the CVP.

APPENDIX B -- WATER TRANSFER ISSUES

The 22 water transfer issues were summarized under the following general topics. In response to comments, Interior has restated each issue and how it is being addressed.

REVIEW AND APPROVAL PROCESS

Issue #1. Delays and complexity of internal processing by Reclamation and coordination of processing efforts with other agencies (i.e., State Water Resources Control Board, U.S. Fish and Wildlife Service, and National Marine Fisheries Service). Inconsistency of administration by Reclamation and Reclamation disincentives to transfers. *The programmatic water transfer approval process discussed in this administrative proposal addresses the issue.*

Issue #4. Involvement/lack of involvement in transfer administration/approval by district. What procedures should govern district involvement? *Addressed in this administrative proposal.*

Issue #11. Propriety of requiring districts to create water transfer programs for water users. *Addressed in this administrative proposal.*

Issue #12. Need for objective criteria for conditioning or denying a transfer. *Addressed in this administrative proposal.*

Issue #13. What standard should apply to the Secretary of the Interior's review of any district input regarding proposed water transfers? *The District should provide its evaluation of water transfers pursuant to section 3405 (a)(1)(K), and the Secretary should have and consider this input but should not be required to defer to the District's opinion.*

Issue #15. Clarification of 20 percent threshold (i.e., may each water user only transfer 20 percent of that user's district supply, or may a water user transfer 100 percent of its supply so long as the total amount transferred from that district is less than 20 percent). *Addressed in this administrative proposal.*

THIRD-PARTY IMPACTS

Issue #10. Ground-water impacts (i.e., adequacy/propriety of review undertaken and requirements to protect ground water in area of transfer). Who should be responsible for review and imposition of ground-water requirements? *A mechanism*

has been proposed in the administrative proposal to determine and quantify the third-party impacts.

Issue #16. Determining and addressing third party impacts. *Same response as to Issue #10 above.*

Issue #17. Level of environmental review for long-term transfers. *Interior has not addressed this issue in this administrative proposal. Interior will continue to follow established environmental laws and procedures.*

Issue #19. Whether there should be a limitation on profits obtained through water transfers and if so, whether excess profits should be used for fish and wildlife mitigation purposes. *Interior did not respond to this issue. The fundamental premise of water transfers is that the act is between willing buyers and sellers. CVPIA does require additional charges on water transfers and such charges are remitted to the U. S. Government.*

CVPIA APPLICABILITY

Issue #2. Impediments to historical transfers, exchanges, and banking arrangements (i.e., Reclamation's position that CVPIA transfer provisions preempt all other federal authority for transfers of Central Valley Project (CVP) water). *The issue was addressed in the administrative proposal.*

Issue #3. Applicability or inapplicability of CVPIA transfer provisions to Sacramento Valley base supply water, exchange contractor water, water rights settlement water. *This issue was addressed in the administrative proposal.*

Issue #8. Propriety of Reclamation's determination relative to imposition of increased pricing (for example, on base supply water, exchange contractor water and water rights settlement, or for water to be transferred for environmental purposes) and $25 municipal and industrial (M&I) surcharge. *This issue was addressed in the administrative proposal.*

Issue #14. CVPIA transfer provisions vs. California law. What does "consistent with state law" mean? *Interior believes its actions are consistent with State of California water code and does not plan to further address this issue.*

Issue #18. What, if any, procedures should be developed to amend contracts to accommodate transfers? *Interior partially addressed this issue in this administrative proposal through the programmatic water transfer approval process. Interior is also willing to negotiate more specific water transfer provisions in water service contracts.*

TRANSFERABLE WATER

Issue #5. "Wet" water versus "paper" water issues (i.e., appropriateness of consumptive use limitations/refill criteria). Is historic use the relevant measure for transferable water, or is contract quantity without regard to historic use more appropriate? How should "conserved water" be defined and prioritized relative to transfers, and should the CVPIA transfer provisions be applicable to conserved water? *This issue was partially addressed in the administrative proposal. The development of the Programmatic approval water transfer process addressed the issue of historic use and consumptive use for intra-CVP division water transfers. However, the issue of consumptive/historic use and the issue of recognizing past water conservation practices as the basis to transfer water today will be further addressed in the CALFED process and the rules and regulations process, not in this administrative proposal.*

Issue #6. Differentiation of "true" transfers from exchanges and water banking arrangements. *Interior has committed to develop water banking criteria separately and will address this issue in that forum and codify our position in the rules and regulations process.*

RIGHT OF FIRST REFUSAL.

Issue #9. Clarification of operation of right of first refusal (e.g., method of providing notice, entities entitled to exercise right). *This issue was addressed in the administrative proposal.*

LENDER CONCERNS

Issue #22. Agricultural lender involvement in water transfer proposals. *Interior has responded to this issue to a limited degree in the administrative proposal and substantially in the response to comments of this administrative proposal.*

AREA OF ORIGIN

Issue #20. Interpretation of Section 3405 (A) (1) (m) - Area of Origin - of CVPIA. *The issue raised in this administrative process was what was Reclamation's interpretation of the Area of Origin provisions of California law. Reclamation has released in draft form, its interpretation of area of origin provisions of California law and is now evaluating the comments received.*

OTHER

Issue # 7. Wheeling charges and losses charged to transferring parties. *The scope of this issue never really developed. The issue raised concerns about the cost of wheeling non-project water through Federal facilities. Reclamations CVP Irrigation rate-setting policy discusses this issue. The second part of the issue regarded the use of Preference Use Power to convey non-project water through Federal facilities. The CVPIA policy on using project use and preference use power are being addressed separately by the Central Valley Project Operations Office.*

Issue #21. Priority of transfer water, characteristics of irrigation water as it is transferred to M&I uses. *This issue addressed the allocation priority of the transferred water. Resolution was reached in the water transfer forum that water subject to a transfer agreement would retain the shortage of the transferor. Therefore, water transferred from an irrigation water user {the transferor} to a municipal and industrial contractor would be subject to the irrigation water shortage provision of the transferor. This issue is addressed in the Central Valley Project Improvement Act Administrative Proposal on Urban Water Supply Reliability, dated June 9, 1997.*