Comments of the Department of Water Resources
At the Workshop of the State Water Resources Control Board
On Water Transfers[1]

DWR has commented, directly and indirectly, at great length and over a long period of time, on the "nuts and bolts" of the Water Transfer Guide. We have worked closely with Jerry Johns of your staff and with Greg Young and the CALFED transfers staff, as well as with many other interested parties. We intend to continue to do that, and therefore encourage the Board to continue to work on and improve the Guide. It offers the opportunity to explore and to explicate one of the most difficult and misunderstood areas of California water law.

I want comment briefly on the legal and physical context of water transfers in California. The Guide contains a useful background discussion of water rights and the no-injury rule and so forth. I think, however, that it needs to go a lot further and deeper and to present a more fundamental and rigorous discussion of the basic nature of water and property in water. I think that, from that discussion, the Guide could then set forth some contextual principles which would help greatly to make the "nuts and bolts" of the Guide hang together and make more sense.

I also think this is needed, particularly because of the persistence of many, fundamental misconceptions about water transfers. At their root, I think, is a great tendency to believe that water is no different from any other economic good and to interpret the physical complexity and uncertainty of water and the rules of law which sometimes must reflect that complexity as a problem of unnecessary legal arcana and institutional inertia or friction. I think that it is has become very clear that we need to go back to basics.

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[1]David B. Anderson, May 4, 2000.

The Guide should set forth and explain the fact that water is by its nature a fugitive and fluctuating resource; and property rights in water are therefore inherently fraught with both physical and tenurial uncertainty. Water is a common-pool resource, one which, until it is captured, is incapable of ownership and of the "precise and static demarcations" of which property in land or personal property is capable. As a common-pool resource, it is one in which property rights are not exclusive but instead exist simultaneously and are shared, and in which the exercise of one person's right almost invariably impacts, or puts in issue impacts on, the rights of others. It is the intrinsic nature of the water right to be burdened by the rights of others.

In this same way, water is a resource, and water use is an activity, inextricably connected with the sustenance of natural systems and environmental uses and values. The stream is not just a common pool for private rights, it is a broader common pool for all uses, including instream beneficial uses. Finally, but not least, water is a resource fundamental to the well-being of local communities and areas in which it occurs and is used. In short, because of the inherent nature of water and watercourses, water transfer--inherently, automatically--raises significant issues about the private and social impacts and costs external to the transfer transaction, which must, therefore, be administratively addressed.

Of all the possible catchwords I would like to leave the Board with today, one rises to the top. It is "responsible transfer". There are transfers and there are responsible transfers. A responsible transfer is one which assures (1) that it is only the transferor's rights that are being transferred, and not someone else's; and (2) that the transfer is one whose external social costs have been appropriately accounted for. The market/transfers paradigm is that society is better off through voluntary trades. We subscribe to that view. But transfers that trade someone else's water are not voluntary; and transfers that do not account for all of their social costs cannot claim to confer the social benefit of the economic efficiency model. So: "responsible transfer".

It is our belief that the vital role to be played in this State by the moving and marketing of water can only be achieved by making sure that water transfers are responsible transfers. Yes, let us move as quickly as we can to develop and approve transfers; but the way to accomplish this is not to ignore that the physical system is very complex. I think the State has in fact sought to do this repeatedly over the past decade or so; and we will continue to look for ways to improve. But it is also our belief that haste at the direct expense of other right holders or of the environment or of water quality is not ultimately going to streamline or make more efficient our water transfers system. On the one hand, as I've said, that does not give us the "economic optimization" benefits that transfers are supposed to give us. And, on the other hand, it will ultimately disserve the cause of transfers in general by leading to mistrust, to parochialism, to litigation, and perhaps even to more layers of control--especially at the local level.

One measure of the magnitude of the problem of playing down the interrelatedness of water use in trying to promote transfers is given by the magnitude of reuse: According to Bulletin 160-98, reuse of surface water accounts on average for six and one-half million acre-feet of the developed water use in the State. This does not include recycled wastewater, nor does it include groundwater; perhaps most importantly, it does not include water reused by instream beneficial uses. How can a transfer system slight or ignore reuse, or refuse to take it seriously? It can't. Pretending that the physical system is not complex, or that water rights law is not complex for a reason, will not get us a viable transfers system.

Water in this State can be transferred and frequently is. But, while society benefits from voluntary transfers, as it does from voluntary transfers of other types of property, we must recognize that the transfer of water raises both private and public issues and concerns qualitatively and quantitatively different from the transfer of virtually any other type or property. Responsible transfers must recognize and deal with these issues.

So, in order to impart this fundamental principle of responsible transfers, I think the Guide needs to go back and discuss what a water right is--and why. Only in this way will the key principle of "legal injury" and why and how it applies to transfers be clear as people try to make sense of the "nuts and bolts" of the Guide and to keep them straight.

What are some of the key contextual points? At the center is the very nature and scope of the water right itself, the "property" that is being proposed for transfer and the property system in which our transfer market must work. I think, for example, that this is one instance in which the fact that water rights are "usufructuary" rights is important. They are rights to *make use* of water. Priority of right is based upon priority of *use*. Later uses have lower priorities. Add to the priority of use the very nature of the resource in which private water rights are recognized: Water rights do not attach to a particular parcel of water over which a right holder exercises dominion; rather, they are rights to share in a common pool resource, one in which several people hold rights at the same time. Not only is the resource a common pool, but, for flowing streams in particular, it is one in which the same water may be *used* and *reused*, over and over, by different right holders. In other words, it's not just a matter of having multiple rights in the same watercourse; but of having multiple right holders physically using the same water. This is the basic physical and institutional setting in which we are seeking to identify what may be severed and removed from the common pool for transfer.

The purpose of transfers is to make water available to different uses and to promote efficiency; to make the maximum use of the water we have. In fact, it was the State's desire historically for multiple use, for efficient use, and for the maximum use of water that led us to recognize and to give form to private property rights in water and watercourses in the way that we have. Because water is a common pool resource, because reuse is such an integral feature of water use and supply, because the water right is not to a particular piece of water but is a right to take and use water from a certain watercourse, and because of the importance of the phenomenon of reuse, the

private water right is specific as to location and as to purpose of use. The specificity of the senior right encourages others to use the stream, too, and thus fosters multiple uses.

The property right of every user on the stream is qualitatively the same (and equally entitled to protection): *It is the right to take and use water, subject to existing conditions and uses.* The first user has the first right to make the permitted use. His use and his right do not impose a servitude upon the remaining, unused flows. Others may then come and take and use, and--importantly--get a vested right to the water that is there. The rights of still later users follow the same rule. On and on. New uses are subordinate to existing uses. New uses, even by a senior right holder, are subordinate to existing uses. A transfer is simply a new use, albeit by an existing user or his assignee. Transfers are thus subordinate to existing uses.

All of this discussion helps, I believe, to provide the framework for understanding "legal injury". It immediately helps us to understand the seeming "contradiction" that it is within the user's right to diligently pursue and cause an increase in water use at the place of use and to harm others thereby with legal impunity; but that the same harm is unlawful (i.e., it constitutes "injury" or "legal injury") if a "new use" is being made. This is only hard to understand if we don't take the time to understand the basic nature of water rights, the water rights system, and, ultimately, water itself.

Most of all, I think this framework helps us to understand that "legal injury" is the equivalent of saying that the water "belongs" to some one else--to use the common if not legally rigorous parlance (because a water right is not an ownership right). If legal injury is ignored or allowed to be slighted, we are simply countenancing the transfer of some one else's water. Again: If you can't transfer water without avoiding legal injury, then you're trying to transfer someone else's water. That's not a voluntary transfer. That's not a market transfer. Sometimes we hear it said that the protection of other

water users, the "no-injury rule", is an impediment to transfer. That is like saying that transferring a piece of land and having to resolve and satisfy the easements, leases, liens, or mortgages that might happen to attach to and encumber that land is an impediment to transferring real property. Well, it is. But if you don't resolve them, just like if you don't satisfy the requirement of no legal injury, then the result is you're simply trying to transfer property rights and interests that belong to someone else. That cannot be the basis of any successful property or property transfer system.

Another area of confusion about transfers where the provision of context would similarly be helpful is in the transfer of conserved water. Here, I think the Board should make two clear sets of distinctions:

1. The Board should distinguish between the transfer of current use, where water is used in the place of transfer *instead of* at the existing place of use (a zero-sum transfer, the product of what has been called "fallowing") and the transfer of water which is in some sense new to the system--under which water will continue to be used as before at the original place of use *as well as* at the place of transfer.

2. The Guide should carefully and clearly set forth the difference between conservation which adds water to the system and conservation which simply reduces the amount of water diverted. These are often referred to as basin efficiency and farm efficiency. In the latter case, because water often gets reused before it ends up being evaporated or transpired or lost to a saline water body, the conservation measure--however helpful to the farmer--may have no impact whatsoever on total water supply.

Transfers and conservation, each a broad and important water policy goal of our State, really have little to do with each other. Farm efficiency conservation, like tail water recovery or weed control, has benefits and incentives quite apart from the creation or the ability to transfer water: energy savings, water quality benefits, fish entrainment benefits, and so forth. Somehow, it has gotten bound up with the subject of transfers. I think that what has happened is this: Because conservation, broadly, is a good thing and generally in the public interest, people have gotten the idea either that transferring conserved water must be doubly good or that transfer is a kind of reward for doing something good rather than what it really is: a legal ability sometimes engendered by a particular type of conservation.

In fact, it is only the kind of conservation that adds (or, more precisely, puts back) water to the system that can be transferred without risk of running afoul of the no-injury rule. Conservation which simply reduces diversion by the same amount it reduces return flow leaves the system unchanged and produces no new water. It does not of itself create a new transfer opportunity. The unused diversion right may be preserved--as under Section 1011--and for use by the conservor *at his place of use*. But it does not translate into more water for the system.

I think these are the kinds of basic contextual discussions that would help the Guide. From them can be drawn principles which then will help the discussions of refill impacts, Area of Origin and Term 91, balanced conditions and the Special Delta Term, etc.

I started out with offering "responsible transfers" as a catchword for the Guide. I would also offer that a current catchword that does more harm than good is "transferable water". It is a shorthand that seems to create more confusion than

elucidation. It is a surplus expression that has no legal existence and which ends up being misleading and diverting from the specific tests and criteria that a transfer must meet. It emphasizes water rather than water rights. It suggests that the category of "transferable water" exists *a priori*, rather than being the final product of administrative action.

The fact is, all water rights except riparian rights are "transferable". But whether they can be transferred in a particular situation, and if so, under what conditions, is the question. Thus, the status of "transferable right" really takes the focus from where it should be: from the *administrative process* necessary to assure that a proposed transfer will be a responsible transfer.