

SWRCB WATER TRANSFER WORKSHOP

COMMENTS RE TRANSFERS BASED ON WATER CONSERVATION

I. Introduction:

- A. Water Code § 1011 authorizes the transfer of water made available because of "water conservation efforts."
- B. There is no clear guidance under California law as to the appropriate methodology for determining whether transferable water has been made available through water conservation efforts. The *Guide to Water Transfers* is largely silent on this issue.
- C. In a recent decision involving a proposed transfer of conserved water by the Natomas Central Mutual Water Company (Order WR 99-012), the SWRCB, for the first time, enunciated certain standards to be applied in the evaluation of conservation-based transfers. The Natomas decision is an important first step in the development of guidelines, but further clarification is needed, as will be discussed below.
- D. Transfers based on water conservation have tremendous potential to become an important element of California's future water resource management strategy. For example, during the most recent drought, the Drought Water Bank facilitated the transfer in 1991 of 820,000 af. Fifty percent of the water sold to the Bank was made available by farmers who temporarily took their lands out of production.
- E. In contrast to the Water Bank experience, recent conservation-based transfer proposals have faced stiff opposition particularly from USBR and DWR. The projects clearly have become concerned that water which has been conserved through the efforts of upstream water users (which the projects have been receiving free of charge) will now be transferred to other purchasers. The State Board needs to be the neutral arbiter of these disputes and needs to establish clear transfer standards in order to encourage conservation efforts by agricultural water users. These should be general policy guidelines which would not prejudice specific instances of conservation.

II Key Issues:

- A. **The Historic Use Baseline.** In determining whether a particular conservation effort will result in a decrease in consumptive use, thus making conserved water available for transfer, a central issue is how to define the base condition from which the decrease in consumptive use will be measured. The Natomas decision resolves this issue (at least for purposes of that proceeding) by reference to a long-term average of consumptive use, rather than the average of the high three years of consumptive use as had been proposed by Natomas. The State Board needs to more clearly define how the baseline will be selected, what period of years of use constitute an adequate baseline.
- B. **Transfers Based on Temporary Fallowing.** Related to the baseline issue is the issue of how to calculate the amount of water made available through temporary fallowing. The issue is complex and involves the question of how historical fallowing practices interrelate with a transfer proposal based on temporary fallowing in a particular year. The State Board needs to issue some general policy guidance on this so that farmers can know

what types of fallowing qualify for water transfers and would provide a reasonable justification to pursue a specific transfer by petitioning for approval.

- C. **Level of Measurement and Burdens of Proof.** It is easy to oppose a water transfer, particularly in the agricultural context, by asserting that the data is insufficient to demonstrate lack of injury. Even in the Natomas proceeding, where State Board staff praised Natomas for the quality of the data developed and presented, USBR and DWR raised this argument. A water transfer proponent should not be required to chase down every last molecule of water in order to qualify for approval. This was demonstrated by the Drought Water Bank where the projects took a "hands-off" approach to measurement issues, to the great success of all participants.

- D. **The Relationship Between Transfer Standards and Regulatory Water Conservation Requirements.** Agricultural water users in the Sacramento Valley and elsewhere have, in recent years, been bombarded with various new regulatory requirements for the implementation of water conservation measures. These requirements have often emanated from USBR. Yet when these same water users have attempted to transfer water they claim has been made available through the implementation of such measures, they have faced opposition from those same regulators on the ground that water is not "being made available" through such measures. This occurred in the Natomas proceeding with respect to the water conservation benefits of laser-leveling of fields and water recirculation. USBR and other regulatory agencies cannot have it both ways: if a conservation measure is not making water available, it should not be required. These actions were encouraged and were undertaken, but when credit for the conservation measures was attempted, it was opposed.