COMMENTS OF THE STATE WATER CONTRACTORS REGARDING WATER TRANSFERS

State Water Resources Control Board Public Workshop
Regarding Water Transfers

May 4, 2000

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The State Water Contractors (State Contractors) appreciate the State Water Resources Control Board's (State Board) invitation to interested parties to comment on its "A Guide to Water Transfers" (Transfer Guide). Several of the State Contractors member agencies have and will be significant participants in the developing water transfer market, both by purchasing water to supplement their State Water Project (SWP) and other supplies and occasionally by selling water to, or exchanging water with, others to better manage supplies. As participants in the transfer market, the State Contractors are interested in a State Board process that facilitates good water management. As State Water Project (SWP) customers, however, we also are interested in preventing transactions that are nothing more than paper transfers that reallocate water away from the current legal users and could negatively impact those SWP supplies. With these interests in mind, the State Contractors submit the following comments.

The State Board Should, After Appropriate Public Input, Adopt a "Final" Transfer Guide.

Water transfers are, and will continue to be, an important tool for water management in California. While the concept behind water transfers is simple, the actual implementation of these transactions under the state's statutory scheme can be complex. We commend the State Board for developing the Transfer Guide as single authoritative resource that can answer many of the basic questions that will arise when a transfer is proposed. On the whole, the Transfer Guide correctly analyses the approach that the State Board must follow when considering change petitions related to water transfers. The inclusion of public input through the May 4, 2000 workshop and written comments will assist in identifying and resolving any remaining issues.

The value of the Transfer Guide is significantly reduced, however, if it has no operative effect. In its foreword and on page 1-1, the Transfer Guide states that it "does not establish any rules or guidelines for water transfers" and is not considered "binding or presumptively correct." We recognize that the document is still in the development stage; indeed that is the reason for the May 4 workshop. Once the Board has gathered

and considered sufficient public input, however, it should issue a "final" version of the Transfer Guide that is at least presumptively correct. A more authoritative statement of the Board's view of water transfer law will help focus the transfer market on transactions which are beneficial to the parties involved and to the state as a whole. Even as a "final" product, we would expect the Transfer Guide to be revised periodically to reflect experience gained and future legislation.

The Transfer Guide Properly Recognizes the Fundamental Rule that A Water Transfer May Not Harm Other Legal Users of Water. However, it Appears to Sanction Certain Actions that would Violate that Rule.

In general, the Transfer Guide is a helpful, concise description of the rules controlling water transfers in California and the issues which must still be confronted. In particular, the Transfer Guide's simple statement of the basic rule bears repeating. That is:

> "You can transfer water if it is your water and not somebody else's water, provided the transfer does not injure another water right holder or unreasonably affect instream beneficial uses." (Page. 1-1)

This "no injury" rule is the fundamental underpinning to a water transfer market that truly puts the water resources of the state "to beneficial use to the fullest extent of which they are capable." Without the no injury rule, many alleged water transfers will merely reallocate "somebody else's water" to a third party, without providing any water management benefits. For example, a transferor with a water or contract right with a face value of 50,000 acre-feet may not have historically used more than 40,000 acre-feet. Consistent with California water law, that unused water is available to and likely has been used by downstream and junior users. If the transferor is allowed to transfer that historically and currently unused water to a new user, the downstream/junior users will be injured.

Despite the Transfer Guide's statement that the no injury rule is "one general provision that applies to all water right changes" (Page 3-7), the guide goes on to apparently authorize injury to SWP and Central Valley Project (CVP) customers and perhaps others

so long as a transfer is between in-basin users. In particular, despite recognition that refill criteria and limits on the transfer of reduced return flow would otherwise be necessary to protect other legal users from injury, the Transfer Guide goes on to exempt in-basin transfers from those requirements (Page 6-9 & 6-13).

The proposed exemption is justified by reference to the Watershed Protection Statutes (Water Code §§ 11460 et seq.). Those statutes were intended to reserve to any potential in-basin applicant for an appropriative water right a temporal priority over the SWP and CVP. This is a significant benefit to in-basin users under California's first in time system of rights, since the SWP and CVP rights date from the late 1920's. However, sanctioning in-basin water transfers despite admitted injury to the projects is an unwarranted extension of the Watershed Protection Statutes.

Both the California Attorney General (25 Ops.Cal.Atty.Gen 8) and the Racanelli Court (United States v. SWRCB (1986) 182 Cal.App.3d 82) have set out the proper application of the Watershed Protection Statutes. According to the Racanelli Court

> "The Attorney General . . . has construed the watershed and county-of-origin statutes as having a common purpose: to reserve to the areas of origin an undefined preferential right to future water needs (25 Ops.Cal.Atty.Gen. 8, 10 (1955). The established priority *does not create an individual 'water right'* but rather a grant which is wholly inchoate. As the needs of a watershed inhabitant develop, *he must make and perfect a regular application to appropriate water*; the Board must issue the permit despite the needs of the projects, and the projects must honor the vested right thus created." (182 Cal.App.3d at 139; emphasis added)

The Attorney General opinion construed in the Racanelli case went on to explain that the State Board retains the regulatory authority to determine the factual question of the amount of water to which the priority will attach and that the right may be exercised only "in the usual manner" and in compliance "with the general law of the state, both

substantively and procedurally." (25 Ops.Cal.Atty.Gen. at pages 20, 21-22) In effect, an in-basin applicant who fulfills the normal requirements to establish an appropriative right will not be denied because there is no unappropriated water on a stream shared with the SWP or CVP, and the water needed to fulfill the appropriation would be taken from water otherwise available to the projects. Once that application process is completed the "effect of the statute is exhausted." (26 Ops.Cal.Atty.Gen. 81, 83) That is, other than confirming a temporal priority as against the projects, the Watershed Protection Statutes have no effect on the State Board's responsibility to administer the state's traditional water law, including water transfer law.

Therefore, the Watershed Protection Statutes do not justify exceptions to the no injury rule. Those statutes already ensure that those in-basin users who need water can obtain diversion rights that, irrespective of their temporal priority date, will be senior to the projects' rights to store or divert water. That protection should continue to be limited to the appropriation process—where the State Board has the opportunity to scrutinize the proposed use and to impose appropriate permit terms and conditions, including standard terms and conditions such the Term 91 protection against illegal diversion of SWP and CVP stored water—and not be extended to new areas outside the appropriation process. It would be more appropriate for the in-basin users, and the in-basin users might prefer, to directly establish and use such diversion rights, rather than to pay a transferor a fee for water that the transferor is not using anyway.

The Transfer Guide Must be Amended to Recognize that Water Project Contractors are "Legal Users of Water."

At page 3-8, the Transfer Guide states that water project contractors are not "legal users of water" protected by the no injury rule codified in Water Code Sections 1702, 1706 and elsewhere. That is an erroneous statement of the law and, we believe, does not properly characterize the Board's current position. This same issue recently was resolved correctly by the Board in Decision 1641. In that decision, the Board found that water service contractors *are* legal users of water who can protest water rights applications and

changes based on impacts to the water rights underlying their contracts, as well as on public interest or public trust grounds. (D-1641, page 129) That finding recognizes that water project contractors clearly have standing to participate in judicial and quasi-judicial proceedings (such as water transfer applications) that may impact their interests in their water supply contracts. (See eg. Bennett v. Spear (1997) 520 US 154) The discussion of the water project contractors' status as "legal users of water" in the Transfer Guide should be revised to reflect this correct statement of the law.

The State Board Should Recognize its General Regulatory Authority, in Appropriate Cases, to Review Transfers of Water Under Pre-1914 Water Rights Where the Transfer Could Injure Other Legal Users of Water or Unreasonably Effect the Environment.

The Transfer Guide too narrowly proscribes the State Board's authority to review, in appropriate cases, a change in the place of use by pre-1914 appropriators to accommodate water transfers. The State Board, of course, has no direct jurisdiction over pre-1914 appropriative rights and the transfer of such rights does not require application to, or permission of, the Board. The State Board recognizes this at several points in the Transfer Guide. We believe, however, that the Guide is incorrect to the extent that it states that the sole remedy for a party asserting injury caused by such a transfer is to bring a court action. (See, eg. Page 3-4)

The State Board exercises broad adjudicatory and regulatory authority in the field of water resources to investigate and take all necessary actions protect the public interest, prevent waste and unreasonable use of water and protect public trust resources. (Water Code §§ 174, 183, 275) Its authority in these areas is concurrent with the courts. (National Audubon Society v. Superior Court (1983) 33 Cal.3d 416) While the State Board primarily exercises this authority in the realm of post-1914 appropriative rights over which it has direct permit jurisdiction, it also may exercise this authority over pre-1914 appropriative rights in response to a citizen complaint of misuse of water. (Imperial Irrigation Dist. v. SWRCB (1990) 186 Cal.App3d 548) To the extent the Transfer Guide

implies that the State Board does not share with the courts the jurisdiction to consider a complaint that a transfer of water under a pre-1914 appropriative right under Water Code Section 1706 is harming other users or uses of water, it is incorrect. Whether to accept or act on such a complaint may be discretionary with the State Board, and should be based on at least a prima facie showing that harm will occur. Irrespective of that fact, the State Board should recognize that it shares with the courts the authority to implement Water Code Section 1706.