

BUTTE BASIN WATER USERS ASSOCIATION

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August 25, 2000

RECEIVED

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CALFED Bay-Delta Program
1416 Ninth Street, Suite 1155
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CALFED Bay-Delta Program

Re: **Comments of the Butte Basin Water Users Association to the July 2000
CalFed Bay-Delta Response to Comments on Final Programmatic EIS/EIR
(hereinafter 2000 Response)**

Ladies and Gentlemen:

On September 13, 1999 Butte Basin Water Users Association (Butte Basin) submitted comments to the June 1999 CalFed Bay-Delta Second Draft Programmatic EIS/EIR. Butte Basin now submits its comments to CalFed's 2000 Response. Butte Basin believes that the 2000 Response fails dramatically to answer several of its key concerns with water storage, water transfers, Phase 8 of the Bay-Delta Hearings, and the beneficiary pays policy.

WHAT IS BUTTE BASIN?

Butte Basin commenced formation during the middle of California's five-year drought (1987-1992). There were four primary reasons for Butte Basin's formation:

1. The five-year drought commencing in or about 1986 and extending through 1992;
2. Failure to build planned additional state and federal water storage facilities and inability to complete planned projects to accommodate the state's rapid population growth;
3. The publicly expressed opinion that the Butte Basin's groundwater resource was a "neglected, under-utilized resource;" and
4. The need to manage the Butte Basin surface and groundwater resources to ensure that water transfers in or outside the basin would not adversely impact Butte Basin Water Users and otherwise comply with Area of Origin Rules set forth in Water Code Sections 11128, 11460 and 10505.

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Butte Basin is a voluntary association of public agencies, private water companies and municipalities including Butte County. The organizations entered into a Memorandum of Understanding providing for Butte Basin's formation and operation and Butte Basin continues its operation with monthly Working Committee Meetings. The purposes of formation of Butte Basin include:

1. Determine and manage Butte Basin's existing groundwater supplies and coordinate with existing surface water supplies to provide conjunctive use of Butte Basin's water resources;
2. The preparation and promotion of a Groundwater Management Plan for the Butte Basin area hydrologic sub-basin which would be regulated by another political agency or entity formed for purposes of implementing the plan and having regulatory or management authority to provide local control;
3. Develop a hydrologic model which can be used by the political entity vested with regulatory or management authority to properly regulate and manage groundwater resources;
4. Develop a hydrologic model which would receive annual input or recharge of the Basin's groundwater supplies measured against an extraction of a portion of the groundwater supplies for transfer either inside or outside the Basin;
5. Determine Butte Basin's need for additional or improved water extraction, storage, delivery and conservation facilities and identify those facilities; and
6. Participate in the management of Butte Basin area groundwater quantity and quality by preserving, protecting and monitoring basin area groundwater extraction, distribution, allocation or exportation.

Butte Basin's participants further agreed to fund a hydrologic groundwater model in order to monitor and know the existence and yield of groundwater supplies coordinated with surface water applications on an annual basis. Butte Basin has developed a groundwater hydrologic model which is now operating. Butte County now acts as a regulatory authority which monitors groundwater extraction and transfer due to the adoption of a Groundwater Protection Ordinance (hereafter GPO) by the Butte County Electorate in 1996.

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The operation of the GPO by Butte County also established a Water Resources and Conservation Department and the Butte County Water Commission which meets monthly and receives input from Butte Basin.

The large nonprofit public agency members of Butte Basin (and by large I mean by way of acquisition of water rights, delivery and distribution of water supplies), have developed their own plans for groundwater management through AB3030. Additionally, the nine (9) member Butte County Water Commission is required to operate, coordinate and implement the regulatory requirements of the GPO. The GPO requires environmental and technological review programs which govern the transfer of water and particularly the transfer of surface water which would be made up or replaced by the pumping of groundwater. Although the GPO was adopted by the Electorate in 1996; no applications for permits to transfer water have yet been submitted to Butte County for processing.

Located in north central California within the Sacramento Valley, Butte Basin is bounded by the Sacramento River on the west, the Cascade Range and Sierra Nevada Foothills on the east, the Sutter Buttes and the Yuba River on the south and extends northward to include Singer Creek and Pine Creek Area. Butte Basin is visually described in Exhibit "1."

Butte Basin Water Users have a variety of sources of water supply but some generalities can be made. The greatest source of water supply is the area of Butte Basin generally south of Durham and west of Hwy. 99 and is characterized by significant surface water development implemented by the formation of water districts in the early 1900's to create ways of delivering and distributing surface water for agriculture. These districts possess senior water rights on the Feather River and Butte Creek but those rights are quantified for delivery purposes in outstanding agreements between the districts and the California Department of Water Resources which were developed in order to facilitate the development of the State Water Project including the building of Oroville Dam and Reservoir commencing in 1963 and completed in 1968. The area of Butte Basin from Durham north is primarily characterized by extensive development of groundwater resources via the use of deep wells for both agricultural as well as urban water requirements. Many private entities and individuals within Butte Basin also possess senior water rights not only on the Feather River and Butte Creek but also on the Sacramento River, including but not limited to, M&T Ranch and Llano Seco Rancho.

A WATER STORAGE TIMELINE IS ESSENTIAL

Butte Basin stated its concern that the CalFed program had not properly addressed the need for on-stream or off-stream surface water storage facilities north and south of the Delta. In response, CalFed has increased its estimate for the Integrated Storage Investigation for water

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storage from \$70,000,000 to 1,425,000,000 (now including amounts for facility construction costs). CalFed has also promised a more aggressive schedule for identifying construction storage facilities including already identifying a few sites for construction but Butte Basin does not see this Integrated Storage Investigation in Stage 1 as a way to actually reduce reliance on groundwater.

Initially CalFed considered 52 sites as potential storage projects. There are only 12 sites still being considered. The program has now identified three projects that will provide additional storage, two expansions of existing reservoirs and one new off-stream reservoir with 950 thousand acre-feet (TAF) and two proposed projects to be done in conjunction with local agencies. These five projects could answer California's need for additional surface water storage north and south of the Delta and Butte Basin applauds CalFed's foresight to select such projects.

Additionally, Butte Basin believes that CalFed's Integrated Storage Investigation with its increased budget in the Phase II Report is a step in the right direction, but if implementation is going to take place in Stage 2, the storage facilities indicated must be specifically identified and implementation planned. How can anyone, including CalFed's member agencies, know if the program will be capable of solving the water shortage that California will otherwise have to face in the near future as population demands grow if a timeline is not planned now and implemented within a reasonably short time thereafter.

CalFed has not even proposed a timeline for implementation as was requested in our comments. As our comments in 1999 stated, California's population is projected to exceed 47 million by the year 2020. To meet this demand the surface water storage facilities CalFed has indicated must be constructed and operable by at least 2005 in order to meet the water demand that will be caused by the population increase. In the July 2000 Implementation Plan, CalFed has estimated how long it will take to plan and construct each of these surface storage facilities, for example: Shasta Lake expansion – Planning: yr 1-4, Construction: yr 6-7; or In-Delta storage project – Planning: yr 1-2, Construction: yr 3-7. CALFED Bay-Delta Program Implementation Plan, July 2000, page 2-15.

This skeletal breakdown **does not** provide a schedule of when the projects will be implemented. In fact all of the projects indicated are planned sometime during years 1- 5. This vague timeframe does not indicate what type of priority each project will be given, much less a timeline that CalFed or anyone else can follow. Furthermore, according to the breakdown provided it is improbable that any of the projects will be completed by 2005, jeopardizing the water supply California needs for the future.

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CONFLICT OF INTEREST BETWEEN CALFED AND PHASE 8

We questioned the need for SWRCB to hold Phase 8 of the Bay-Delta Hearings when CalFed has already addressed many of the same concerns for water transfers by encouraging water transfers and conjunctive use programs on a voluntary basis. Our concern was that the SWRCB could potentially recognize voluntarily transferred water as unnecessary and target such water for taking under the SWRCB's alleged Public Trust Jurisdiction.

Additionally, Butte Basin is concerned that there is a conflict of interest between the SWRCB's participating in CalFed's decision making and administratively adjudicating Phase 8 of the Bay-Delta Hearings. SWRCB is one of the 18 agencies participating in CalFed and is also conducting the Bay-Delta Hearings. With SWRCB acting as the decisionmaker in Phase 8 it is in the position to take water it deems "unnecessary" from Bay-Delta watershed diverters. At the same time SWRCB, as a member of CalFed, is making funding decisions that include programs to promote voluntary transfers of water which could then be decided by SWRCB to be "unnecessary" as they have made or approved settlement agreements transferring the same waters.

Your response is that the CalFed program and the hearings are a parallel process. CalFed's plan just assumes that voluntary water transfers, while not creating additional water supplies, are an important part of a complete, long-term water management solution. (WT 00-13) This does not answer our concern that CalFed's attempts to solve water management problems with a voluntary transfer system will not work as long as SWRCB has the ability to penalize water rights holders for such voluntary transfers.

We pointed to a statement made in the draft EIS/EIR that demonstrates that CalFed already assumes that the reallocation of water rights and water supplies as a result of the decision in the Bay-Delta Hearings will increase in-stream flows to the Delta. The response to our concern was that while the CalFed program and the hearings are parallel processes, the CalFed decision may reduce the Bay-Delta Hearings process. If the CalFed program will "obviate the need for a protracted hearing" (ERP III 7.3-5) it must be answering the same questions Phase 8 is meant to answer thus they are not so much parallel processes as overlapping processes that create insurmountable conflicts for the SWRCB.

BENEFICIARIES SHOULD NOT HAVE TO PAY TWICE

In light of the program policy that the beneficiary pays, Butte Basin is concerned about who CalFed considers a beneficiary. The response basically claims that everyone is a potential beneficiary depending on the specific projects to be identified at later dates including farmers,

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water users, water diverters, Californians, fishermen, agricultural users, urban users, and hydropower users. We reiterate our concern that CalFed still desires to impose a broad-based user fee combined with federal and state funding under this beneficiaries pay scheme. The justification for CalFed is that impacts in the Delta are related to water use so this justifies user fees. CalFed needs to explain how it will implement such a scheme. How can CalFed require the user to pay without passing legislation mandating such an arrangement? If legislation is anticipated, will it be Federal, State or a combination? When will it be introduced and where?

CalFed is ignoring the property right aspect of California's long established water right system. CalFed cannot continue to answer this concern by merely disclaiming any authority to regulate water rights leaving that to the individual agencies that comprise CalFed, such as SWRCB. (IA-5.0-5 and IA 8.2-4) Furthermore, agricultural users already pay for the benefit of their water use. The system is set up so that agricultural water users pay a use and service fee to water districts to keep the district running and the district uses those fees to distribute water to those beneficiaries for agricultural production to feed the other beneficiaries of water use. If CalFed institutes an additional user fee upon agricultural water, the beneficiaries of such water will be paying for the benefit of their property right not just once but twice.

WATER TRANSFERS

CalFed's Framework for Action states that, "The successful implementation of CalFed is dependent on access from California's major water transportation systems and removing other barriers to transfers: physical, institutional and legal. Therefore, the goal of the CalFed Water Transfers Program is to encourage the development of a more effective water transfer market that facilitates water transfers and streamlines the approval process while protecting water rights, environmental conditions, and local economic interests."

Notwithstanding the nice language, CalFed has previously released its water transfer program document that clearly would frustrate water transfers, not enhance them. In other words, CalFed's water transfer program document does not support the pro-water transfer statements made in the Framework for Action. The CalFed water transfer program document made it clear that CalFed wants to establish some sort of a central czar, or clearinghouse over water transfers. Although it was unclear as to whether that jurisdiction would be exercised directly by CalFed or by some other agency, the goal was to maintain some sort of policy direction on transfers by empowering entities such as the State Water Resources Control Board to regulate transfers.

Additionally, the CalFed water transfer program document contained an inappropriate application of the "no injury rule" so as to be used to prohibit conservation of water for transfer

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purposes. CalFed's water transfer document concluded that under current law the "no injury rule" does not restrict recapture of tailwater for use within a water right holder's boundaries but that it does prohibit it if the recaptured tailwater is used to support the groundwater transfer.

We disagree with that reading of the law. Recognizing, as it must, the authority of an uplope water user to recapture tailwater within its boundaries and recognizing in other parts of the report that this constitutes good water conservation practices, we question how CalFed's water transfer report then posits that a downstream appropriator who previously relied on the tailwater effectively has a vested right to that tailwater as against a transferor. So long as a water transfer is recognized as placing water to beneficial use, then water that is conserved so that it may be transferred is, by definition, water that is being beneficially used by the transferring district. If CalFed is going to institutionalize the concept that a downstream junior appropriator has a vested right to tailwater as against any potential transferor of the surface water from which that tailwater is derived, then CalFed is effectively determining that conserved water can never be transferred except by the most junior appropriators. Except in those limited circumstances where escaping tailwater serves no function, then such transfers will be prohibited outright in virtually every case, assuming there is re-use of tailwater downstream.

From a practical matter, this means that a district has no incentive to spend money to conserve spills that might otherwise leave its service area. For example, the Exchange Contractors have expended many millions of dollars for conservation projects. CalFed's water transfer program document would completely frustrate the Exchange Contractors ability to transfer any of the water conserved through these many millions of dollars expenditures.

As a matter of state policy, recognition has to be given that preserving water and reducing tailwater supplies does not pose an "injury" to downstream appropriators no matter what is done with the upstream supply.

CONCLUSION

Although CalFed's responses have addressed some of the concerns Butte Basin proposed, there are still many concerns for the future of California's water that CalFed needs to answer:

1. CalFed has failed to provide a timeline for its proposed surface water storage facilities even as it has broadly estimated that planning will happen within the next five years and construction within the next seven. A much more concrete schedule must be created to ensure that adequate storage facilities are in place and operating by 2005.

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2. There is a the conflict of interest in SWRCB, as a member agency of CalFed, propounding voluntary water transfers in the Delta on the one hand, and its authority in Phase 8 of the Bay-Delta Hearings to judge transferred water as “unnecessary” and available for taking on the other hand. CalFed must reconcile this conflict of interest before moving forward with any water transfer implementation.
3. CalFed has decided to implement a financing plan that includes funding under a “beneficiary pays” policy. This plan is faulty because it would require some beneficiaries, such as agricultural water users, to pay more than once for the privilege of using their own water rights. The financing plan needs to be revised to prevent some beneficiaries for paying twice for their water use.
4. CalFed applies the “no injury” rule to prohibit conservation of water for transfer purposes by recognizing the ability of a water right holder to recapture tailwater for use within its boundaries (which is a correct application of California Law) but then grants a downstream junior appropriator as a vested right to tailwater as against any potential transferor of the surface water from which the tailwater was derived. Such a grant to a junior appropriator of a vested right in tailwater frustrates conserved water transfer policies historically developed by California Water Districts and individual farmers. CalFed must give Districts and individual farmers an incentive to spend money to conserve spills that might otherwise leave their service areas/farms.

We want CalFed to understand that Butte Basin wants to be part of the solution to solve the problems of the Bay-Delta Geographic Area. You were able to answer several of the concerns that we addressed in our comments to the 1999 version of the CalFed Programmatic EIS/EIR and we thank you for that. Yet, be assured that Butte Basin will actively oppose this 2000 Final Programmatic EIA/EIR unless we receive: 1) a timeline for surface water storage; 2) resolution of SWRCB’s conflict of interest in Phase 8 of the Bay-Delta Hearings; and

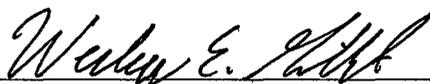
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3) assurances that users of agricultural water will not be required to pay twice to use their property rights to historically acquired water rights and supplies.

Sincerely,

BUTTE BASIN WATER USERS ASSOCIATION

By: 
MARK KIMMELSHUE, Chairman by
WES GILBERT, Water Plan Coordinator
on behalf of Butte Basin Water Users Assn.

WS/kc

Attachment

cc: Butte County Water Commissioner
Butte County Board of Supervisors
Colusa County Board of Supervisors
Glenn County Board of Supervisors
Sutter County Board of Supervisors
Tehama County Board of Supervisors
Yolo County Board of Supervisors
Association of California Water Agencies
Northern California Water Association
Senator Tim Leslie
Assembly Member Sam Aanestad
Assembly Member Richard Dickerson
Assembly Member Helen Thomson
Congressman Doug Ose
Sacramento Bee
Chico Enterprise-Record