

September 29, 1997

**Water Transfer Case Study Submitted by Alex Hildebrand for
Discussion by the BDAC Water Transfer Work Group**

INTRODUCTION

The San Joaquin River System has been greatly depleted by upstream exports and increased consumptive use of water in the watershed. There is now typically no net outflow of San Joaquin water through the Delta except in wet years. Water transfers are, therefore, reallocations of water and not a use of water that is surplus to present demands on the watershed as a whole.

The USBR has been making purchases of water from the Merced, the Tuolumne, and the Stanislaus tributaries of the San Joaquin River. These purchases have, so far, been limited to one or two year purchases, but the programmatic EIS for the CVPIA anticipates acquiring up to 600,000 af in any year from these three tributaries on an extended basis. In each case the purchase is to increase flow in April and May and/or October for fishery benefit. In no case has the purchase agreement required in any defined, quantified, and assured manner that the seller would decrease its consumptive use, or increase yield in the tributary. A purchase by USBR from the Merced Irrigation District (MID) during 1996 and 1997 is described in this case study.

1. STRUCTURE OF THE TRANSFER

Parties: USBR is purchasing from Merced Irrigation District.

Quantity: An October 8, 1996 EA and FONSI proposed that 20,000 af be released in October 1996 and 25,000 to 100,000 af in April, May and October 1997.

On May 9, 1997 a revised EA and FONSI was issued without notice to provide 40,000 af in April and May and 7500 af in October 1997.

Purpose: The purpose is to increase flows for fishery benefit in the Merced and San Joaquin Rivers and for inflow to the Delta at Vernalis.

Delivery: Via the Merced and San Joaquin Rivers to the Delta.

Source: Releases from New Exchequer Dam.

2. TRANSFER APPROVAL PROCESS

Notice: The EA and FONSI appear to have been issued without any effective prior notice or offer of review to potentially affected parties downstream of the Merced River along the San Joaquin Main stem and in the South Delta. SDWA became aware of the proposed purchases through attendance at Stanislaus Stakeholder meetings. (SDWA does not hold water rights in the South Delta. No riparian or other water right holder was notified).

SWRCB Approval: SDWA alleged that SWRCB approval was needed for the change in place and purpose of use. The need for SWRCB approval was accepted by USBR and written into the October 1996 EA and FONSI. However, this provision was removed from the May 1997 revised EA and FONSI that was issued without notice. USBR then purchased 45,332 af in April and May instead of the 40,000 in the EA and without SWRCB approval. Then in September 1997 they requested SWRCB approval to release 7500 af in October 1997 for a total release of 52,832 instead of the 47,500 in the EA. That request is still pending as this is written. If the spring releases are now asserted to have been a bypass of natural flow that was not needed by MID and, therefore, did not need SWRCB approval, one must then wonder why MID had a right to sell it and why USBR should pay for it.

Environmental Analysis: The environmental analysis did not quantitatively address what would happen to the water if it were not sold and how the reallocation in time and purpose of use would affect downstream holders of superior water rights in either quality or quantity, and instream flow at other times of the year.

Public Review: There was no public review process to our knowledge.

3. THIRD PARTY IMPACTS

Impact Analysis: There was apparently no analysis of economic and third party impacts either as regards water quality in the San Joaquin upstream of Vernalis or at Vernalis; or flow adequacy to protect riparian rights in the South Delta. If any analyses were made they were not made available even when requested.

Cumulative Impacts: There was also no analysis of the cumulative impacts with other USBR purchases, or with proposed sales to other parties, or of the extent to which the sales would exacerbate non-compliance with the Vernalis Salinity Standard.

The USBR is required as a New Melones permit condition by the SWRCB to release New Melones water to dilute the salt load that drains to the San Joaquin River from lands on the Westside of the valley that receive water from the Delta

Mendota Canal. The USBR in its current New Melones Interim Operating Plan stipulated that it will only release limited amounts of water to comply with that Standard. USBR also distributed an analysis showing that these limited releases would have a 44% chance of being inadequate to comply with the permit condition on a probability basis even in the absence of water purchases. In years of non-compliance the calculated deficiency was shown by their analysis to be substantial.

Impact mitigation: It was proposed in the EA that impacts on SDWA (but not on parties upstream of Vernalis) would be mitigated by release of Stanislaus b(2) water. However, there was no provision for determining when or how much b(2) water would be needed, or how its release would be assured. Furthermore, it appears that all available Stanislaus b(2) water has been committed for fish flows and by an agreement to provide 50,000 af of water via contract to Stockton East in 1997 and again in 1998. The Stanislaus Interim Plan makes no provision for b(2) water to mitigate the MID purchase. In any event it is not clear that Stanislaus water that has been committed by contract to an area of origin can then be committed without notice to mitigate a purchase on another tributary.

4. LEGAL COMPLIANCE

SDWA alleges that these water purchases violate;

- a) Requirements that the SWRCB must approve changes in place and purpose of use and must consider among other things Sections 1725 and 1707 of the California Water Code.
- b) Limits on permissible purchases per provisions in the CVPIA.
- c) Provisions in the National Environmental Protection Act.
- d) Provisions in the Administrative Procedures Act.
- e) Provisions in Federal Law that USBR must comply with State law.

These allegations are being tested in Federal Court.

CONCLUSION

Regardless of the outcome of the above legal action, this example demonstrates that there is no assurance that third party interests will in practice have any effective protection from water transfers that are made without effective and necessarily burdensome oversight by parties other than the buyer and seller. This is particularly true when changes in purpose and/or watershed of use is involved.