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CALFED Water Transfer Element

Draft Discussion Paper No. 9 - Third Party Impacts

Issue

A major set of issues related to water transfers, particularly out of basin, long term (multi year) transfers, is third party impacts. Generally, there are three types of third party impacts: impacts to other legal users of water (usually downstream users); environmental impacts; and economic effects in the source area. Cumulative impacts of a series of one year transfers or multiple long term transfers from the same area raise a special set of third party impact issues.

Applicable Law

Impacts to downstream users are addressed by the "no injury" rule. The "no injury" rule prohibits transfers which would harm another legal user of the water proposed for transfer. This rule is found at Water Code sections 1706, 1725, 1736 and 1810(d).

The "no injury" rule is the legal mechanism for the prohibition of transfers of "paper water" (water which does not meet the test of consumptive use).

State law also prohibits transfers which would have an unreasonable impact on fish, wildlife, or other instream uses. See Water Code sections 1025(b), 1725, 1736 and 1810(d). A similar prohibition applies to CVP transfers subject to the CVPIA.

Economic impacts of transfers are less clearly regulated. It is generally recognized that certain types of transfers can have adverse impacts on local economic conditions. Fallowing transfers, for example, will result in lower agricultural production in the source area and may impact local employment of farm workers.

Groundwater transfers or transfers of surface water with groundwater replacement may result in lower groundwater levels, lower groundwater quality and higher pumping costs for other local groundwater users. In extreme cases, impacted groundwater users may lose the use of existing wells due to water quality degradation or lower groundwater levels. (Groundwater issues are discussed in more detail in Issue Paper No. 7. Therefore, this paper will be limited to a discussion of the potential impacts of groundwater transfers.)

State law does not generally address the economic impacts of fallowing or groundwater transfers. Section 1810(d) provides that the conveyance facilities of a public agency may not be used to transfer water if the transfer would have an "unreasonable effect" on the local economy.

Section 1745.05(b) of the Water Code limits fallowing transfers by water suppliers to twenty percent of the water made available by the water supplier.

Water Code Section 1745.10 prohibits replacement of transferred surface water with groundwater unless certain conditions are satisfied (consistency with local groundwater management program, or finding of no contribution to long term overdraft of groundwater).

CVPIA prohibits the Secretary of Interior from approving a transfer which would have a long term impact on groundwater conditions or which would unreasonably impact the water supply, operations, or financial condition of the transferor district or its water users.

Water Code sections 1215 and 11460 prohibit transfers which would deprive areas of origin of water reasonably required to meet local beneficial needs.

However, there is no counterpart of general application in state law to the "no injury" rule or the "no unreasonable environmental impact" rule for economic impacts of fallowing or groundwater based transfers.

<u>Discussion</u>

The fundamental policy issue related to economic impacts of transfers is to what extent should external impacts be internalized as transaction costs of the transfers. How should such costs be calculated? Who should decide which costs are part of the transfer cost? Who decides what level of impact is significant? Ultimately, this leads to a debate about who should have the authority to approve, disapprove or condition a proposed transfer?

An absolutist view of the market approach to water transfers based on land fallowing would be that external economic impacts should not be considered at all. A water rights holder or water user is under no legal obligation to provide employment or economic benefits to his/her community. No one would argue that a farmer must farm his/her land every year in such a way as to generate a given level of employment or economic activity in the local area. No one would argue that if a landowner sells a parcel of land, that he or she must compensate others who are indirectly affected by the change to the local economy resulting from a change in use of the land. According to this logic, then, a farmer or water supplier who sells the right to use water should have no obligation to constrain his/her action due to adverse economic impacts to others and society should not interfere with the operation of the market.

The usual response to the market argument is based on the concept that water is not a pure commodity, but is in the nature of a shared natural resource, to which an entire community has some claim of right. Water is legally owned by the people of the state and an individual user has only the right to the use of so much as can be put to reasonable and beneficial use. While transfers are recognized under state and federal law as a reasonable and beneficial use, a pure market approach to water transfers fails to acknowledge that entire communities and local or regional economies rely on the economic value produced by the local use of water. Therefore, the argument goes, changes in purpose or place of use of water which affect local socio-economic conditions must be regulated to avoid or mitigate adverse impacts.

Third party impacts also occur when the transfer is a direct groundwater transfer or when surface water is replaced with groundwater. Here there is a direct impact on a resource which is legally defined as subject to correlative rights. The use by one directly affects the use by another. If one user is allowed to sell or pump groundwater to the detriment of other overlying users, the correlative right can been impaired or destroyed.

Possible Options

Over the past few years, a number of mechanisms have been suggested for dealing with the local economic impacts of water transfers:

- limit the number of acres which can be fallowed (in order to produce transfer water) in a given area (District or county);

- limit the amount of water which can be transferred from a given area (District, service area, county);

- levy a tax on transfers to compensate the local area for increased social service costs incurred by local governments;

- establish a mitigation fund for compensating losses or to pay for retraining farm workers, to be administered by local governments;

- further restrictions on groundwater transfers or groundwater substitution (e.g., establish a limit on groundwater level drawdown).

- legislation to define level of acceptable impacts of transfers.