

Water Transfer Discussion Papers
Issue 3
Water Transfers for Fish or Wildlife
Under Water Code Section 1707

Background

California water law does not allow the appropriation of water for fish and wildlife uses. A key tenet in California's water law is the ability of the water user to take "control" of the water. Simply leaving the water in the stream for fishery purposes has not met the test for "control". However, in 1991 legislation was enacted that allows existing water right holders to dedicate all or part of their rights for instream purposes. The section of the Water Code that allows this type of change is section 1707. This section states:

"(a) Any person entitled to the use of water, whether based upon appropriative, riparian, or other right, may petition the Board pursuant to this chapter, chapter 6.6 (commencing with Section 1435) or chapter 10.5 (commencing with Section 1725) for a change for purpose of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.

(b) The Board may approve the petition filed pursuant to subdivision (a) subject to any terms and conditions which in the Board's judgement, will best develop, conserve, and utilize, in the public interest, the water proposed to be used as part of the change, whether or not the proposed use involves a diversion of water, if the Board determines that the proposed change meets all of the following requirements:

- (1) Will not increase the amount of water the person is entitled to use.
- (2) Will not unreasonably affect any legal user of water.
- (3) Otherwise meets the requirements of this division."

Sections 1435 and 1725 are water transfer sections in the Water Code. While the SWRCB has received a few requests for 1707 changes, only one has met the tests set forth above. It did not involve the Delta.

Issues

Section 1707 transfers raise the same issues of any transfer; (1) is this real or paper water, (2) how is the water tracked to the place of use which could be the Delta or San Francisco Bay, (3) what are the effects on other legal users of water, (4) what are the environmental effects and (5) other typical transfer issues.

All water transfers involving CALFED resources should go through a review process to ensure these issues and the ones below are addressed in a consistent manner.

There are some unique issues involved with 1707 transfers. These include the following: (1) The rights to 1707 water left in the stream are based on the priority date of the water right. Therefore, a user with a relatively recent water right may forgo his direct diversions in order to protect instream uses under section 1707 only to find that during water short periods more senior water right holders can legally divert this water downstream thus nullifying his efforts. (2) If the 1707 transferor has senior rights or the water involved is stored or otherwise foreign to the stream system, the issue then is protecting it from illegal diversion by water users with junior rights. (3) Once this water reaches the Delta, accounting for the water depends upon the desired use of the water. If the ultimate desired use of the water is to increase Delta outflow or other enhanced environmental protection beyond the existing standards, it must be accounted for differently than if it is intended to satisfy existing demands. All of these issues involve tracking the water to the place of use.

Solutions

The solutions to the unique issues of 1707 transfers can be divided into two parts: (1) upstream of the Delta and (2) in the Delta.

Upstream of the Delta the CALFED program needs to develop a procedure for tracking or accounting for allowable depletions that will accrue to 1707 transfers which are intended to reach the Delta. Each proposed 1707 transfer should have a procedure for calculating the amount of water that will reach the Delta based on the rights of the transferor, the amount of water released or bypassed and the timing of when it will reach the Delta. These are principally technical issues that need some very smart people to figure out.

Once a 1707 transfer reaches the Delta, the tracking depends on the use the transferor intends for the water. If the transferor has no special use for this water in the Delta, the water will be used to meet existing demands. Accordingly, the SWP or CVP could appropriate it to meet their obligations. In effect, this extra water would be exported or saved in upstream CVP or SWP reservoirs, because it would reduce the need for releases from these reservoirs to meet demands in the Delta.

If the transferor wants the water to enhance conditions beyond the existing operating standards or contribute to Delta outflow in excess of the existing standards in the Delta, then the place of use of this water would include the entire Delta. As a result, the water would remain under the control of the transferor and could not be appropriated by another water right

holder. Additionally, it would be necessary to ensure that the water actually improved the conditions in the Delta. One method of protecting the water would be to increase the standards each time a transfer is approved. This is cumbersome. Another alternative is to define how this water is to be tracked by the CVP and SWP when it gets to the Delta. For example, if the transferor desires the water to augment the San Joaquin River flows beyond the operating standards and to go out the Delta to augment Delta outflow during controlled flow periods, then a stipulation of the transfer would be that DWR and USBR would not count the 1707 transfer water as flow to meet the standards. If the actual flow was 5,500 cfs and 500 cfs was 1707 water tracked to the Delta, then the flow for the purpose of standards would be 5,000 cfs. This could be used for calculating inflow standards, export/inflow ratio, and/or Delta outflow depending on the desires of the transferor. The use of this method when water quality standards are controlling in the Delta needs more thought, but the general concept applies.

In summary, the major issues and solutions involving 1707 transfers are largely technical water tracking issues that involve consideration of the desires of the transferor on the ultimate use of this new water in the system.