

February 17, 1998

CALFED WATER TRANSFER ELEMENT

Draft Discussion Paper No. 3 - Instream Water Transfers for Fish or Wildlife Under Water Code Section 1707

Issues

In the July 17, 1997, Discussion Paper on the Water Transfer Element, we identified Issue No. 3 as "Accounting and tracking of instream transfers - How can water transferred under Water Code section 1707 be tracked and accounted for."

In addition to the tracking and accounting questions, Section 1707 transfers raise the same issues as any transfer: (1) is this "real" water; (2) what are the effects on other legal users of water, and (3) what are the environmental impacts.

This is a DRAFT paper for review and comment. It has not been reviewed by CALFED member agencies and is not intended as a statement of position by CALFED or any member agency.

Background

Instream flow transfers, or 1707 transfers, refer to the transfer of water from a consumptive use to a nonconsumptive use, which results in a reduced diversion from the system and increased instream flow or Delta outflow. California water law does not provide for the appropriation of water for fish and wildlife uses. Leaving water in the stream for fish or wildlife purposes has not been considered to meet the test of "taking control" of the water which is the hallmark of appropriation for domestic, municipal and industrial or irrigation purposes. However, in 1991, Water Code Section 1707 was enacted which allows water right holders to dedicate all or part of their rights for instream purposes. This section states:

"(a) Any person entitled to the use of water, whether based upon an 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 purposes 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 judgment, 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."

The transfer or change in place of use under Section 1707 may be temporary or permanent. The State Water Resources Control Board (SWRCB) has received a few requests for 1707 changes, but only one has met the tests set forth above.

Discussion

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. If the 1707 transferor has senior rights or the water involved is stored or otherwise foreign to the stream system, then it must be protected from illegal diversion by downstream water users with junior rights. Once the 1707 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.

In addition to this technical problem of tracking and accounting for instream water, there may be some question about the application of the "real water" doctrine to 1707 transfers, i.e, whether the consumptive use limits of Water Code Section 1725 apply. It has been suggested that the State Board would have the authority under 1707, in developing conditions for the proposed change of use which will best serve the public interest, to determine that the amount of water available for transfer is the amount of the entitlement, rather than the amount of water which would have otherwise been consumptively used or irretrievably lost.

A question which is likely to arise in the event 1707 transfers are proposed for incremental increases in Delta flows or outflow is whether this meets the test of reasonable and beneficial use. By what standard does the State Board determine that an incremental increase in flow or outflow is enhancing fish or wildlife conditions? For example, if the Delta outflow standard of 10,000 cfs is being met, is an additional 100 cfs a measurable benefit? Is an additional 1,000 cfs a measurable benefit? Does the State Board simply assume that any increase in flow or outflow will be of some beneficial use for fish and/or wildlife, and therefore, this is not an issue.

One possible approach to addressing this question would be for the State Board to adopt a rule or policy that any 1707 transfer which made a contribution to any restoration or recovery goal (ERPP, AFRP, ESA recovery plans) is deemed a reasonable and beneficial use of water.

Solution Options

There is a need for a procedure to track and account for allowable depletions that will accrue to 1707 transfers which are intended to reach the Delta. For each proposed 1707 transfer, CVP and SWP operators will need to be able to calculate 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.

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 CVP or SWP reservoirs to meet contractual or regulatory 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.

One method of protecting the water would be to increase the standards each time a transfer is approved. One way to do this is with a regulatory registry of instream flows. To protect environmental flows or instream flows, the State Board would temporarily increase instream flow standards at the appropriate control points.

Increasing standards for each transfer may be somewhat cumbersome. A variation on that approach is to simply ignore instream or environmental transfer water when calculating whether or not standards are being met. 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.

Some of the issues related to tracking and accounting for 1707 transfers might be resolved by amending California water law to allow a resource management agency (an existing agency or a new environmental/Bay Delta trustee) to hold water rights and purchase transferred water for the specific purpose of flow enhancement or fish and wildlife benefit.