

# SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

*Consisting of 240,000 acres on the Westside of the San Joaquin Valley*

**JAMES E. O'BANION**  
Chairman

January 11, 1999

**JOHN B. BRITTON**  
Vice Chairman

**STEVE CHEDESTER**  
Executive Director

**JOE SCOTT**  
Water Resources Specialist

Mr. Greg Young, Co-Chair  
Bay Delta Advisory Council  
Water Transfer Work Group  
1416 Ninth Street, Room 1412  
Sacramento, CA 95814

**SHELLEY STAUFFER**  
Administrative Assistant

**MINASIAN LAW FIRM**  
Legal Counsel

Re: Draft Comments on Early Review Draft of CALFED Bay-Delta Program Water Transfer Program

**Central California  
Irrigation District**

Dear Mr. Young:

**JAMES E. O'BANION**  
President

**MIKE PORTER**  
General Manager

The undersigned serves as the Executive Director of the San Joaquin River Exchange Contractors Water Authority. The Authority's members' water rights are derived from riparian and pre-1914 appropriative rights on the San Joaquin River that date back to the 1870's. In addition, Authority members also rely to a large extent on groundwater within their respective service area. Under long-standing agreements with the United States, our San Joaquin River water rights have been exchanged for use in the Friant Division and our principal source of supply under our agreements is the Delta Mendota Canal and San Luis Reservoir.

**San Luis Canal Company**

**JACK THRELKELD**  
President

**ROBERT E. CAPEHART**  
General Manager

**Firebaugh Canal  
Water District**

**JOHN B. BRITTON**  
President

**JEFF BRYANT**  
General Manager

The Authority wishes to confine its comments with respect to the above-described draft to two particular areas and to urge that the Committee refrain from taking the actions indicated, which we believe are directly detrimental to the water rights, which the committee has pledged to protect.

**Columbia Canal  
Company**

**DARRELL VINCENT**  
President

**DAVID WOOLLEY**  
General Manager

Our particular areas of concern are the inappropriate application of the "no injury rule" to prohibit conservation of water for transfer purposes. The second is the suggestion that the State Water Resources Control Board should have limited discretion in connection with determining what is transferable water.

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With respect to the former issue, the Report concludes that, under current law, the "no injury rule" does not restrict recapture of tailwater for use within a water right holder's boundaries, but it does prohibit it if the recaptured tailwater is used to support a groundwater transfer.

Mr. Greg Young, Co-Chair  
January 11, 1999  
Page 2

We disagree. Recognizing, as it must, the authority of an up-slope water user to recapture tailwater within its boundaries and recognizing in other parts of the Report that this constitutes good water conservation practices, how does the Report then postulate that a downstream appropriator who previously relied on the tailwater effectively has a vested right to that tailwater as against a transferor? The conserved water is being beneficially used within the boundaries of the District. It is being conserved so that less water is being diverted at the headworks of our system. 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 source 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 (which is extremely difficult to postulate), then such transfers will be prohibited outright in virtually every case, assuming there is reuse of tailwater downstream.

In our opinion, we believe CALFED has reached a crossroads where it must determine whether it will stick with its direction of recognizing and honoring traditional water rights, or depart from it. If it wishes to respect California law of water rights (which we support), then its application of the "no injury rule" should not be applied to deprive an upstream appropriator, with senior rights, of the right to reduce its appropriation with aggressive conservation and thereby make other surface water available for transfer. To acknowledge protection of existing water rights and then to take away one of the significant elements as of that ownership—the right to transfer water otherwise conserved—is simply to negate the very water right protection policy that CALFED is pledged to protect.

How does one then consider protection for downstream appropriators of a junior quality? One way of being protected is for a right of first refusal to be established in order to preserve the tailwater supply upon which they have historically relied. Another would be simply to consider the fact that preserving water and reducing tailwater supplies does not pose an "injury" to downstream appropriators, no matter what is done with the upstream supply. Although that may be perceived as harsh, it is a position of any junior appropriator.

A substantial beneficiary of escaping tailwater is wildlife refuges and gun clubs. Again, perhaps as a matter of state policy, recognition has to be given that the water to provide those benefits does come at substantial cost. It is cost of delivering either the water outright, or the cost incurred in terms of foregone revenue from no water transfers. In either case, at some point or another, there is going to have to be a recognition of the economic value of this water, but the misapplication of the no injury rule proposed by CALFED would not achieve that.

The other significant point of interest is in the concept of a State Water Resources Control Board (SWRCB) proceeding to determine what is "transferable" water. As a practical matter, the SWRCB is not able to apply its analysis to a pre-1914 water right to determine what is transferable without applying that analysis to what is not being transferred. We believe such a policy would needlessly expand Board jurisdiction. For obvious reasons, the expansion of SWRCB jurisdiction is a concept we are not in support of. For the SWRCB to make a

Mr. Greg Young, Co-Chair  
January 11, 1999  
Page 3

determination of a particular transferor's water supply for purposes of transfer, it will have to assess the overall water right, which supports the transfer.

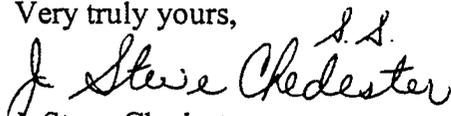
We believe that the districts which hold the water rights provide a public review process, complete with local Board review and approval and public input through NEPA and CEQA, which can address the concerns of available supply and potential impacts. It does not require the input of the SWRCB or the dangerous expansion of its jurisdiction such a review would entail.

We oppose this concept and believe that in those cases where a pre-1914 appropriative water right exists, the SWRCB's jurisdiction remains as it has always been, the prevention of waste and unreasonable use, and the protection of public trust resources. It does not include the determination of what is transferable. The water right holder, through its authorized Board of Directors and/or governing body as the case may be, should make those determinations for pre-1914 rights.

We oppose the concept of a statewide Water Transfer Clearinghouse. It appears CALFED is attempting to solve a northern California problem with a global solution that just does not fit the state as a whole. For example, when the Authority proposes a transfer the governing board of directors at a publicly noticed meeting must first approve it. It then submits both NEPA and CEQA documents for public comment. With CEQA, after the appropriate time has elapsed, the governing board of directors hold yet another public hearing to solicit comments before it decides to adopt a Negative Declaration or not. This gives the "Public" four bites at the apple. It seems completely redundant to mandate that the transfer be submitted to yet another "process" for "public review". It appears that all that will be accomplished is further government manipulation and fee extraction from the transfer proponent. At the very least, those who go through the NEPA/CEQA process should be exempt from having to comply with the "Clearinghouse" rules.

We appreciate the opportunity to comment on these matters and hope that the Committee's efforts to develop a transfer mechanism do not result in a wholesale abrogation of water rights.

Very truly yours,

  
J. Steve Chedester  
Executive Director

CC: Member Agencies  
Bill Jones, Secretary of State  
Assemblymen, Dennis Cardoza  
Assemblymen, Mike Machado  
Senator, Dick Montieth  
Senator, Jim Costa

Congressman, George Radanovich  
Congressman, Gary Condit  
Congressman, Cal Dooley  
Roger Patterson, Regional Director, USBR  
Steve Hall, Executive Director, ACWA