



**CALFED Bay-Delta Program
Proposed Interim Water Transfer Rules**

Western Water Company, along with most business, environmental and water user organizations, believes that waters transfers are critical in terms of addressing current and future water needs in the Western United States. There remain significant obstacles to realizing this promise, including political, technical and financial hurdles. In the course of attempting to actually complete water transfers under current statutory and regulatory authority, Western Water Company has discovered that, despite common perception to the contrary, the water transfer system in California does not accommodate water transfers as public policy dictates. The lessons we are learning in this "school of hard knocks" may be of some assistance in developing the operating rules that can make beneficial water transfers a reality rather than a policy dream. Some of the most important rules that we believe must be in place on a trial basis prior to the start of Stage One (that is, by December 31, 1999) include:

● **Clarity on Transferable Water**

Clear rules need to define transferable water so that buyers, sellers and other interested parties can know with reasonable certainty what they have to transfer. Currently, the offer to transfer water is perceived as exposing the underlying water title to regulatory attack in an administrative forum inimical to transfers. Therefore, potential transfers are subject to the "chilling effect" of a Department of Water Resources or a State Water Resources Control Board proceeding designed, it appears, to find a way to prevent the transfer. Of even greater concern is that, without clear standards, these proceedings raise the risk of loss of the underlying water right on a charge of lack of beneficial use. Finally, where the decision-maker is also a regulator or a conveyance facility operator, the perception of fairness is compromised by vague standards of decision concerning the transferability of water. Validating the transferability of a portion of a water right, without prejudicing the validity of the total rights claim, may ease this concern. In addition, standards for proving ownership of a water right, particularly for older rights where physical usage records may be scant or unreliable, must be in place to induce these water rights to be offered for transfer.

● **Carriage Water**

Water losses on a transfer due to Delta (or other conveyance) "carriage water" must not so penalize transfers that few will be economically justifiable. Because north-to-south transfers will increase the amount of water that would otherwise be flowing into the Delta, carriage water penalties on transfer water should be reduced or eliminated. Since the State and Federal projects do not propose to be relieved of their obligation to meet the water quality standards based on a voluntary transfer taking place, transfer water should "float on top" of water to meet the standards. With the standards having been met, additional carriage water requirements should be minimized.

- **Refill Criteria and Non-storage Transfers**
 Refill criteria for transfers out of surface storage should be explicit, and such criteria should not be unreasonably punitive to transfers. Transfers that do not come out of storage should not be burdened with indirect and speculative impacts on surface storage and should be free from refill penalties. Similarly, groundwater use for transfer purposes should not be discriminated against compared to other uses. That is, groundwater pumping—regardless of ultimate beneficial use—should be treated as having the same proportionate impact on the basin and should be subjected to the same tax or regulatory burdens.
- **Access to Publicly-owned Facilities – Availability and Priority**
 Voluntary transfers, which as a whole constitute good public policy, should not be effectively “locked out” of publicly-owned projects by being shunted to last or uncertain priority to use those project facilities. By virtue of substantial historic and continuing public subsidies, available conveyance capacity in State and Federal projects should be available on an “equal access” basis to public and private entities alike. Such entities should be able to contract for either firm or standby capacity (with a price differential), rather than being automatically relegated to last in line status. This principle recognizes fundamental nature of public ownership and insists that the agencies that act as stewards for the public do so in their constituents’ best long-term interests.
- **Access to Publicly-owned Facilities – Pricing**
 Wheeling costs should be based on marginal costs of using available capacity in project facilities, and rules requiring fair prices for both firm and standby capacity should be enforced against recalcitrant operators. Project operators should receive their variable costs, plus some reasonable “mark-up” for facilities usage. Firm prices should be higher, and standby prices should be lower, reflecting the respective value of non-interruptible or interruptible service. However, transfer proponents should not be priced out of a facility through allocation of a proportionate share of fixed and capital charges. Such charges are properly borne by permanent contractors with firm capacity, not occasional users.
- **Third Party Impacts – Economic**
 Impacts on third parties that are directly related to a specific transfer must be mitigated as a cost of completing the transfer. However, transfers must not be burdened by the cost of ameliorating tangential or unrelated impacts. For example, low-value subsidized annual crops may no longer be a viable economic proposition in a certain region. Transferring water in such a circumstance may be a necessary adjustment to economic reality, not a cause of the dislocation. Therefore, interim rules for water transfers must require a credible demonstration of direct causality as a condition to requiring third party impact mitigation.
- **No Injury Rule**
 The “no injury” rule must be interpreted in a commercially reasonable way. At the extreme, altering the usage of a single acre-foot of water can be construed as affecting all other water rights holders in a region or community. Therefore, interim rules must include a reasonable standard of proof of injury and must include a concept of standing to support an intervention. Further, the injury claimant must bear the burden of proving injury rather than the transfer proponent being required to prove the universal negative.

- **List of Approvals Needed – Formal and Informal**

Interim rules must clearly identify the regulatory authorities with jurisdiction over the approval of water transfers as well as the standards for granting or withholding such approval. Currently, the uncertain and overlapping jurisdictions of many state, federal and local agencies turn the approval process into an open-ended search for some constituency with an objection, however baseless. In addition, informal processes that lack both authority and accountability often determine the outcome of specific transfer requests. Transfers should be able to withstand appropriate scrutiny by all relevant parties, including the public. They should not, however, be subjected to vague and arbitrary decisions made as part of a murky process based on informal conversation and consultation.