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Mr. Jerry Johns, Assistant Chief  
Division of Water Rights  
901 P Street  
Sacramento, California 95814

**RE: Public Workshop Regarding Water Transfers**

Dear Mr. Johns:

The following questions and observations are submitted on behalf of Ellison & Schneider pursuant to the State Water Resources Control Board's ("SWRCB") Notice of Public Workshop Regarding Water Transfers. With increasing population and more onerous environmental restraints, water transfers are necessary for California to meet its future water needs. Efficient and orderly administration of water transfers is imperative if water transfers of any significance are going to occur in the future. The SWRCB's draft *Guide to Water Transfers* addresses various legal and regulatory issues, and was intended to be of assistance. It is not clear, however, whether this "guidance" should be in the form of formally promulgated rules, following formal rulemaking procedures. We are concerned that the guidance document will be relied upon or cited as if it had the status of SWRCB regulations or precedent decisions. At the very least, its legal status and intended use should be clarified as to its consistency with the Administrative Procedures Act.

In addition, we would like the following questions and observations to be addressed. They involve only a few of the many complex legal and political questions implicated by water transfers. The following are directed at issues that have arisen in the context of transfers with which we have been involved. We hope that this workshop will rejuvenate the debate regarding water transfers, and result in clarification of the *Guide to Water Transfers* and clear identification of how it is to be used and its legal characterization.

- The *Guide* does not appear to recognize that there is a distinction between "legal injury" and "impact." There appears to be an assumption among opponents of water transfers that any "impact" associated with a water transfer violates the no injury rule. For example, opponents of long-term transfers often assume that only "consumptive use savings" are transferrable. This

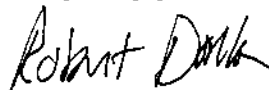
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assumption leads to costly and time consuming administrative and court proceedings, and reduces the incentive to engage in voluntary water transfers. The *Guide* does not clarify this distinction, which affects the determination of how much water is available for transfer. A clear rule on this issue would also allow for expedited SWRCB review of transfer and change petitions, and allow for dismissal of protests that fail to demonstrate "legal injury."

- With respect to temporary transfers of conserved water that are governed by both Water Code Section 1011 and Section 1725, there is a presumption that transfers of such water will not result in injury to the extent that the transferee can demonstrate that the water to be transferred would have been consumptively used or stored but for the transfer. This presumption should obviate protests based on "legal injury."
- The SWRCB should adopt rules that would clarify that, for purposes of establishing "conservation" under Section 1011(a), the transferee need not be required to establish that such efforts were intentionally undertaken pursuant to a formal program implemented specifically for the purposes of Section 1011.
- The SWRCB should address whether the DWR and the USBR, or other third parties, should be obligated to pay for storage of conserved water that cannot be transferred as a result of application of the "no injury rule" or "refill criteria."

These are complex questions that have arisen in the context of several projects with which we have been involved. We appreciate the opportunity to comment on the SWRCB's draft *Guide to Water Transfers*, and wish to express our willingness to work with the SWRCB in the future to further refine water transfer law in California, preferably through the formal rulemaking process.

Very truly yours,



Robert E. Donlan