

23443 S. Hays Rd.  
Manteca, CA 95337  
February 7, 1997

Sunne McPeak, President and CEO  
Bay Area Council  
200 Pine St., Ste. 300  
San Francisco, CA 94014

Re: Water Transfers and SB15

Dear Sunne:

Following up on our discussion on January 30, I attach a copy of the Hildebrand-Herrick critique of the proposed Model Water Transfer Act. The document is entitled "Comments by the South Delta Water Agency on 'A Model Water Transfer Act for California'", now in SB15.

We believe the proposed Model Act is seriously flawed in several respects including inadequate protection of third parties including parties downstream of sellers and diverters with limited resources; short term exemptions from impact scrutiny which can be manipulated to become long term exemptions; shifting the burden of proof to potentially injured parties; the potential adverse effect on other riparians if riparian water is transferred per Section 207; ambiguity in respect to the end use of water sold for environmental purposes and the consequent responsibility for impacts; the repeal of statutes affecting permits other than transfers; etc.

The Act could be modified to address some of these concerns, but we believe there is a broader issue. Transfers do not create water. They reallocate it, and the reallocation being sought is obviously from agriculture to other uses. We believe that free marketing of water among purposes of use is bad public policy and is inconsistent with the way the lands that use the water are marketed. The State's lands are zoned for compatible and proportionate uses in the public interest. We then free market lands within those restraints on purpose of use. Lands that are zoned for a particular use should retain the water that has been available and is needed to sustain that use.

A largely unrestricted free market will transfer a lot of water away from agriculture. Public funds are now available to outbid agriculture for environmental water, and urban users for whom water is a minor budget item can always outbid agriculture for whom water is a major budget item. This results in impacts in addition to those on local economies and local labor. It will also gradually effect the cost and diversity of the food supply. The State has no plan regarding how it will feed the twenty million more Californians that are expected in less than three

decades. We can continue in some degree to reduce the water applied to crops, but we can do little to reduce the water consumed by any given level of crop production. Excess applied water in the Central Valley is nearly all recovered and reused (with some resultant water quality problems). Even at best, the per capita allocation of water that can be consumed to grow food will substantially decline. We should not exacerbate this decline by promoting the transfer of our limited supply of water to other uses.

We believe that the subject of water transfers should be considered in the context of the long term social consequences that will result from reallocation of a limited supply of water in a manner that is inconsistent with land use policy and inconsistent with the long term food supply. Transfers should not just be a cheap, short term substitute for increasing the water supply. They do not even lead to better watershed management to increase the multiple use and reuse of water.

With best regards,

Alex Hildebrand

cc: Jim Costa  
Mike Machado  
Ann Veneman  
Bob Vice  
Lester Snow  
Judith Redmond  
Michael Jackson  
Rita Schmidt Sudman

COMMENTS BY SOUTH DELTA WATER AGENCY ON  
"A MODEL WATER TRANSFER ACT FOR CALIFORNIA", MAY 1996  
BY THE BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE, FARM BUREAU,  
AND MANUFACTURES ASSOCIATION

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Introduction

The South Delta Water Agency ("SDWA") strongly opposes the "Model Water Transfer Act for California". Although there is nothing wrong in principle with transfers of water in order to help ease the growing water crisis in California, the Model Water Transfer Act ("Act") fails to address many relevant issues and in fact exacerbates many current and ongoing problems facing many of the smaller users of water in California.

Because the development of new water has become tremendously expensive, purchases and transfers of water are gaining in popularity. The concept of a free market in water is an attractive way to address shortages by letting the market allocate this limited resource.

A completely free market, however, is not possible due to society's determination that such things as fish and wildlife preservation are also entitled to protection even though they do not fund themselves.

Similar concerns of potential harm to other public and private interests not involved in a particular transfer must also be considered before large scale changes are made to existing California Water Law. The desire to expedite and encourage water transfers should not result in laws that harm current and future water users, result in a detriment to agriculture, or preclude the development of large areas of the state.

This proposed Act is an attempt to balance the potential benefits of facilitated water transfers versus the third party and social detriments which can result from transfers which may be deemed beneficial only by a buyer and a seller.

The Act separates short term and long term transfers, but does not adequately distinguish among transfers within a hydrologic basin and without change in purpose of use, versus transfers which move water from an area of origin to an area of water deficit and/or from agriculture to other economies.

The Act tries to strike a balance between an unbridled free market versus the limitations on free markets that are typically imposed by such things as county land zoning, air pollution controls, environmental protection statutes, numerous permit requirements, laws protecting minority interests, etc. Free markets are usually required to operated within boundaries and with social oversight when the commodity involved is both essential to much of society and in limited supply.

We believe the Act does not achieve an appropriate balance between short term benefits to those who developed the proposal, versus both the short term protection of rural economies and third partes in areas of origin, and the long term consequences to society as a whole. The proposal permits largely unrestrained changes in purpose of use (it carves out large exceptions to CEQA, the California Environmental Quality Act), thereby providing reliability for urban users at the expense of reliability for agricultural use. This threatens the sustainability of the agricultural infrastructure needed by others than the buyers and

sellers. It is cheaper in the short run for urbans to buy water from agriculture rather than to develop new water yield or even go to extensive demand reduction. However, the free market will not react fast enough as the population grows to inhibit this type of transfer before the price of food rises, and it is then too late to develop new yield.

### Buyers And Sellers Can Not Be Relied On To Protect Third Party And Broad Social Interests

In most instances, buyers and sellers have neither the incentive nor, often, the technical knowledge to see that other interests are protected. Currently, CEQA and California Water Law impose broad requirements to insure any transfer does not do harm. In the case of transfers within a district or between agricultural districts that use exported water the districts can probably be relied on for oversight. Even transfers among State and Federal contractors from agricultural to environmental or urban use will have some oversight if there is no governmental coercion to transfer. However, it is doubtful that other transfers (that would become popular under the proposed Act) will have adequate oversight unless expanded SWRCB approval is required.

### Protection Of Downstream Diverters

Downstream diverters and rural communities will not be protected if they are not notified of a proposed transfer by an upstream diverter or a transfer that may affect the rural economy. Notice in a back page of a newspaper as required by the Act is not

an effective notice. There must be direct notification of parties at risk.

### Short Term Exemptions

The proposals for oversight exemptions for "short term" transfers ignore the ease with which the long term provisions can then be avoided. For example, the two year limit on short term transfers could be avoided by two sellers arranging with two buyers to swap customers every two years.

### Burden Of Proof

We strongly oppose shifting the burden of proof to damaged parties. This is not only unfair, but any potentially damaged party will lack the financial and technical ability to defend themselves against major adversaries. Furthermore, they may have difficulty in getting the transferors to provide necessary information. (See later discussion of conservation and of return flows).

### Determination Of Whether Water Being Transferred Is Either Salvaged Or A Result Of Reduced Water Consumption

It has been our experience that upstream transfer proposals are often based on alleged "conservation" by more efficient water application, but with no actual reduction in water consumption and no salvage of water otherwise lost. The result is that they sell water that previously was put to use by downstream users. At this time, some potential transferors are refusing to reveal details of their operations in order to hide the downstream effects. Third

parties would be severely handicapped if they then bear the burden of proof.

#### Return Flows

Diversions for upstream agricultural use generate substantial surface and subsurface return flows to the stream system, and also provide groundwater recharge to supply cities which otherwise would use surface water. If this diverted water is used instead for fish flows or for delivery to non-agricultural users, the seller is in part selling return flow water needed by downstream diverters in summer months. These effects are complex and the burden of proof must not be placed on downstream parties who may not have the data or the expertise to prove and quantify the impact.

#### Permanent Transfers

Proposals for permanent transfers should be disfavored. Even the vast state and federal projects are limited by area of origin and watershed protection laws that protect future users in the areas where the water originates. If allowed at all, there should be no expedited process for such a transfer, rather there should be at least the same level of scrutiny as would be given to an application for a new appropriation.

#### Transfer Of Riparian Water Rights

Any provision for transferring some riparian rights may place all riparian rights in jeopardy. Section 207 of the Act allows for the transfer of riparian rights (that have been quantified under Water Code Sections 2500 et. seq.). Current law precludes transfers

of riparian rights although a riparian right can be reallocated or limited by way of a grant. The Act raises two issues; policy considerations and abuses.

The policy considerations deal with examining the effects of such a change in the law. Currently agricultural and rural communities pay from \$0 to \$250 per acre foot for water. Large urban areas sometimes pay \$500, \$600 and more per acre foot. If a riparian right is temporarily or permanently transferred at a \$500 per acre foot cost, agricultural and rural economies will never be able to "out bid" or buy back the water. Thus the areas in which the water originates will in fact lose their right to use the water and be precluded from further growth if not further existence. Current riparian law has as its purpose to guarantee that the areas in which the water originates will have water available for future use. Changing this is a complete reversal, not a minor adjustment to California Water Law.

Similarly, riparian use on a stream is what determines how much is available for junior permitted appropriators. A transferee of a riparian right under the Act would jump ahead of permitted appropriators on the priority scale. (Less riparian use on a stream would normally make more water available to both other riparians and permitted appropriators.)

The abuse issue deals with overcoming Section 207's limitation on transferring only judicially quantified riparian rights. Again, economics will take over. If it is cheaper to fund a judicial determination of rights on a stream than it is to develop alternate sources of water (e.g. desalination plants produce water at a cost



of approximately \$2,000 per acre foot), then large urban interests will seek more and more judicial quantifications. Hence, a narrow exception in the proposed Act may become a huge loophole.

Section 402 of the Act states:

"The Board shall not have jurisdiction over any other transfers of water unless the water right holder requests the Board to exercise jurisdiction pursuant to Sections 403 and 404".

Does this mean a riparian can acquiesce to the SWRCB's exercising jurisdiction over a transfer of his water under this Act? If so, then virtually all riparian rights can become subject to this Act; it just becomes a question of how much money.

#### Through Delta Transfers

If water is designated or sold for fish and wildlife purposes from a San Joaquin tributary and is then recaptured for export, is that a "through Delta transfer" under the Act? Is the sale really for fish or for export or both? Who pays and who is responsible for impacts? The Act provides no guidance and would appear to facilitate expedited transfers for fish and wildlife, which then become exports after they pass a certain point.

#### Groundwater Sales

There should be no exceptions to the prohibition of sale of non-banked water from a "critical" groundwater basin, and any sale from a non-critical basin must terminate whenever the basin is found to be overdrafted.

Section 1701 permit change process realizes that these shortened time frames preclude meaningful participation. [Without a substantial increase in staff and funding, the Board's analysis would be cursory at best.]

Long term transfers have slightly longer time frames, for Board analysis, but the same time frame for protestants to comment. This provides no meaningful participation especially for a permanent transfer of water. By way of example, both CEQA and Section 1701 processes always take at least a year. Even then it is difficult to conduct adequate investigation or review on complicated issues.

Although the long term transfer keeps the burden on the petitioner, that obligation is significantly lessened because the test under the Act is less than CEQA requirements, and because protestants have a limited amount of time to evaluate the issues and data.

### Repealed Statutes

Strangely, the proposed Act seeks to repeal Water Code Sections 1700-1707. Sections 1701 and 1702 deal with all changes in place, time, and use of water under permits. Repealing these Sections leaves non-transfer changes with no statutory review criteria.

Section 1702 is itself an important protection for all water users. By changing the test and shifting the burden, the Act changes the emphasis from protecting third parties to favoring transfers. This change will allow both the Board and the courts to label harms as "unlikely" or "not significant" in order to allow

transfers. Current law has the Board and courts err on the side of protecting third parties because of the heavy burden placed on the petitioners.

### Compensation Of Parties Injured By Expedited Transfers Of Conserved Water

Section 505 and 506 of the Act are truly extraordinary substitutions for CEQA Law. Under current CEQA Law, a petitioner must examine all potential effects and can only proceed if the effects are not significant, or if they are mitigated. This occurs before the project begins.

Under this Act, the petitioner submits a copy of the Transfer Agreement and then verifies its calculations of the conserved water. "Any interested party may submit written comments" and then the Board decides in thirty days whether to allow the transfer.

Should this even more shortened process result in an error, relief is limited to \$5 an acre foot, the amount required as security under the Act. There is no judicial review. This unrealistic limit on damages is actually a condemnation of a property right that avoids paying just compensation. In addition, it again requires the damaged party to bear the burden of proof.

This section of the Act has numerous other serious problems that need evaluation if not outright removal. For example, a party may have no water right but be getting water under a contract; the Act allows the sale of this water with no judicial review. Also, the transferor can avoid liability for damage if the damage is allegedly due to changes in operations of other facilities. Who

is responsible if the damage is a result of an accumulation of many expedited transfers?

Conclusion

Water transfers do not create water. Central Valley water is already fully committed much of the time so increased exports from the valley should be based on new yield rather than reallocation.

The Act attempts to set forth clear and straight-forward steps to allow water transfers to become more prevalent. However, a review of the Act reveals that the drafters have not considered many likely effects that will result. The Act will make it even more difficult for small water users to protect their interests and will make certain the transfer of water from agriculture and rural communities to large urban centers. The shifting of the burden and the lessening of the evaluation and investigation process set forth in the Act, suggests that the above effects are intended results. Regardless, the SDWA will strenuously oppose the Act in its current form.

Submitted by:

SOUTH DELTA WATER AGENCY

Dated: June 26, 1996

Alex Hildebrand  
Alex Hildebrand, Secretary

BREWER, PATRIDGE, GERLONES  
& HERRICK

Dated: June 26, 1996

J. Herrick  
JOHN HERRICK, Attorneys for  
SOUTH DELTA WATER AGENCY

# SOUTH DELTA WATER AGENCY

2509 WEST MARCH LANE, SUITE 200  
POST OFFICE BOX 70383  
STOCKTON, CALIFORNIA 95267  
TELEPHONE (209) 474-2509  
FAX (209) 474-9701

**Directors:**

Jerry Robinson, Chairman  
Peter Alvarez, Vice-Chairman  
Alex Hildebrand, Secretary  
Robert K. Ferguson  
Natalino Bacchetti

**Counsel:**

Brewer, Partridge,  
Gerlomes & Herrick  
Engineer:  
Gerald T. Orlob

March 19, 1997

(SEE ATTACHED MAILING LIST)

Re: Model Water Transfer Act  
Preprint SB 15

Dear Ladies/Gentleman:

The South Delta Water Agency ("SDWA") presents the following comments to Preprint SB 15, the Model Water Transfer Act for consideration by you and the Committee.

Although the SDWA is not opposed to transfers per se, SB 15 presents extreme risks to users on the San Joaquin River System and in the Delta, and to agriculture in general. Some transfers can be beneficial and will certainly be a part of an overall plan to address California's future water needs. A program such as the Monterey Agreement is an example of a beneficial method by which transfers can be accomplished.

However, SB 15 will result in damage to San Joaquin River and Delta diverters and pose a risk to all agriculture in California. A brief description of the current situation is necessary for an understanding of our position.

The south Delta encompasses mostly riparian agricultural diverters. Riparians are the superior most right holders pursuant to California law. Inferior right holders under the law, must decrease usage if insufficient water is available for riparians.

In summary, the south Delta on paper has numerous laws and rights which should protect the diverters within its boundaries. However, our Agency, with its limited funds, continues to fight a never ending battle in attempts to get the quantity and quality of water to which the diverters are entitled. Although we periodically seem to make some progress on some of the battles, the war is far from over and the outlook is certainly unclear. In our opinion, and as we believe can be easily shown, virtually any upstream transfer of water on the San Joaquin River System will aggravate the current situation and additionally harm south Delta riparians. The reasons are as follows:

The San Joaquin River System is a finite or closed system. Each year only a given quantity of water passes through it. This yearly quantity is spread out over the full year with flows differing at different times of the year. Any change in timing and flow at one time of the year necessarily changes the timing and flow at another time of the year because any such change does not add to that year's total flow, rather it simply reallocates it to a different time. Hence, every time there is a transfer of water presently used in the time period of approximately April through September, the flow of the San Joaquin River during that time, will be adversely affected.

Virtually all agricultural water use in the San Joaquin System affects the amount of water in the river. If the use does not directly provide surface or subsurface return flows to the waterways, it provides water to a groundwater basin. Should this seepage to a groundwater basin cease (the transfer applies/uses the water somewhere else) the groundwater basin users typically can and do exercise their ability to get substitute deliveries from providers of surface waters. The effect then is less surface water flowing into the San Joaquin River. [Agricultural use of water is generally at 65% to 75% efficiency, which means that approximately 25% to 35% of applied water is not consumed through evaporation or by plant uptake]

Most current transfers, as well as those contemplated in the near future, shift water that is currently being used during the peak agricultural months of April through September either to springtime releases (to provide fish flows) or for export purposes. Both of these have the effect of decreasing the water in the San Joaquin River during those peak irrigation months.

Current statutes that deal with transfers contain language that purports to protect downstream or other legal users. The proposed SB 15 clearly decreases the investigation and review of any transfer when compared to the existing statutes. Under the current system, in the last 2 to 3 years, the SDWA has dealt with five transfers. Each of these transfers has had an environmental review which did not examine the above described issue, and concluded with a FONSI (NEPA) or a Negative Declarations (CEQA).

## SOUTH DELTA WATER AGENCY

3031 WEST MARCH LANE, SUITE 332 EAST  
POST OFFICE BOX 70392  
STOCKTON, CALIFORNIA 95267  
TELEPHONE (209) 956-0150  
FAX (209) 956-0154  
EMAIL Jherrlaw@aol.com

**Directors:**

Jerry Robinson, Chairman  
Peter Alvarez, Vice-Chairman  
Alex Hildebrand, Secretary  
Robert K. Ferguson  
Natalino Bacchetti

**Counsel:**

John Herrick

**Engineer:**

Gerald T. Orlob

April 27, 2000

**Via Fax (916) 657-1485**

Mr. Jerry Johns  
Assistant Chief, Division of Water Rights  
State Water Resources Control Board  
901 P Street  
Sacramento, CA 95812

Re: Water Transfer Workshop

Dear Mr. Johns:

SDWA will be attending the May 5 Workshop on Water Transfers and looks forward to participating in this process. Enclosed for the Board is a copy of our comments to the Model Water Transfer Act which was previously proposed as legislation. We believe these comments set forth the areas of concern regarding transfers.

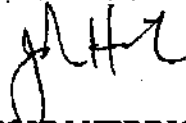
Too often it is assumed that transfers will help alleviate water shortages and so there should be a policy of encouraging transfers. To the contrary though, transfers produce no new water and do not increase the amount of water available for all uses. In virtually every instance on the San Joaquin River, a transfer will simply reallocate available supplies and thus reallocate the shortage. To encourage this sort of activity is therefore counterproductive.

It appears to be the SWRCB's policy to seek ways to expedite transfers which only makes it easier and faster for upstream users to harm downstream interests. As we have seen from the ongoing Bay-Delta hearings, there is no assurance that the Board or proponents of a transfer will adequately examine the effects of the project. The SJRGA conducted extensive modeling of the effects of the transfers they sought, *but*, they instructed the modeler to assign a value of zero for return flows from the districts. Later, it was discovered that one of the districts own evidence showed that a transfer resulted in a decrease in river flows in the amount of one-third of the transfer amount. Notwithstanding this, the Board approved the transfer.

Mr. Jerry Johns  
April 27, 2000  
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If the Board is interested in protecting water rights and water quality, it will take a much closer look at the effects of transfers. It is not in California's interest to allow dam operators to trap water in excess of their needs in order to sell it to the highest bidder. Not only does this eviscerate water right priority law, but it will necessarily harm most other users within the areas of origin who have acted with reliance on the historical practices of the other users within the system.

Very truly yours,

A handwritten signature in black ink, appearing to read "JH", written over a horizontal line.

JOHN HERRICK