

VII. Junior Right Holders Will Not Be Harmed

No Colorado River right holders will be harmed by the Agreement. The IID will be transferring newly conserved water to the Authority. Those senior to the IID in the priority scheme will continue to take the same amount of water, as will those junior to the IID. Ignoring for illustration purposes only All-American Canal return flows and transfers to MWD under the 1988 IID/MWD Agreement, consider the following hypothetical example: suppose in the year 2010 the IID would divert 3.1 million AFY of water in the absence of new conservation. Suppose further that by using funds from the Authority new conservation can produce 200,000 AFY of water. The IID would transfer an amount equal to the new 200,000 AFY to the Authority and reduce its diversions from the Colorado River by 200,000 AFY to 2.9 million AFY. Junior right holders such as CVWD and MWD are unaffected by the conservation/transfer because the combined IID/Authority total diversion does not increase and, but for the conservation, 3.1 million AFY would have been diverted and used by the IID.

Sections 1702, 1707, 1725 and 1736 all provide for approval of petitions by an appropriator to change place of use, purpose of use, or point of diversion if the change (a) "will not operate to the injury of any legal user of the water involved" (§ 1702); (b) "will not unreasonably affect any legal user of water" (§ 1707); (c) "would not injure any legal user of the water" (§ 1725); and (d) would "not result in substantial injury to any legal user of water" (§ 1736).

The SWRCB has found that this "no-injury" condition protects only those who have a right to use the water, and not every person in the state. In response to the Merced Irrigation District's request to transfer 7,500 AF of water to the BOR under §§ 1707 and 1725, the South Delta Water Agency ("SDWA") contended that it was entitled to protection under the "no-injury" language of §§ 1707 and 1725. SWRCB Order WR 98-01 at p. 1. The SWCRB disagreed, finding that SDWA was not a "legal user of water" within the meaning of the statutes and consistent case law:

SDWA argues that it does not need a legal right to use the water in order to be injured within the meaning of Water Code sections 1707 and 1725 et seq., and that the common law cases do not apply. We do not agree. [FN2] The statutory no-injury rule codifies the common law no-injury rule. (See Water Code section 1706; Code Commission Notes to Water Code section 1700; Final Report, Governor's Commission to Review California Water Rights Law (1978) at 64-65.) Accordingly, the no-injury rules under Water Code sections 1702, 1706, 1707, 1725, and 1727 all should be interpreted consistently with the case law.

Id. at p. 7.

We conclude, however, that the requirement that a transfer not injure any legal user of water does not extend protection to persons or interest[s] who have no legal right to use of the water.

Id. at fn.2.

SDWA could not object on "no-injury" grounds. It had no legal right to use the water and therefore was not a "legal user of water" under the terms of the relevant statutes.

This inherent legislative limitation of the term "legal user of water" is important in the context of this proceeding. Even "legal users of water" can only properly object if there is injury to the quantity or quality of water available to them under their water right. For example, the MWD contended in its recent lawsuit against the IID that because it might "lose sales" to the Authority if

the transfer went through, it was an "injured" party who could protest the transfer. Judge Laurence Kay of the San Francisco Superior Court agreed with the SWRCB's earlier interpretation that the term "legal user of water" was not meant to apply in the manner contended by the MWD. IID Appendix, Tab 12, pp. 10-12.²²

Accordingly, only holders of legal rights to use Colorado River water could object to the IID-Authority transfer on "no-injury" grounds. Further, only legal users of water with rights subordinate to IID could conceivably complain, since senior right holders will continue to receive their full diversion whether or not the IID-Authority transfer is approved and implemented. CVWD is a junior right holder that has indicated that it likely will object. Among the objections CVWD is likely to assert is that it will suffer injury as a result of the transfer.

First, however, CVWD must establish the four corners of its own water right, including a showing that it is using water reasonably and beneficially (despite its on-farm efficiency being substantially less than the IID's). Furthermore, whatever the extent of CVWD's reasonable and beneficial use, its water right is subordinate in priority to the IID's third priority right as a result of the 1934 Compromise Agreement. CVWD (or any junior right holder) will not be able to demonstrate substantial injury to its water right as a result of the proposed transfer because:

1. It will have the same amount of water available to it before and after the transfer;
2. It does not rely on any IID return flow to the Colorado River (virtually all of the IID's tailwater ultimately empties into the Salton Sea);
3. There will be no negative "carriage water" impact for CVWD (the IID will continue to divert millions of acre-feet of Colorado River through the All-American Canal); and
4. The transfer will not cause CVWD to overdraft its groundwater basin, given that CVWD has been allowing such overdraft for decades.

²² MWD has appealed Judge Kay's decision.