

## IX. State Law Favors This Transfer

Water transfers are recognized as an important means of meeting California's increasing water demands without injuring the environment. Given substantial differences in water endowments among regions of the state, and significant variation in precipitation from year to year, California's development has necessitated large inter-basin transfers. For the first 70 years of this century, California met its increasing water needs by constructing large storage and diversion projects and moving water over massive distances. The urban coastal plain of Southern California, for example, satisfies less than a quarter of its water demand with water from local sources. The remainder of its water comes from the Colorado River via the Colorado River Aqueduct, from Inyo and Mono Counties through the Los Angeles Aqueduct, and from Northern California via the State Water Project. The continued growth in urban water demand, coupled with governmental mandates to retain more water in rivers and lakes for environmental purposes, has used up any surplus water supply that had been available in normal rainfall years. Today, the Southern California coastal plain and many other regions of the State face increasing water concerns.

To address these issues, as early as 1979, the California Legislature began to enact a series of statutes that, taken together, mandate approval of the IID-Authority transfer. First, § 1011 allows an appropriative right holder to conserve water and to then transfer the conserved water without losing the underlying water right despite reduced use. Section 1011 unequivocally establishes that conservation of appropriated water constitutes a reasonable and beneficial use of the water by the water right holder:

When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of such appropriated water shall be deemed equivalent to a reasonable beneficial use of water . . . .

§ 1011(a). Such "deemed" reasonable beneficial use takes place at the location of the water conservation efforts since the resulting reduction in use is the deemed reasonable beneficial use.

The Legislature's statement in § 1011 that conservation "shall be deemed equivalent to a reasonable beneficial use of water to the extent of such cessation or reduction in use" is important. This language states that conservation itself constitutes a reasonable and beneficial use, thus providing that the "use" occurs where conserved. In other words, when the IID conserves the water which is to be transferred to the Authority, the IID is reasonably and beneficially using the water within the boundaries of the Imperial Irrigation District. Section 1011(b) then states that such water may be transferred. The statute was drafted to facilitate transfers such as that proposed by the Agreement. Thus, § 1011 provides a clear mandate for the SWRCB to approve the transfer under the terms of the Agreement.

The enactment of § 1011 was followed by a litany of statutes declaring and affirming the State's strong policy in favor of voluntary water transfers. For example, § 109, enacted in 1980, states:

(a) The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.

(b) The Legislature hereby directs the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water and water rights . . . .

If there were any doubt about the application of § 1011 to IID conservation, § 1012, enacted in 1984, is abundantly clear:

Notwithstanding any other provision of law, where a person, public agency, or agency of the United States<sup>23</sup> undertakes any water conservation effort, either separately or jointly with others entitled to delivery of water from the Colorado River under contracts with the United States, which results in reduced use of Colorado River water **within the Imperial Irrigation District**, no forfeiture, diminution, or impairment of the right to use the water conserved shall occur, except as set forth in the agreements between the parties and the United States.

§ 1012 (Emphasis added.)

In 1986, the Legislature enacted additional statutes expressly designed to promote water transfers:

The Legislature hereby finds and declares that voluntary water transfers between water users can result in a more efficient use of water, benefiting both the buyer and the seller . . .

The Legislature further finds and declares that it is in the public interest to conserve all available water resources, and that this interest requires the coordinated assistance of state agencies for voluntary water transfers to allow more intensive use of developed water resources in a manner that fully protects the interests of other entities which have rights to, or rely on, the water covered by a proposed transfer.

§ 475.

The Legislature hereby finds and declares as follows: . . .

(d) It is the policy of the state to facilitate the voluntary sale, lease, or exchange of water or water rights in order to promote efficient use. . . .

Deering's California Codes (Annotated), Note re "Stats. 1986 ch. 918" preceding the "Wheeling Statutes" at § 1810 et seq.

The SWRCB expressed very strong support for the policy codified in § 1011, writing to the law's author, State Senator Rose Ann Vuich, in June of 1981:

I am pleased to tell you that the Board has implemented your bill effectively, yet with a minimum of new red tape. As you know, the new law allows an appropriator to retain the right to any surplus water created because water conservation measures were implemented. . . .

Your bill is clearly a step in the right direction of creating incentives for water conservation. We hope you will continue to support and author legislation that seeks to promote efficient and effective use of our scarce water supplies.<sup>24</sup>

In 1982, the SWRCB prepared a Bill Analysis of Assembly Bill 3491<sup>25</sup>, which contained an amendment to § 1011 allowing transfers of the conserved water. The SWRCB stated (emphasis added):

Under existing law, if water right holders cease or reduce use of water under an existing water right because of reclamation or conservation efforts, they do not forfeit the right. AB 3491 would make clear that saved water can be transferred. Although existing law allows these transfers,

enactment of this provision would eliminate any uncertainty concerning this matter, and provide greater incentives for transfers.

The SWRCB supported AB 3491 because:

[T]he provisions of AB 3491 are designed either to encourage or facilitate market transfers of water, which was urged by the Governor's Commission to Review California Water Rights Law.

Id. p. 2.

The SWRCB also recognized California's pro-transfer policy and, specifically, potential transfers by IID in its Decision 1600 and Order WR 88-20:

Water Code Section 1011 expressly authorizes the sale, lease, exchange or other transfer of water saved through conservation efforts. Under appropriate circumstances, the maximum beneficial use provision of Article X, Section 2 of the California Constitution may mandate the transfer of surplus water to water-short areas.

SWRCB Decision 1600 (IID Appendix, Tab 6 at pp. 17-18.)

[T]he California Water Code not only authorizes the voluntary transfer of water made available through implementation of conservation measures, but it actively encourages such transfers and protects the underlying water right of the agency which conserves the water.  
SWRCB Order WR 88-20 (IID Appendix, Tab 7 at p. 39.)

In a Bill Analysis by the SWRCB<sup>26</sup> regarding § 1012, the SWRCB concluded that there was approximately 438,000 acre-feet of water which could be conserved in the IID:

There is a potential 438,000 acre-foot [sic] of water which could be conserved annually by IID if they have economic incentive for doing so. This bill helps provide that incentive.

In its analysis of § 1012 for the Enrolled Bill Report to the Governor<sup>27</sup>, the SWRCB again noted that existing law already guaranteed protection of the IID's appropriative rights:

Existing law provides that no forfeiture of an appropriative water right shall occur when the appropriator fails to use water because of water conservation efforts. AB 2542 would enact language that would make this rule specifically applicable to any water conserved by the Imperial Irrigation District.

In other words, § 1012 just restated the conserved water safety net of § 1011, with specific application to the IID. This was confirmed by the Bill Analysis by the Department of Water Resources ("DWR") of Assembly Bill 2542 (which became § 1012), wherein the DWR stated that because of § 1011, "This bill is largely declaratory of existing law."<sup>28</sup> After indicating how § 1011 already allowed transfers of conserved water, the DWR concluded, "the bill is not legally necessary." Id.

Water transfers are beneficial and important for a number of reasons. They create a new source of water to meet increasing demands. By the IID's conserving and transferring water, communities such as San Diego can help ensure that the Colorado River Aqueduct remains full and thereby avoid serious water shortages.

Voluntary water transfers play a similarly valuable adjustment role during droughts. By 1991, California recognized that new sources of water were necessary to avoid serious economic

damage from the drought that had begun in 1987, and the state therefore created a drought water bank run by the DWR to encourage voluntary transfers. The 1991 drought water bank facilitated the transfer of 800,000 AF of water from areas that could reduce their water use to areas with important unmet demands, at a value of over \$111 million. The 1991 drought water bank was successful enough that the State ran drought water banks again in 1992 and 1994 (and formed and operated an options bank in 1995 before increased precipitation reduced water needs).

By providing a means of meeting the growing demands of urban regions of the State such as San Diego, voluntary water transfers can reduce the pressure to construct new water projects with their potential harmful environmental results, such as depleting rivers and other waterways. If transfers of Colorado River water are stifled, and the amount of water flowing through the Colorado River Aqueduct thus falls, pressures will mount to bring water into Southern California from elsewhere in California, and will put additional pressure on the San Francisco/San Joaquin Bay Delta.

Finally, voluntary water transfers can provide the financial resources that many water users need to engage in conservation. Water conservation can often require significant amounts of money and, without the revenues from voluntary transfers, many users cannot afford to employ additional and more expensive conservation measures. The SWRCB has recognized the symbiotic relationship between transfers and conservation:

In appropriate conditions, the [IID] conserved water presumably could be transferred directly to another party by agreement between IID and the other party.

SWRCB Decision 1600 (IID Appendix, Tab 6 at p. 16.)

This IID-Authority transfer is entirely consistent with goals and objectives of SWRCB Decision 1600 and Order 88-20 and California law. The SWRCB should approve the transfer as authorized and supported by state law, its own policies and numerous public policy pronouncements.

<sup>23</sup> The uncodified portion of §1012 states: "The Legislature finds and declares that the enactment of Section 1012 of the Water Code is intended to clarify and make specific existing California law in regard to water conservation measures which may be taken within the Imperial Valley. In enacting Section 1012 of the Water Code, it is not the intent of the Legislature to alter the relationship of state and federal law, as each may apply to the distribution and use of Colorado River water." (Emphasis added.)

<sup>24</sup> IID Appendix, Tab 15 (June 23, 1981, letter from Stephanie Bradfield of SWRCB to The Honorable Rose Ann Vuich).

<sup>25</sup> IID Appendix, Tab 16.

<sup>26</sup> IID Appendix, Tab 17.

<sup>27</sup> IID Appendix, Tab 18.

<sup>28</sup> IID Appendix, Tab 19, p.1.