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A SUMMARY OF THE CALIFORNIA LAW OF SURFACE WATER AND GROUNDWATER RIGHTS

Set forth below is a brief discussion of the California law of surface water and groundwater rights, including provisions for transfer of different types of water rights and entitlements. These are general provisions. Please consult an attorney regarding specific water right issues. The State Water Resources Control Board's (State Board) website (<http://www.waterrights.ca.gov/WRINFO/>) includes publications that provide additional information on California water rights.

1. Reasonable and Beneficial Use Doctrine

Article 10, section 2 of the California Constitution (enacted in 1928) prohibits the waste of water, and requires reasonable use, method of use and method of diversion for all surface and groundwater rights. The doctrine of reasonable and beneficial use is the basic principle defining California water rights: that no one can have a perpetual interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially. (See also Water Code section 275: "The department [of water resources] and [state water resources control] board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.")

2. Riparian Rights

Riparian water rights are rights that an owner of land contiguous to a natural stream possesses to divert the naturally-available supply directly to use, without artificial storage, for reasonable, beneficial purposes on that riparian land. Riparian land is the smallest parcel of such contiguous land, in a single chain of title from the original private owner, that is within the watershed of the stream. The right arises by virtue of ownership of the riparian land, and is not gained by use nor lost by nonuse. Generally, the riparian right is superior to the other types of surface water rights, but the riparian right does not apply to water that is stored for later use. The riparian right may be junior to an appropriative water right that was perfected before a patent on

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the riparian land was issued by the United States. The riparian rights of owners of land that are riparian to the same source are "correlative," in that, if there is insufficient water under the riparian right for all riparians, each is entitled to a fair share of the available supply based upon the amount of their land and their reasonable water supply needs.

Where interests in the riparian parcel are conveyed or the riparian parcel is subdivided, the riparian right as to any subparcel that is no longer contiguous to the source of water may be severed, absent the intent to retain the riparian nature of the severed parcel.

3. Appropriative Rights

Appropriative rights to surface water are rights to use unappropriated water, that is, water that is surplus to the needs of riparian owners and prior appropriators and prescriptors. Appropriative rights are based not on land ownership, but on actual diversion and use of water. They are rights of priority, in that, if the available surface water supply is insufficient to meet the needs of all appropriators, the one with the earliest priority date is entitled to satisfy his or her needs fully before those with later priority are entitled to any water. An appropriative right may be established to use water for any reasonable, beneficial purpose on any land no matter where located, and to store water from one season for use in a later season, or from one year for use in subsequent years. Just as appropriative rights are gained by use, conversely, once acquired, they may be lost wholly or in part by five years' nonuse during a time when the water was physically available for use.

Prior to 1914, appropriative rights could be acquired simply by posting or filing a notice, and then diverting and using the water for reasonable, beneficial purposes (referred to as "pre-1914 water rights"). Since 1914, California statutory law has required that an application be filed and a permit obtained from a State agency, now the State Water Resources Control Board. The State Board has the discretion to decide whether unappropriated water exists, and whether the proposed use under the application is reasonable, beneficial and in the public interest. If the State Board finds affirmatively on these issues, it can issue a permit, and then, after the diversion and use facilities have been constructed and the water appropriated has been fully put to beneficial use within the time allowed, the State Board can issue a license confirming that the water right has been perfected by use for the amount used.

Under Water Code sections 5100 through 5108, the holder of an appropriative water right is required to file periodic statements with the State Board of diversion and use of water under the water right. Under section 5108, these statements are for informational purposes only, and neither the failure to file a statement nor any error in information filed will have any legal consequence. From time to time, the State Board has proposed amendments to these provisions that would require filing the statements of diversion and use as a condition to retaining the water

right.

4. Prescriptive Rights to Surface Water

Prescriptive water rights are created by five years' open and notorious use of water under a claim of right that is adverse to one or more existing prior rights: riparian, appropriative or prescriptive. (But see, *People v. Shirokow* (1980) 26 Cal.3d 301, which held that prescriptive rights could not be obtained against the State's interest in allocating water in the public interest.) The use must be reasonable and beneficial. As in the case of appropriative rights, a prescriptive water right can be established for use on any land, and water can be diverted directly to use or stored for later use. Prescriptive rights, however, cannot be acquired against public agencies or public utilities. Prescriptive rights, like appropriative rights, can be lost by five years' nonuse.

5. The Public Trust Doctrine

In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the California Supreme Court held that the State, in accordance with Article 10, section 2 of the State Constitution, as trustee of the "public trust," retains supervisory control over all the State's waters to protect navigation, fishing, recreation, ecology and aesthetics. No person has a vested right to appropriate water in a manner harmful to the interest protected by the public trust. "Once the State has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the State is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The State accordingly has the power to reconsider allocation decisions. . . . No vested rights bar such reconsideration."

6. The County of Origin Law (State Filings)

In the 1920's and 1930's, the State legislature adopted legislation authorizing massive applications by the State for future water development projects. In order to attempt to allay the fears of areas from which water projects might transfer water, the legislature passed certain "area of origin" laws. Specifically, in 1931 the legislature passed the County of Origin Law (Water Code section 1055), and in 1933 the legislature adopted the Watershed Protection Law (Water Code sections 11460 - 11463), which is discussed in the next section of this document.

The State, acting through the Department of Water Resources ("DWR," and previously the Department of Finance), is authorized to appropriate water (and has done so) for future water projects (known as "State filings"). (See Water Code sections 10500 - 10507.) The State Board is authorized to release from priority or assign these State filings to other agencies or entities when the release or assignment is for the purpose of development not in conflict with the State water plan. (Water Code section 10504.) Under the County of Origin Law, the State Board is

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expressly prohibited from assigning or releasing the priority when, in its judgment, the effect could be to deprive the county in which the water originates of water necessary for its development. (Water Code section 10505.)

The legislative intent and effect of section 10505 was to provide protection for the future interest of the counties of origin by placing restrictions on the authority of the State to transfer or dispose of the priorities vested in the State by filing applications to appropriate unappropriated water. (25 Ops.Cal.Atty.Gen. 8, 15 (1955).) Section 10505 applies only to applications filed by the State. The county of origin provisions do not apply to water rights that are not based on assignment or release of a State filing.

7. The Watershed of Origin Protection Act (“Area of Origin Act”)

The “Watershed of Origin Protection Act” (Water Code sections 11460 ó 11465, sometimes referred to as the “area of origin law”) operates to protect the priority of water rights within the watershed against State export rights in two major ways: (a) by giving protected areas a preferential right to contract for State-developed water, and (b) by allowing later upstream developments within the watershed to obtain priority as against the State’s projects. Water Code section 11460 states: “In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.”

The area of origin law does not entitle protected areas to State-developed water free of charge, nor does it allow the protected areas to gain any priority against entities other than the State who may export water out of the watershed. Area of origin rights are not transferable to an area outside the area of origin. The area of origin law does not create any hierarchy of preference between areas included within the same watershed. The Central Valley Basin contains two watersheds: one comprising the Sacramento River and its tributaries down to and through the Delta, and another comprising the San Joaquin River and its tributaries. (29 Ops.Cal.Atty.Gen. 136 (1957).)

The United States must comply with the area of origin law when it seeks a priority established under a state filing (Water Code section 10500). (See 25 Ops.Cal.Atty.Gen. 8, 28 - 29 and Water Code section 10505.5: “Every application heretofore or hereafter made and filed pursuant to section 10500 . . . shall provide that the application, permit or license shall not authorize the use of any water outside the county of origin which is necessary for the development of the county.” Under Water Code section 11128, the area of origin law applies to

the operation of the federal Central Valley Project. (See also, *California v. United States* (1978) 438 U.S. 645.)

8. The Delta Protection Act

Article 4.5 of Division 6 of the Water Code (commencing with section 12200) sets forth the Delta Protection Act, which provides a first priority to provision of salinity control and maintenance of an adequate water supply in the Sacramento-San Joaquin Delta (‘‘Delta’’) Delta for reasonable and beneficial uses of water, and relegates to lesser priority all exports of water from the Delta to other areas for any purpose.

9. Groundwater Rights

Groundwater rights attach to percolating groundwater, which includes all groundwater that does not comprise a subsurface stream or the underflow of a surface stream. An underground stream is a stream or river flowing in a definite channel in an underground watercourse. The underflow of a surface stream is the water in the soil, sand and gravel comprising the bed of a stream in its natural state and essential to its existence. Water in a stream’s underflow or an underground stream is treated like surface water for legal purposes, including State Board permitting. It usually is in contact with the surface flow, and flows in the same direction. Courts have classified water rights in percolating groundwater as overlying, appropriative or prescriptive. No water right permit is required to pump percolating groundwater.

Overlying groundwater rights are analogous to riparian rights to surface water. Each owner of land that overlies a common groundwater supply has a right to reasonable, beneficial use of the water of that supply on or in connection with the overlying land. The use of each overlying landowner is ‘‘correlative’’ with the rights of all other owners of land overlying the same groundwater supply. In the event of insufficiency of the supply for the requirements of the overlying landowners, the water may be apportioned among them all by a court decree. There is no priority in time among overlying pumpers.

Similar to riparian rights, the transfer of title to an overlying groundwater right, separate from the land, can result in a permanent severance of the right from the land. Once the overlying water right has been severed, the parcel ceases to be an overlying parcel and it loses its overlying groundwater right. One acknowledged way to transfer the right to exercise an overlying right, without causing a severance of the right, is the transfer of the overlying right to a mutual water company, which acts as an agent or trustee of the owners of the overlying right. At least one case has suggested that the right to exercise an overlying right could also be transferred to a public agency or an agent or trustee without resulting in a severance of the right. (See *Orange County Water District v. City of Colton* (1964) 226 Cal.App. 642.)

Water users that do not use groundwater on their overlying land are not barred from using groundwater. Such water users include public agencies and owners of non-overlying land. They may extract groundwater, but their rights are analogous to appropriative rights to surface water. Unless there has been an adjudication of the groundwater basin rights, their use is limited to surplus water, which is defined as water in excess of the safe annual yield that is not needed for reasonable, beneficial use by the overlying owners. If the basin is in overdraft, use may be restricted to the overlying owners. As between groundwater appropriators, the one first in time is the first in right, and a prior appropriator is entitled to all the water he or she needs, up to the amount he or she has taken in the past, before a subsequent appropriator may take any groundwater.

Prescriptive groundwater rights are not acquired by taking surplus or excess water. An appropriative taking of groundwater that is not surplus is wrongful, and may ripen into a prescriptive right when the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under a claim of right. (See, generally, *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.) Prescriptive groundwater rights are most often obtained when someone pumps groundwater during an obvious overdraft condition.

10. Groundwater Adjudication

Groundwater rights generally are not quantified unless the groundwater basin is adjudicated. The authority to adjudicate a groundwater basin exists in State courts, and in limited circumstances, with the State Board. In an adjudication, junior groundwater right holders generally try to prove that they have obtained higher priority pumping rights by pumping for at least five years during an overdraft of which the senior groundwater right holders had notice. If the junior right holders prove such a case, then, under the doctrine of "self-help," the senior right holders retain their priority to only as much water as they actually pumped during the relevant period. In such a situation: (1) an overlying landowner's "correlative" right to a reasonable share of a basin's safe yield effectively may be replaced with a right based on its past water usage; and (2) a public agency with only a junior appropriative right may be able to obtain a higher priority. The California Supreme Court has held that Civil Code section 1007 prevents prescription against public agencies' groundwater rights or such rights that a public utility has dedicated to public use. (See *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224; *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723.)

11. Conjunctive Use of Surface Water and Groundwater

DWR Bulletin 160-98, *The California Water Plan Update* (November 1998, Volume 2,

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page G-2), defines "conjunctive use" as "the operation of a groundwater basin in combination with a surface water storage and conveyance system. Water is stored in the groundwater basin for use by intentionally recharging the basin during years of above-average water supply." Conjunctive use can involve direct recharge or "in lieu" recharge. "In lieu" recharge occurs when someone uses surface water in lieu of pumping groundwater. The storage aspects of the conjunctive operation of a groundwater basin may contemplate both storage of surface water in available basin storage space and increasing pumping from the basin to create additional storage space.

The conjunctive use of surface water and groundwater is favored under California law and policy. (See *Los Angeles v. Glendale* (1943) 23 Cal.2d 68, and *Los Angeles v. San Fernando*, referred to in the previous section.) Water Code section 1242 states that storing water underground, including necessary diversion and spreading operations, is a beneficial use of water if the water stored is later put to beneficial use. Under Water Code section 1005.1, the reduction in the extraction of groundwater by the owner of a right to extract, as result of the use of an alternative supply of water, is deemed to be equivalent to establishing and maintaining a right to extract the groundwater. In other words, a person who reduces his groundwater extraction due to the development of a surface water supply does not diminish, as a result, his groundwater rights.

12. Groundwater Management

Although California does not have centralized groundwater regulation, the Legislature has adopted special legislation for the formation of groundwater management districts in various parts of the State, and authorized other local agencies to exercise groundwater management authority. (See, e.g., Water Code sections 10750 through 10755.)

13. Water Transfers

a. General

The State Board's website (<http://www.waterrights.ca.gov/watertransfer/>) includes publications that provide additional information on water transfers.

Several sections of the Water Code contain declarations of state policy favoring voluntary water transfers. For example, Water Code section 109 contains a declaration of state policy favoring voluntary water transfers, and directs DWR, the State Board and all other state agencies to encourage voluntary transfers. Water Code section 475 contains legislative findings and declarations favoring voluntary water transfers, states that the coordinated assistance of state agencies is required for voluntary transfers, and directs DWR to establish an ongoing program to facilitate voluntary water transfers.

Several statutory provisions declare that the act of transferring water will not, by itself,

result in a forfeiture of the underlying water right. For example, Water Code section 1244 states that a water transfer, in itself, will not constitute evidence of waste or unreasonable use, and will not affect any determination of forfeiture of an appropriative right. Water Code section 1745.07 states that no transfer of water pursuant to any provision of law will cause a forfeiture, diminution or impairment of any water right, and that a transfer approved under any provision of law is deemed to be a beneficial use of water by the transferor. (See also, Water Code sections 1010, 1011, 1011.5, 1014 - 1017, 1440, 1731 and 1737.)

The transferability of water depends on the source of the water right being transferred. The following provisions of the Water Code provide authority to carry out water transfers: Water Code sections 1011(b) (Transfer of Conserved Water), 1020 through 1031 (Water Leases), 1435 through 1442 (Temporary Urgency Change), 1700 through 1705 (Permanent Changes), 1707 (Transfers for Instream Uses), 1706 (Transfer of Pre-1914 Rights), 1725 through 1732 (Temporary Transfers), 1735 through 1737 (Long-Term Transfers), 1740 (Transfer of Decreed Rights) and 1745 through 1745.11 (Transfers by Water Suppliers). In addition, the enabling legislation for a number of different types of water districts includes authorization to transfer surplus water. See, for example, Water Code sections 22228 (Irrigation Districts) and 35425 (California Water Districts).

b. Transfers Under a Riparian Water Right

It is well-settled under California law that a riparian water right is not transferable for use on nonriparian land. (See, e.g., *People v. Shirokow* (1980) 26 Cal 3rd 301, 307.) A riparian owner may, however, enter into a contract under which he or she agrees not to exercise the riparian right for his or her property, so as to increase the downstream water supply. Such an agreement could not prevent a downstream riparian owner from exercising his riparian right. DWR has entered into water transfer agreements with riparian landowners in the Delta under which the riparian owner agreed for compensation not to exercise his or her riparian right. Water that was left in the river was pumped from the Delta as part of DWR's Water Bank operations. Under Water Code section 1707, however, riparian rights are among the water rights that may be included within a change petition to the State Board for the purpose of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in or on the water. An adjudicated riparian right can be transferred under Water Code section 1740.

c. Transfers Under an Appropriative Water Right

An appropriative water right can be sold or transferred off the land by changing the place of use under the right. Under Water Code section 1706, the point of diversion, place of use or purpose of use of a pre-1914 appropriate right can be changed if others are not injured by that change. The transfer or other change involving the exercise of a post-1914 appropriate right

requires the approval of the State Board under Water Code sections 1020, 1435, 1700, 1707 (for instream uses), 1725 or 1735, and State Board findings that the proposed transfer would not injure legal users or unreasonably effect fish, wildlife or other instream beneficial uses. Under Water Code section 1729, a water transfer under section 1725 for not longer than one year is exempt from the provisions of the California Environmental Quality Act.

d. Transfers of Groundwater

There are no general statutory procedures for the transfer of groundwater. Under Water Code section 1220, groundwater may not be pumped for export from the combined Sacramento and Delta-Central Sierra Basins (as defined in DWR Bulletin 160-74), unless the pumping is in compliance with a groundwater management plan that was adopted by ordinance of the county board of supervisors and approved by the voters of the county that overlies the affected groundwater basin. No such plans currently exist. Therefore, groundwater may not be pumped for export from the Delta at the present time. DWR contends that the transfer of groundwater for Delta outflow rather than export purposes would not violate Water Code section 1220.

A number of counties within the Sacramento Valley have adopted ordinances that regulate the direct export of groundwater. One such ordinance has been upheld as a valid exercise of the police power that was not preempted by general state legislation. (See *Baldwin v. County of Tehama* (1994) 31Cal.App.4th 166.)

In groundwater basins that have been adjudicated by a court, the court's judgment often establishes unique conditions concerning the transfer of groundwater rights in the basin.

e. Transfers of Water Under a Contractual Entitlement

Under California law, the right to water under a contract or as result of owning land within a water district is not transferable in whole or in part without the consent of the water right holder and the water supplier. (E.g., see Water Code sections 382-383 and 1745.04.) Under section 3405(a) of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575), the Secretary of the Interior is authorized to approve an application of an individual water user to transfer his or her federal CVP water entitlement without the consent of the water district that holds the CVP contract under which the water is supplied. However, transfers involving more than twenty percent of the CVP water subject to a long-term contract within a contracting district or agency is also subject to review by the district or agency under the provisions specified in Section 3405(a)(1) of the CVP Improvement Act.

f. Transfers by Public Agencies

In addition to the provisions discussed above that deal with the ability to transfer water under different types of water rights, there are numerous statutory provisions that deal with the

authority of public agencies to transfer water. Before a public agency undertakes a water transfer, it must determine that it has authority in its enabling legislation, or elsewhere, to transfer water for use outside its boundaries. Water Code sections 382 and 1745 - 1745.11 provide alternative sources of authority for a public agency to transfer surplus water for use outside of its boundaries. Under Water Code section 1745.10, surface water that is transferred under these provisions may not be replaced with groundwater unless such groundwater use is consistent with a groundwater management plan adopted pursuant to State law for the affected area, or the substitution of groundwater was approved by the transferring agency after it determined that the transfer would not create or contribute to conditions of long-term overdraft in the affected groundwater basin. The transfer would also have to be carried out in compliance with applicable procedural requirements, such as under Water Code sections 1706 or 1725.

g. Determining What Water Is Transferable - The “No Injury” Rule

An important element of any water transfer is determining what quantity, if any, of the water is “transferable,” as a result of the application of provisions of the Water Code that are intended to protect other legal users of water and fish and wildlife from the possible adverse effects of a water transfer. The “no injury” rule originates in the common law, and also is reflected in Water Code provisions intended to protect legal users of water from injury from a water transfer. (See, e.g., Water Code sections 1702, 1706 and 1725.) Under the no injury rule, a water transfer would not be authorized to the extent that it reduced the availability of water for downstream users, regardless of the water priority of those users. Under the no injury rule, only “new water” is transferable, i.e., water that is added to the downstream water supply as a result of the transfer. The rationale for the “no injury” rule is as follows: “. . . California water law protects senior water users (those with the oldest water rights) from junior diverters while protecting junior water right holders from the expansion of senior water rights. Junior water right holders would be harmed if seniors could increase the amount of water they divert under their senior priority. Likewise, juniors could be hurt if seniors could change their point of diversion, place of use or purpose of use in a manner that reduces the quantity or quality of water relied upon by juniors for their diversion. The “no injury” rule protects junior right holders against this kind of harm from senior right holders.” (See *A Guide to Water Transfers*, July 1999, pages 3-7 and 3-8, published by the State Board.) Under section 3405(a)(1)(M) of the CVP Improvement Act, however, one CVP contractor can transfer unused entitlement under its CVP water supply contract to another CVP contractor for use within the watersheds of origin.

h. Transfers of Conserved Water

Under Water Code section 1011, the right to the use of water that has been reduced as a result of water conservation efforts may be transferred pursuant to any provision of law relating to the transfer of water. For purposes of this section, “water conservation” means the use of less

water to accomplish the same purpose of use allowed under the existing appropriative water right. In order to obtain the benefits of this section, the water right holder must file periodic reports with the State Board that describe the extent and amount of the reduction in water use due to the water conservation efforts.

On December 28, 1999, the State Board issued Order WR 99-012, which involved a proposed transfer of conserved water under Water Codes sections 1725 and 1011 involving licensed water rights of Natomas Central Mutual Water Company. The State Board determined that Natomas could transfer the right to use of the amount of water that Natomas would have consumptively used but for Natomas' water conservation efforts, but that a reduction in diversions that did not reduce consumptive use could not be transferred under Water Code section 1725. For example, the State Board said that conservation efforts that reduced diversions from the stream and return flows to the stream by equal amounts would not result in consumptive use savings that could be transferred.

State Board Order WR 99-012 describes the purpose of Water Code section 1011 as follows: "Section 1011 preserves an appropriative water right when less water is used under the right due to water conservation efforts. Essentially, section 1011 requires water to be treated as though it were used, when in actuality the water is conserved. Any reduction or cessation in the use due to conservation efforts is deemed equivalent to a reasonable beneficial use...." Thus, the right to use the amount of water conserved is not subject to forfeiture for nonuse. The right thereby protected from forfeiture may be used later if needed. The right to use the water conserved may also be transferred pursuant to other provisions of law authorizing transfers."

The State Board order also points out that, since 1980, the State Board has required licensees to document their conservation efforts in the Report of Licensee form that must be filed with the State Board every three years under 23 California Code of Regulations, sections 847 and 848, and that the failure to fill out the section of the form regarding water conservation would deprive the licensee of the benefits of section 1011. The State Board order also states: "It also merits note that Natomas' failure to report conservation efforts in a timely manner called into question the credibility of its claim to have conserved water. Late reporting raises the question whether the nonuse of water was in fact due to conservation efforts, or if the water user is attempting to characterize nonuse that occurred for some other reason as water conservation in order to obtain the protections of section 1011. Conversely, reporting water conservation in a timely manner, while insufficient in itself to prove water conservation, would tend to support a claim that the nonuse of water was the result of water conservation efforts. For this reason, it is in every water user's best interest to report water conservation efforts in a timely manner."

i. Use of Conveyance Facilities for a Water Transfer

As a practical matter, State Water Project and federal Central Valley Project facilities are often needed to convey transfer water to the place of use of the transferee, such as for through-

Delta transfers. Water Code sections 1810-1814 authorize joint use of unused capacity in water conveyance facilities, requiring the state, regional and local public agencies that own water conveyance facilities to make available up to seventy percent of their unused capacity for a bona fide water transfer upon payment of fair compensation, and so long as: (1) no legal user of water would be injured; (2) there would be no unreasonable effect on fish, wildlife or other instream beneficial uses; and (3) there would be no unreasonable effect on the overall economy or the environment of the county from which the water is being transferred. Use of CVP facilities to convey non-CVP water would require a Warren Act contract with the United States (43 U.S. Code sections 523-525 and 2212), which would include provisions to compensate for use of federal facilities and to ensure that the transfer does not interfere with the operation of federal facilities.

j. Third-Party Impacts from a Water Transfer

There has been confusion from time to time regarding the terms used to refer to potential impacts to others resulting from a proposed water transfer. There generally are three types of potential impacts: (1) injury to legal users of water; (2) unreasonable effects on fish, wildlife or other instream beneficial uses; and (3) unreasonable effects on the overall economy of the area from which the water would be transferred.

The requirement to avoid impacts to "legal users" (discussed above) is set forth in various provisions of existing law. For example, see Water Code section 386 (as to State Board approval of certain water transfers), section 1706 (as to a transfer under a pre-1914 water right), section 1707 (as to a transfer for instream uses), section 1727 (as to a temporary transfer under a water right permit), section 1736 (as to a long-term transfer under a water right permit) and section 1810 (as to determinations of DWR concerning use of surplus conveyance capacity).

The requirement to avoid unreasonable effects on fish, wildlife or other instream beneficial uses is also set forth in various provisions of existing law. For example, see Water Code section 386, section 1707, section 1727, section 1736 and section 1810.

The requirement to avoid unreasonable effects on the overall economy of the area from which the water would be transferred (what is commonly referred to as "third-party economic impacts") is provided for in more limited situations. Water Code section 386 has such a provision, but it is in a chapter on State Board approval of water transfers that is rarely used. Water Code Sections 1725 through 1732 are in the chapter that is generally relied on for State Board approval of a temporary water transfer (i.e., for a term of less than one year), and section 1727 requires the State Board to consider only impacts to legal users and instream uses (i.e., the State Board is not authorized to consider third-party economic impacts). The same section 1727 requirements are also contained in section 1736 for approval of a long-term water transfer.

Water Code Section 1810(d) requires DWR, however, to consider all three types of impacts (i.e., to legal users, to instream uses and to the economy of the area from which the water would be transferred) in determining whether to allow use of its surplus water system conveyance capacity for a water transfer.

Generally, transfer water is developed through four methods: (1) surplus water released from storage facilities; (2) substituting groundwater for transferred surface water; (3) fallowing agricultural land to make water available for transfer; and (4) undertaking conservation activities that develop surplus water (e.g., under Water Code section 1011). Transfers from storage and transfers resulting from conservation activities have little or no likelihood to cause third-party economic impacts because these types of transfers do not affect crop production or groundwater pumping. Therefore, it would not seem necessary or appropriate to require an analysis of potential third-party impacts from these two types of transfers.

There are other provisions of existing law that have the effect of limiting the extent to which water transfers that involve land fallowing or groundwater substitution would cause third-party economic impacts. For example, Water Code section 1745.05 (which authorizes water suppliers to transfer surplus water) puts a limit on the amount of land that may be fallowed in connection with a water transfer. Subdivision (b) of this section states: "The amount of water made available by land fallowing may not exceed 20 percent of the water that would have been applied or stored by the water supplier in the absence of any contract entered into pursuant to this article in any given hydrological year, unless the agency approves, following reasonable notice and a public hearing, a larger percentage."

Water Code section 1732 states that a petition for State Board approval of a temporary water transfer that involves the increased use of groundwater to replace transferred surface water must be in compliance with Water Code sections 1745.10 and 1745.11. Sections 1745.10 and 1745.11 generally require a water supplier that increases the use of groundwater to replace transferred surface water to determine that the groundwater use: (1) would be consistent with a groundwater management plan adopted pursuant to State law for the affected area; or (2) would not create or contribute to conditions of long-term overdraft in the affected groundwater basin.

Section 3405 of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575) includes provisions that would limit the amount of federal water that a water district could transfer. For example, subsection (a)(1) states in part: "Transfers involving more than 20 percent of the Central Valley Project water subject to long-term contract within any contracting district or agency shall also be subject to review and approval by such district or agency under the conditions specified in this subsection í [including a determination by the Secretary of Interior that the transfer would have no significant long-term adverse impact on groundwater conditions].ö

k. Environmental Review of Water Transfers

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In general, water transfers are subject to compliance with the requirements of the California Environmental Quality Act and the National Environmental Policy Act, to the extent applicable. Water Code section 1729 provides an exemption from compliance with CEQA for temporary water transfers under Water Code sections 1725 through 1732.

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