

1 ALLEN MATKINS LECK GAMBLE & MALLORY LLP  
DAVID L. OSIAS  
2 JEFFREY R. PATTERSON  
MARK J. HATTAM  
3 501 West Broadway, Ninth Floor  
San Diego, California 92101-3577  
4 Phone: (619) 233-1155  
Fax: (619) 233-1158

5  
6 HORTON, KNOX, CARTER & FOOTE  
JOHN PENN CARTER  
895 Broadway, Suite 101  
7 El Centro, CA 92243  
Telephone (760) 352-2821

8  
9 *Attorneys for Petitioner*  
*Imperial Irrigation District*

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT  
and SAN DIEGO COUNTY WATER  
AUTHORITY,

Petitioners.

**STATEMENT OF EXPERT QUALIFICATION  
AND WRITTEN TESTIMONY OF PROFESSOR  
BARTON H. THOMPSON, JR., IN  
SUPPORT OF IID-SDCWA JOINT LONG-  
TERM TRANSFER PETITION**

1                   **WRITTEN TESTIMONY OF PROFESSOR BARTON H. THOMPSON, JR.**

2  
3           1.     My name is Barton H. Thompson, Jr. I am Vice Dean and  
4 Robert E. Paradise Professor of Natural Resources Law at Stanford  
5 Law School, where I head Stanford's program in Environmental and  
6 Natural Resources Law and Policy. I also am a Senior Scholar, by  
7 courtesy, at Stanford University's Institute for International  
8 Studies and its Center for Environmental Science and Policy. I  
9 have taught Water Law since 1980, first at the U.C.L.A. Law  
10 School and then at Stanford. I am co-author, along with  
11 Professors Joseph Sax (U.C. Berkeley) and John Leshy  
12 (U.C. Hastings), of "Legal Control of Water Resources"  
13 (3d ed. 2000). A copy of my curriculum vitae is attached to this  
14 testimony and incorporated herein as Exhibit A.

15           2.     I have written over 20 papers on issues related to  
16 water markets. I also served in the 1990s on the expert  
17 committee that authored the Model Water Transfer Act for  
18 California. A copy of the Model Act, which was published in May  
19 1996, is attached to this testimony as Exhibit B. I will be  
20 present at the upcoming Phase I hearing to answer any questions  
21 regarding my testimony. This testimony is provided under oath,  
22 as stated below, and contains my expert opinions on the matters  
23 addressed.

24           3.     The overall purpose of my testimony is to provide the  
25 State Water Resources Control Board ("SWRCB") and its staff with  
26 a general overview of California's need for water transfers, so  
27 that the SWRCB can better understand the context of the pending  
28 transfer petition. If there is anything not covered in this

1 testimony that the SWRCB would like answered, I will be present  
2 at the hearings and will be glad to answer any such questions.

3 **A. Summary**

4 4. The proposed transfer of water from the Imperial  
5 Irrigation District ("IID") to the San Diego County Water  
6 Authority ("SDCWA") is of tremendous importance to California for  
7 several reasons. First and most importantly, voluntary transfers  
8 of water within Southern California are essential if California  
9 is to meet the Southland's water needs within the limits of the  
10 State's water resources and without damaging the State's  
11 environment. Southern California is facing reductions in all of  
12 its three major sources of imported water. Voluntary transfers  
13 are essential if Southern California is to have any hope of  
14 balancing its water budget. Second, the proposed IID-SDCWA  
15 transfer will create a valuable example for long-term transfers  
16 of water elsewhere in the State; long-term transfers provide one  
17 of the most effective means of encouraging needed water  
18 conservation and should be encouraged. Finally, the proposed  
19 IID-SDCWA transfer demonstrates how large agricultural water  
20 districts such as IID can be part of the solution to California's  
21 water problems. Large agricultural water districts historically  
22 were reticent to engage in long-term water transfers; through the  
23 proposed transfer, IID is helping to define a new and important  
24 role for water districts as facilitators of water transfers that  
25 benefit the State as a whole.

26 **B. The Importance of Water Markets to California**

27 5. Water markets are crucial if California is to make the  
28 most effective use of its water resources, meet its growing

1 domestic and economic needs, and protect its environment.  
2 California, like all arid states, enjoys only a limited supply of  
3 water. The amount of water available for consumptive use,  
4 moreover, is shrinking as other states make claims on the  
5 Colorado River and as the State dedicates more water to instream  
6 flows and other environmental purposes. At the same time,  
7 however, the State faces continuing domestic and economic needs  
8 for water. Water markets provide metropolitan areas like San  
9 Diego with the means of meeting their water needs during a period  
10 of shrinking supplies. First, water markets encourage and pay  
11 for water conservation. Every drop of water that is conserved in  
12 California can go toward meeting unmet needs. Water users with  
13 the capacity to conserve water, however, frequently do not have  
14 the substantial monetary resources that conservation can require;  
15 water markets provide the needed funding, as well as a financial  
16 incentive to conserve. Second, water markets provide a means of  
17 reallocating conserved and other water from regions that can  
18 spare some of their water to regions with unmet needs. A 1984  
19 economic study of the potential for voluntary water transfers in  
20 California found that, by stimulating conservation and providing  
21 a voluntary means of reallocating water, market transfers could  
22 ensure an adequate water supply for the State for some forty  
23 years.<sup>1</sup>

24 6. Water markets also provide a number of secondary  
25 benefits. By making additional water available to other regions  
26 and sectors of the State, for example, water markets reduce the

27 \_\_\_\_\_  
28 <sup>1</sup> Henry J. Vaux & Richard E. Howitt, Managing Water Scarcity:  
An Evaluation of Interregional Transfers, 20 Water Resources  
Research 785 (1984).

1 political pressure to construct new and environmentally harmful  
2 water projects and to relax existing environmental constraints on  
3 water diversions. For this reason, a number of environmental  
4 organizations such as Environmental Defense strongly support  
5 water markets. Indeed, as I will explain later in my testimony,  
6 Environmental Defense has been a long-standing proponent of  
7 transfers between IID and the Southern California coastal region.  
8 By allowing farmers to lease or sell conserved water, markets  
9 also can help maintain the financial health of California  
10 agriculture. The California Legislature has found that market  
11 transfers can provide "agricultural operations and public  
12 agencies experiencing financial difficulties" with a "means of  
13 obtaining financial relief or augmenting their income" and thus  
14 help them weather periods of economic hardship.<sup>2</sup>

15       7. Since the early 1970s, governmental and private studies  
16 repeatedly have recognized these benefits and concluded that  
17 water markets are essential in helping California and other  
18 western states meet the water needs of their growing populations  
19 and economies. In 1968, President Lyndon Johnson appointed a  
20 National Water Commission to examine the policies that the Nation  
21 should adopt to provide for the efficient, equitable, and  
22 environmentally responsible management of its water resources.  
23 In its final 1972 report, the Commission strongly urged the  
24 federal and state governments to promote water markets by  
25 streamlining transfer processes and removing legal obstacles.  
26 According to the Commission, water markets are an important means  
27 of promoting water conservation, reducing the need for new and

28 \_\_\_\_\_  
<sup>2</sup> Cal. Stats. 1986, c. 918, §§ 1(b)-(c).

1 expensive water projects, and putting existing water rights "to  
2 better use so as to maximize the economic yield to society." In  
3 discussing the benefits of water markets, the Commission  
4 explicitly highlighted the potential value to California of a  
5 voluntary transfer of water from IID to Southern California  
6 coastal cities.

7       8. Six years after the National Water Commission issued  
8 its report, its conclusions and recommendations were echoed at  
9 the state level by the Final Report of the Governor's Commission  
10 to Review California Water Rights Law. Governor Edmund G. Brown,  
11 Jr., created the Governor's Commission to recommend improvements  
12 in California water law; then Chief Justice Donald R. Wright of  
13 the California Supreme Court chaired the commission. The  
14 Governor's Commission found that voluntary water transfers can  
15 "increase the productivity" of the State's water resources by  
16 enabling water users to free up water for important unmet needs.<sup>3</sup>  
17 Like the National Water Commission, the Governor's Commission  
18 recommended that the Legislature remove procedural and  
19 substantive barriers to effective water transfers. The  
20 Governor's Commission, for example, noted that a common fear of  
21 agricultural water users is that transfer proposals might be used  
22 as evidence that the users do not need their water; the  
23 commission therefore encouraged the State Legislature to enact  
24 "legislation explicitly stating that the transfer or exchange of  
25 water or water rights, in itself, should not be considered as  
26  
27

28 <sup>3</sup> Governor's Commission to Review California Water Rights Law,  
Final Report 62 (Dec. 1978).

1 evidence of waste or unreasonable use ... and that such a  
2 transfer or exchange should not result in forfeiture."<sup>4</sup>

3       9. In 1994, the California Business Roundtable, the  
4 California Chamber of Commerce, the California Farm Bureau  
5 Federation, and the California Manufacturers Association joined  
6 together to help promote voluntary water transfers by  
7 commissioning a Model Water Transfer Act. According to Richard  
8 M. Rosenberg, the former Chairman and Chief Executive Officer of  
9 Bank of America and one of the initiators of the project, the  
10 business community could not "envision successful resolution of  
11 major water problems in the state in the absence of a more  
12 effective market for voluntary water transfers than currently  
13 exists."<sup>5</sup> The expert committee that was assembled to draft the  
14 Model Water Transfer Act, of which I was a member, concluded that  
15 water markets were an essential means of encouraging  
16 conservation, avoiding the environmental and economic costs of  
17 new water projects, and ensuring that water in California is put  
18 to its highest valued use. We concluded, moreover, that water  
19 markets would "become increasingly important as the demand for  
20 water continues to grow in relation to available supplies."<sup>6</sup>

21       10. The importance of water markets was emphasized most  
22 recently in the June 1998 final report of the Western Water  
23 Policy Review Commission, entitled, "Water in the West:  
24 Challenge for the Next Century." Congress created the Review  
25 Commission in 1992 to review, among other issues, the water

---

26 <sup>4</sup> Id. at 66.

27 <sup>5</sup> Richard M. Rosenberg, Introduction, 4 West-Northwest 1,  
1 (1996).

28 <sup>6</sup> Brian E. Gray: The Shape of Transfers to Come: A Model Water  
Transfer Act for California, 4 West-Northwest 23, 24 (1996).

1 supply requirements of the nineteen western states and  
2 alternative means of meeting those requirements. Like the  
3 commissions and committees that preceded it, the Review  
4 Commission concluded that markets "promise greater economic  
5 efficiency," while avoiding the problems of new water  
6 developments, and are "an invaluable new tool in how the West  
7 manages its limited resources."<sup>7</sup>

8 11. The California Legislature also has repeatedly  
9 recognized the important role that water markets can and must  
10 play in California water policy. Indeed, the California  
11 Legislature has had particular foresight and is the leader among  
12 western states in promoting and facilitating water transfers.  
13 Over the last 20 years, for example, the California Legislature  
14 has taken steps to reduce the procedural barriers to water  
15 transfers (see, e.g., California Water Code §§ 1020-1030, 1435-  
16 1442, & 1725-1737), establish an ongoing program within the  
17 Department of Water Resources to encourage transfers (Water Code  
18 §§ 480-484), expand rights to recycled water (Water Code §§ 1210-  
19 1212), assure water users that their efforts to conserve and  
20 market water will not threaten their water rights (Water Code  
21 § 1244), and ensure wheeling capacity to transport marketed water  
22 to the transferee (Water Code §§ 1810-1814). In promoting and  
23 facilitating water transfers, moreover, the State Legislature  
24 repeatedly has emphasized that water transfers are a keystone of  
25 the State's water policy. According to the Legislature, it is  
26 the "policy of the state to facilitate the voluntary sale, lease,  
27

---

28 <sup>7</sup> Western Water Policy Review Advisory Commission, Water in the  
West: Challenge for the Next Century 3-22 (June 1998).



1 or exchange of water or water rights in order to promote  
2 efficient use."<sup>8</sup>

3 **C. The Special Importance of Market Transfers to Southern**  
4 **California**

5 12. Although water markets are important in meeting water  
6 needs throughout California, market transfers are of essential  
7 importance to Southern California as it tries over the next  
8 several decades to balance its water budget. Southern  
9 California's coastal cities are faced with reductions in their  
10 traditional water imports from the Owens Valley, Colorado River,  
11 and Northern California. Without water markets, Southern  
12 California will not be able to fill the resulting gap between  
13 supply and demand. Failure to make quick progress toward filling  
14 this gap, moreover, is likely to jeopardize California's current  
15 ability to take more than its formal entitlement from the  
16 Colorado River.

17 **a. Southern California Water Imports**

18 13. Southern California's coastal cities long ago outgrew  
19 their limited local supplies of water. The urban coastal plain  
20 of Southern California today satisfies less than 40% of its water  
21 demand with water from local sources. For over a century, the  
22 cities of Southern California met their growing water demands by  
23 diverting and importing new supplies of water from increasingly  
24 distant watersheds. Los Angeles took the lead in 1913 when it  
25 completed the 233-mile Los Angeles Aqueduct to import over  
26 200,000 acre-feet annually from the Owens Valley to Los Angeles.  
27 In 1940, Los Angeles extended the aqueduct 105 miles north to the

28 \_\_\_\_\_  
<sup>8</sup> Cal. Stats. 1986, c. 918, § 1(d).

1 Mono Basin and began to draw water from the four feeder streams  
2 of Mono Lake, increasing the aqueduct's capacity to 336,000 acre-  
3 feet per year. In 1970, Los Angeles completed a second aqueduct  
4 to the Owens Valley, further increasing the system's capacity to  
5 560,000 acre-feet per year.

6 14. When Southern California cities as a whole found that  
7 they could no longer satisfy their burgeoning populations from  
8 local water supplies, the cities formed the Metropolitan Water  
9 District of Southern California ("MWD") in 1928 to import water  
10 from the Colorado River. The Colorado River Aqueduct has the  
11 capacity to carry approximately 1.2 million acre-feet of Colorado  
12 River water to MWD and its member agencies.

13 15. When water from the Colorado River began to be  
14 insufficient by the early 1960s to meet the growing needs of  
15 Southern California, MWD entered into contracts with the  
16 California State Water Project to transport water 400 miles from  
17 Northern California through the San Joaquin-Sacramento Delta and  
18 over the Tehachapi mountains. Water deliveries from the State  
19 Water Project began in 1973. Under the original plans, the State  
20 Water Project ultimately was to deliver 4.2 million acre-feet of  
21 water to its customers; of this amount, MWD expected deliveries  
22 of 2.01 million acre-feet, enough to meet the South Coast Basin's  
23 growth well into the 21st century.

24 16. By the 1970s and early 1980s, Southern California was  
25 importing up to about 500,000 acre-feet per year from the Owens  
26 Valley and 1.2 million acre-feet from the Colorado River. By the  
27 early 1990s, Southern California also was importing up to  
28 approximately 1.3 million acre-feet per year from the State Water

1 Project. The water that Southern California imported from these  
2 three regions constituted in total slightly less than two thirds  
3 of the region's annual water supply. Southern California, in  
4 short, has been and remains highly reliant on its three principal  
5 sources of imported water.

6 17. A map of Southern California's water importation system  
7 is attached to this testimony as Exhibit C.

8 **b. Limits & Threats to Traditional Imports**

9 18. The growth in Southern California's population and  
10 economy shows little sign of slowing. In the late 1990s, water  
11 users in MWD's service area consumed approximately 3.3 million  
12 acre-feet of water per year. At the same point in time, MWD  
13 estimated that by 2020 its service area would need close to  
14 5 million acre-feet of water in a normal year -- approximately  
15 40% more than its existing level of use. Although estimates of  
16 future water use are highly uncertain, virtually all experts  
17 agree that Southern California's need for water will continue to  
18 increase for the foreseeable future.

19 19. As Southern California continues to grow, however, its  
20 cities no longer can rely on their traditional divert-and-import  
21 water strategy. Most California rivers are already fully  
22 utilized or off limits under the federal and state wild and  
23 scenic river systems. These rivers simply have no more water to  
24 give up to cities and farmers. Even if water were available, the  
25 cost of developing new supplies would be prohibitively expensive.  
26 As the lead author of the Model Water Transfer Act has noted,  
27 "California's voters' decisive rejection of the Peripheral Canal  
28 in 1982 signaled an end to the public's willingness to pay for

1 expensive new water projects, at least in the absence of a  
2 showing of compelling need for the new supplies."<sup>9</sup> Diverting more  
3 water from distant watersheds, moreover, would raise serious  
4 environmental concerns. Prior projects often jeopardized  
5 biodiversity and threatened water quality by reducing and  
6 modifying natural flows. As a result, California's Legislature  
7 and courts, as well as the United States Congress, have imposed  
8 tough restrictions on the construction of new water projects.

9       20. Each of Southern California's three principal sources  
10 of imported water, moreover, have faced challenges in recent  
11 years, with the result that Southern California is likely to  
12 receive less rather than more water from these sources in future  
13 years.

14           1. The Los Angeles Aqueduct

15       21. A series of environmental lawsuits and challenges have  
16 limited Los Angeles' ability to import water from the Owens  
17 Valley. In the best known decision, of course, the California  
18 Supreme Court ruled that Los Angeles' diversion of water from  
19 streams feeding Mono Lake violated the public trust doctrine. A  
20 separate lawsuit resulted in minimum instream flows for the Owens  
21 River. And the ability of Los Angeles to withdraw stored  
22 groundwater has been restricted. As a result, the Los Angeles  
23 Department of Water and Power expects that the median annual  
24 delivery through the Los Angeles Aqueduct over the next 20 years  
25 will be approximately 321,000 acre-feet, less than half of the  
26 capacity of the system and only about two-thirds of the water  
27 that Los Angeles exported from the area in the early 1980s.

28 \_\_\_\_\_  
<sup>9</sup> Gray, supra note 6, at 25.

1           2.    The Colorado River Aqueduct

2           22.   The reduction in deliveries from the Los Angeles  
3 Aqueduct pales in comparison to the potential loss of Colorado  
4 River water that Southern California faces absent transfers such  
5 as the proposed IID-SDCWA transfer.  The Colorado River Compact  
6 of 1922 apportions 7.5 million acre-feet of water to the Lower  
7 Basin states of Arizona, California, and Nevada.  In the Boulder  
8 Canyon Project Act of 1928, Congress required California to agree  
9 "irrevocably and unconditionally" to limit its aggregate  
10 consumptive share of this water to 4.4 million acre-feet.  
11 California complied on March 4, 1929, by passing the California  
12 Limitation Act.  Under the Seven Party Agreement entered into  
13 among the major California users of Colorado River water in 1931,  
14 the first 3.85 million acre-feet of Colorado River water going to  
15 California goes to the agricultural users in IID, the Coachella  
16 Valley Water District ("CVWD"), and the Palo Verde Irrigation  
17 District.  MWD receives the next 1.2 million acre-feet of  
18 Colorado River water, to the degree available.  The apportionment  
19 of the Seven Party Agreement is incorporated into the water  
20 contracts between the federal Bureau of Reclamation and the  
21 various California users of Colorado River water.

22           23.   For years, MWD was able to import the full 1.2 million  
23 acre-feet of water through the Colorado River Aqueduct because  
24 Arizona and Nevada were not using their full shares of Colorado  
25 River water.  As a result, California could divert the "surplus  
26 water."  That, however, has begun to change.  Nevada now is using  
27 its full allotment and, following the completion of the Central  
28 Arizona Project, Arizona has increased its diversion of Colorado

1 River water for underground storage and other uses. In the late  
2 1990s, moreover, the other Colorado River states demanded that  
3 California reduce its use of Colorado River water to the mandated  
4 4.4 million acre-feet.

5 24. The federal government ultimately was able to craft a  
6 compromise that will enable California to continue to use more  
7 than 4.4 million acre-feet of water for 15 years in return for  
8 California's commitment over the same period to slowly reduce its  
9 reliance on surplus Colorado River Water pursuant to its Colorado  
10 River Water Use Plan (commonly known as the "4.4 Plan"). Under  
11 Interim Surplus Guidelines, the federal government will modify  
12 the operating rules for Colorado River reservoirs and declare  
13 "surplus years" permitting California to divert more than  
14 4.4 million acre-feet. But the Interim Surplus Guidelines are  
15 designed to provide additional water only for a limited period of  
16 years. In the long run, MWD's firm entitlement to Colorado River  
17 water remains only 550,000 acre-feet, plus about 106,000 acre-  
18 feet from its conservation/transfer program with IID. Absent  
19 further transfers or storage operations, MWD in the future will  
20 be able to fill only a fraction of the capacity of the Colorado  
21 River Aqueduct. A linchpin of California's 4.4 Plan, moreover,  
22 is the successful implementation of the proposed IID-SDCWA  
23 transfer.

24 25. The 15-year period for California to gradually reduce  
25 to 4.4 million acre-feet under the Interim Surplus Guidelines is  
26 at risk of being lost if the Quantification Settlement Agreement  
27 between IID, MWD, and CVWD is not executed by December 31, 2002.  
28 In such an event, rather than MWD having 15 years to find a

1 replacement for the 550,000 acre-feet of Colorado River water it  
2 needs to keep the Colorado River Aqueduct full, it would lose  
3 500,000 acre-feet in 2003.

4           3.    The State Water Project

5           26.   Deliveries from the State Water Project also are under  
6 pressure.   The State Water Project has never delivered the full  
7 amounts for which contracts were signed.   Of the total yield of  
8 4.2 million acre-feet originally planned, the State Water Project  
9 has delivered a maximum of only about 2.4 million acre-feet in  
10 normal years and only a percentage of that amount in dry years.  
11 MWD has never received more than 1.3 million acre-feet of water  
12 from the State Water Project in any year, despite contracts for  
13 approximately two million acre-feet.

14           27.   Various environmental concerns, moreover, threaten to  
15 reduce further the reliable supply of water to Southern  
16 California from the State Water Project.   The Central Valley  
17 Project Improvement Act, passed by Congress in 1992, provides for  
18 the reallocation of significant amounts of water to the  
19 environment.   The requirements of the federal Endangered Species  
20 Act and Clean Water Act threaten separate reductions in water  
21 deliveries.   Although part of the burden of these reductions will  
22 be borne by agricultural users in the Central Valley, long-term  
23 deliveries of water from the State Water Project to Southern  
24 California are likely to be significantly less than its peak  
25 deliveries of the early 1990s, absent significant new  
26 investments.

27  
28

1           c.    The Essential Role of Water Markets in Filling the  
2                    Supply Gaps

3           28.   Water transfers are a critical element of any strategy  
4 to fill the supply gaps created by these reductions in Southern  
5 California's traditional imports.  Transfers of Colorado River  
6 water from agricultural agencies such as IID to cities in the  
7 Southern California coastal basin can take advantage of the  
8 available capacity in the Colorado River Aqueduct to maintain the  
9 basin's current level of Colorado River imports.  Without such  
10 transfers, Southern California cities could lose about half of  
11 their current supply of Colorado River water and the Colorado  
12 River Aqueduct could sit underutilized.

13           29.   The important role that water transfers can play in  
14 helping provide a sustainable water supply for the Southern  
15 California metropolitan areas has long been recognized.  In 1983,  
16 for example, Environmental Defense ("EDF") investigated the  
17 possibility of transferring water from IID to MWD.<sup>10</sup>  EDF became  
18 interested in the possibility because it saw water markets as a  
19 means of reducing the political pressure for new water projects  
20 that would increase the diversions of water from Northern to  
21 Southern California.  At the time of the EDF study, MWD predicted  
22 a 490,000 acre-foot water deficit by the start of the 21st  
23 century, largely because of an estimated 50% plus reduction in  
24 its supply of water from the Colorado River Aqueduct, and thus  
25 MWD strongly supported the proposed Peripheral Canal.  In its

26 \_\_\_\_\_  
27 <sup>10</sup> Environmental Defense Fund, Trading Conservation Investments  
28 for Water:  A Proposal for the Metropolitan Water District of  
Southern California to Obtain Additional Colorado River Water  
by Financing Water Conservation Investments for the Imperial  
Irrigation District (March 1983).



1 study, EDF concluded that MWD instead could reduce its deficit by  
2 entering into a market agreement with IID in which IID would  
3 conserve water and transfer the water to MWD. In a foreword to  
4 the EDF study, Harvey O. Banks, the former Director of the  
5 California Department of Water Resources, praised the EDF  
6 analysis and urged MWD and IID to study the opportunity more  
7 formally.

8 30. There is yet another reason why the proposed IID-SDCWA  
9 transfer is critical to Southern California. The proposed  
10 transfer helped convince the other Colorado River states to  
11 permit California additional time to bring its use of Colorado  
12 River water within the 4.4 million acre-feet cap provided in the  
13 Boulder Canyon Project Act and the 1929 Limitation Act. The  
14 proposed transfer is a linchpin of the 4.4 Plan. If the proposed  
15 transfer does not occur, the 4.4 Plan and thus the willingness of  
16 the other Colorado River states not to challenge California's  
17 continued withdrawals in excess of its apportioned share both  
18 would be in danger of collapse. This in turn would further  
19 aggravate Southern California's water situation.

20 **D. The Importance of Long-Term Transfers**

21 31. Most of California's experience with water markets has  
22 centered on short-term transfers of a year or less. Such  
23 transfers can be extremely valuable in helping to reduce the  
24 economic disruption of droughts and other sudden changes in water  
25 supply. In 1991, for example, the California "drought water  
26 bank," by facilitating the short-term transfer of water from  
27 areas and sectors that could reduce water use to others with  
28 important unmet needs, produced an estimated savings to the

1 California economy of over \$111 million.<sup>11</sup> Short-term transfers  
2 also can help water users meet temporary needs for additional  
3 water.

4 32. Longer term transfers, however, are needed to encourage  
5 conservation and help Southern California and other portions of  
6 the State develop a sustainable water supply. Few water users  
7 are likely to make the often sizable and continual investments  
8 needed for significant conservation in return only for short-term  
9 revenues. Cities like San Diego, moreover, cannot make  
10 reasonable plans in reliance on only short-term water transfers.  
11 The proposed IID-SDCWA transfer paves the way for developing the  
12 longer-term water markets needed to achieve these other  
13 significant goals.

14 **E. The Importance of IID's Leadership**

15 33. The proposed IID-SDCWA transfer also is important for a  
16 final reason - the leadership displayed by IID in pursuing the  
17 transfer. A number of studies have found that large agricultural  
18 water districts such as IID historically have been reticent to  
19 engage in external water transfers. Because such districts hold  
20 significant amounts of water in California, the reticence of  
21 water districts to consider external transfers of their water has  
22 posed a significant obstacle to meaningful water markets. As a  
23 result, both Congress and the State Legislature have considered  
24 legislation limiting the authority of water districts to restrict  
25 water transfers initiated by their members. In the Central  
26 Valley Project Improvement Act of 1992, Congress tightly

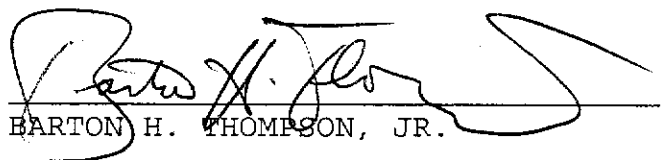
27 \_\_\_\_\_  
28 <sup>11</sup> See Richard E. Howitt, Nancy Moore & Rodney T. Smith,  
A Retrospective on California's 1991 Emergency Drought Water  
Bank (Cal. Dept. of Water Resources, March 1992).

1 restricted the power of California water districts to veto or  
2 condition external transfers involving water from the Bureau of  
3 Reclamation's Central Valley Project. And in the early 1990s,  
4 the California Legislature considered bills that would have given  
5 anyone receiving water from a public water agency the right to  
6 sell his or her allocation to outside users even over the  
7 opposition of the agency. The expert committee that drafted the  
8 Model Water Transfer Act also initially proposed limiting the  
9 authority of water districts to block external transfers.

10 34. IID's proactive pursuit of a water transfer with SDCWA  
11 breaks with the traditional opposition of water districts to  
12 external transfers and delineates a new role for water districts  
13 in promoting water markets. Water districts can play a valuable  
14 role in facilitating water conservation by their members and  
15 serving as an intermediary to potential purchasers interested in  
16 financing the conservation and transfer. Water districts also  
17 can provide a valuable forum for their members to discuss and  
18 shape the terms of transfers. If successful, the IID-SDCWA  
19 transfer thus will serve a valuable function in setting an  
20 example for other large water agencies with market opportunities.

21 I declare under penalty of perjury under the laws of the  
22 state of California that the foregoing is true and correct.

23 Executed on March 21, 2002, at Stanford, California.

24  
25   
26 BARTON H. THOMPSON, JR.

27  
28

Exhibit A

**Barton H. Thompson, Jr.**  
Stanford Law School  
Stanford, California 94305

Office Phone: (650) 723-2518  
Home Phone: (650) 493-0599  
Fax: (650) 725-8509  
E-mail: Buzzt@Stanford.Edu

Professional Background

Stanford Law School

*Vice-Dean*  
*Robert E. Paradise Professor of Natural Resources Law*  
*Academic Director, Environmental and Natural Resources Law & Policy Program*  
Principal subjects: water resources, environmental, natural resources, and property

Stanford Institute for International Studies

*Senior Fellow (by courtesy)*

Hoover Institution for War, Revolution, and Peace, Stanford University

*Visiting Fellow (Spring 1999)*

O'Melveny & Myers, Los Angeles

*Partner (1984-1986)*  
*Associate (1978-1983)*

University of California at Los Angeles

*Instructor (1980-1983: water resources)*

United States Supreme Court (1977-1978)

*Law clerk to Justice William H. Rehnquist*

United States Court of Appeals, San Francisco (1976-1977)

*Law clerk to Judge Joseph T. Sneed*

## Educational Background

Stanford Law School, J.D. 1976  
Stanford Business School, M.B.A. 1976  
Stanford University, A.B. 1972 (economics)

## Books

LEGAL CONTROL OF WATER RESOURCES (3d ed. 2000) (West Group) (with Joseph Sax, John Leshy, and Robert Abrams)

REAL PROPERTY (2d ed., in progress, expected publication in Fall 2002) (Foundation Press) (with Paul Goldstein)

CONCEPTS IN ENVIRONMENTAL LAW & POLICY (in progress, expected publication in Fall 2002) (Foundation Press) (with James Salzman)

## Articles & Book Chapters

*Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENVTL. L.J. 309 (2001)  
(with James Salzman and Gretchen C. Daily)

*Markets for Nature*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 261 (2000)

*Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241 (2000)

*The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185

*The Allure of Consequential Fit*, 51 ALA. L. REV. 1261 (2000)

*Water Allocation and Protection: A United States Case Study*, in EARTH SYSTEMS: PROCESSES AND ISSUES (W.G. Ernst ed., 2000)

*People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127 (1999)

*Endangered Species*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS & LAW (1998)

*Water Law as a Pragmatic Exercise: Professor Joseph Sax's Water Scholarship*, 25 ECOLOGY L.Q. 363 (1998)

- Water Federalism: Governmental Competition and Conflict Over Western Waters*, in ENVIRONMENTAL FEDERALISM (Terry L. Anderson & Peter J. Hill eds. 1997)
- The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 601 (1997)
- Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996)
- Resource Use and the Emerging Law of "Takings": A Realistic Appraisal*, 42 ROCKY MT. MIN. L. INST. 2-1 (1996)
- Water Markets and the Problem of Shifting Paradigms*, in WATER MARKETING--THE NEXT GENERATION (Terry L. Anderson & Peter J. Hill, eds. 1996)
- Legal Disconnections Between Ground and Surface Water*, in MAKING THE CONNECTIONS: PROCEEDINGS OF THE TWENTIETH BIENNIAL CONFERENCE ON GROUND WATER (Univ. Cal. Water Resources Center Report No. 88, June 1996)
- Foreword: The Search for Regulatory Alternatives*, 15 STAN. ENVTL. L.J. viii (1996)
- Environmental Policy and the State Constitution*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE (Institute of Governmental Studies Press, University of California 1995)
- Takings and Water Rights*, in WATER LAW: TRENDS, POLICIES, AND PRACTICE (American Bar Assn. 1995)
- Foreword*, in STRATEGIES FOR ENVIRONMENTAL ENFORCEMENT (Stanford Environmental Law Society 1995)
- Institutional Perspectives on Water Policy and Markets*, 81 CALIF. L. REV. 671 (1993)
- A History of the "Judicial Impairment Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373 (1992)
- A Comment on Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 141 (1992)
- Judicial Takings*, 76 VA. L. REV. 1449 (1990)
- Water Law and the Development of Geothermal Resources*, 14 NAT. RESOURCES LAW. 635 (1982) (with Owen Olpin)

*Income From the Discharge of Indebtedness: The Progeny of United States v. Kirby Lumber*, 66 CALIF. L. REV. 1159 (1979) (with Boris I. Bittker)

*Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563 (1975)

### **Studies**

*A Model Water Transfer Act for California* (California Business Roundtable, May 1996) (with Brian E. Gray, Richard Howitt, Lawrence J. MacDonnell, & Henry J. Vaux, Jr.)

*An Economic Analysis of Water Availability in California Central Valley Agriculture* (Stanford University, Center for Economic Policy Research, February 1992) (with Sandra Archibald)

### **Professional Publications & Newspapers**

*Wheeling Wars*, WATER STRATEGIST (July/Aug. 2000)

*Will Reserved Rights Federalize Groundwater?*, WATER STRATEGIST (Feb. 2000)

*Privatization of the Municipal Water Industry*, LOOKING AHEAD (May/June 1999)

*MWD's Ill-Advised Broadside on Agricultural Water Rights*, WATER STRATEGIST (Feb. 1999)

### **Selected Speeches & Presentations**

*Using Water More Efficiently: Opportunities for Water Conservation* (Conference on Two Decades of Water Law and Policy Reform: A Retrospective and Agenda for the Future, University of Colorado, Boulder, Colorado, June 13, 2001)

*Preserving Watersheds to Preserve Water Quality: The New York City Example* (11<sup>th</sup> Natural Resources Law Teachers Institute, Estes Park, Colorado, June 1, 2001)

*Tragically Difficult: Managing the Nation's Fisheries* (Invited Presentation, Donald Bren School of Environmental Science and Management, Santa Barbara, California, May 11, 2001)

*Wheeling Water: Issues and Possible Solutions* (Conference on California Water Law, CLE International, San Francisco, California, April 6, 2001)

*Using Ecosystem Services to Preserve Watersheds* (Conference on Ecosystem Services, Stanford Law School, Stanford, California, November 16, 2001)

*Privatization of Municipal Water Supplies* (Conference on Competitiveness of Municipal Water and Wastewater Enterprises, Urban Water Institute, San Francisco, California, November 13, 2001)

*Borders and the Environment* (Distinguished Visiting Scholar Lecture, Florida State University, Tallahassee, Florida, October 25, 2000)

*Conservation Options: Toward a Greater Private Role* (Conference on Saving Nature: Theories, Tools, and Strategies in Environmental Conservation, University of Virginia School of Law, Charlottesville, Virginia, October 19, 2000)

*Alternative Ways of Responding to Environmental Problems* (Environmental Law Seminar for Judges, Federal Judicial Center & Georgetown Law Center, Washington, D.C., October 19, 2000)

*Environmental Protection Through State Constitutions* (The State of State Constitutions Conference, Philadelphia, Pennsylvania, May 6, 2000)

*Markets for Nature* (Conference on Watershed Management, College of William & Mary, Marshall-Wythe School of Law, Williamsburg, Virginia, April 1, 2000)

*Water Futures* (Invited Lecture on Law & Society, University of Kansas School of Law, February 24, 2000)

*Harmonizing Environmental & Commercial Uses of Water* (Rosenberg International Forum on Water Policy, Barcelona, Spain, October 1999)

*Southern California Water Wars* (Conference of the Society of Environmental Journalists, Los Angeles, California, Sept. 17, 1999)

*Tragically Difficult: The Obstacles to Regulating the Commons* (Annual Distinguished Visitor Lecture, Northwestern Law School of Lewis & Clark, Portland, Oregon, Sept. 8, 1999)

*Consensus and the Legal System: Are We Making Progress?* (Conference of the Association of California Water Agencies, South Lake Tahoe, California, May 6, 1999)

*The Allure of Consequential Fit* (United States Court of Federal Claims Symposium on Retroactive Legislation, Washington, D.C., April 29, 1999)



*Private Enforcement of Environmental Laws: Citizen Volunteers, Business Draftees, and Mercenaries* (University of Illinois Symposium on Innovations in Environmental Policy, Champaign, Illinois, April 16, 1999)

*Trends and Issues in the Privatization of Municipal Water Supply* (17<sup>th</sup> Annual American Bar Association Water Law Conference, San Diego, California, February 25, 1999)

*Whither Western Water Policy: Blind Salamanders & Markets* (American Association for the Advancement of Science Annual Meeting, Anaheim, California, January 23, 1999)

*Experiential Teaching Techniques: Situational Case Studies, Simulations, & Clinics* (American Association of Law Schools Annual Meeting, New Orleans, Louisiana, January 10, 1999)

*Alternative Conservation Tools: Selecting Among Governmental Purchase of Land, Governmental Regulation, and Private Conservation* (Symposium on Changing the Guardian, Cornell Law School, Ithaca, New York, February 1998)

*Using the Judiciary to Resolve International Water Conflicts* (Rosenberg International Forum on Water Policy, San Francisco, California, September 1997)

*Regulatory Reform: Problems & Promises* (9th Natural Resources Law Teachers Conference, Park City, Utah, May 1997)

*Wheeling Water: Pricing and Access* (Water Education Foundation Executive Briefing, Sacramento, California, March 1997)

*Preserving Water Based Biodiversity: Designing an Effective Model* (Conference on Biodiversity Preservation, Hastings Law School, February 1997)

*Resource Use and the Emerging Law of "Takings"* (Rocky Mountain Mineral Law Institute, Santa Fe, New Mexico, July 1996)

*Water Federalism: Governmental Competition and Conflict Over Western Waters* (Conference on Environmental Federalism, Big Sky, Montana, June 1996)

*The Endangered Species Act & Property Rights* (Conference on the Endangered Species Act, University of Colorado, Center on Natural Resources Policy, June 1996)

*Application of the Law of "Takings" to Restrictions on Mineral Development* (Rocky Mountain Mineral Law Foundation Institute on Regulation of Mineral Development, May 1995)

*State, Pueblo, & Aboriginal Water Rights* (1994 Indian Water Rights Conference, Stanford Law School, September 1994)

*Regulation of Water Use and Takings* (University of Colorado Conference on Regulatory Takings and Resources, June 1994)

*Water Markets: An Overview of Current Law, Institutions, and Issues* (Keynote Address; Water Conference, University of Tulsa College of Law, March 1994)

*The Future of Water Markets* (Conference on Market Approaches to Environmental Protection, Stanford University, December 1993)

*Water Organizations in the West* (University of Colorado Conference on Water Organizations in a Changing West, June 1993)

*The Relevance of Water "Ownership" to Water Markets and Other Issues* (University of Colorado Conference on Water Organizations in a Changing West, June 1993)

*Lucas and Other Recent "Takings Decisions" -- Water Rights Implications* (Keynote Address; Washington State Bar Program on Water Rights Law, September 1992)

*Natural Resource Damage Actions: Whither Contingent Valuation?* (Annual ABA Convention, San Francisco, California, August 1992)

*Judicial Takings of Private Property: Limitation on State Water Regulation?* (10th Annual ABA Water Law Conference, San Diego, California, February 1992)

*Interstate Water Transfers: Sporhase, Compacts, and Free Markets* (ALI-ABA, Western Water Law in the Age of Reallocation, Tucson, Arizona, March 1991)

### **Organizations & Associations**

California Bar

American Bar Association

Committee on Appellate Skills Training, 1984-1985

Water Strategist

Advisory Legal Editor, 1999-

Rocky Mountain Mineral Law Institute

Trustee, 1990-

Chair, Teaching Committee, 1995-97

Co-chair, Environmental Program, 1995-96

Natural Heritage Institute  
Board of Directors, 1997-  
Chairman, 2000-  
Treasurer, 1999-2000

Environmental Volunteers  
Board of Directors, 1994-1998

### **Honors and Awards**

Distinguished Lecturer, Florida State University School of Law (Fall 2000)  
Distinguished Visitor, Northwestern School of School of Lewis & Clark College (Fall 1999)  
Hurlburt Award for Excellence in Teaching (1993)  
Robert E. Paradise Fellowship for Excellence in Teaching and Research (1993-94)  
Order of the Coif

### **Selected University Service**

Advisory Board on Hiring & Promotions  
Counsel to the Board, 1998

Earth Systems Program  
Faculty Steering Committee, 1992-

Haas Center for Public Service  
Faculty Steering Committee, 1993-

Health & Safety Committee  
Member, 1994-96, 2000-

Provost's Committee on Environmental Studies  
Member, 1995-

University Budget Committee  
Member, 1998-

University Fellows  
Member, 1993-95

*last updated: 7/1/01*

Exhibit B

Maintaining Momentum  
On California Water Issues:  
Business Leaders' Findings

May 1996

A Model Water Transfer  
Act for California

**SPONSORS**

California Business Roundtable  
California Chamber of Commerce  
California Farm Bureau Federation  
California Manufacturers Association

**ACADEMIC PANEL**

**Primary Author**

Brian E. Gray, Professor of Law, University of California,  
Hastings College of the Law, San Francisco

**Oversight Committee**

Richard E. Howitt, Professor of Agricultural Economics,  
University of California at Davis

Lawrence J. MacDonnell, Former Director of the Natural  
Resources Law Center, University of Colorado

Barton H. Thompson, Jr., Professor of Law, Stanford University

Henry J. Vaux, Jr., Associate Vice President for Agriculture  
and Natural Resources, University of California, and  
Professor of Agricultural Economics, University of California at Riverside

## ACKNOWLEDGMENTS

The sponsors wish to thank the Academic Panel that drafted A Model Water Act for California. They also wish to express their appreciation to the following individuals and their organizations for bringing together the focus groups whose assistance brought a broad range of perspectives to the study development process:

Richard Golb, Northern California Water Association  
Sunne McPeak, Bay Area Economic Forum  
Brent Graham, San Joaquin Valley Agricultural Water Committee  
Joan Anderson, Southern California Water Committee  
Kathy Neal, Kneal Resource System  
Gwen Moore, Former Assemblywoman, GeM Communications Group  
Bob Potter, California Department of Water Resources

The sponsors also thank the numerous individuals who participated in the focus group process.

<b>Executive Summary</b> .....	v
<b>A Model Water Transfer Act for California</b> .....	1
Part A: Purposes and Policies .....	1
Part B: General Authority .....	3
Part C: Protection of Water Rights .....	6
Part D: General Standards and Procedures Governing Transfers of Water .....	7
Part E: Standards and Procedures for Expedited Transfers of Conserved Water .....	14
Part F: Transfers of Water to Instream Use .....	21
Part G: Water Transfer Fees .....	22
Part H: Authority of Local Water Agencies .....	24
Part I: Wheeling .....	25
Part J: Water Banks .....	30
Part K: State Water Resources Control Board .....	32
Part L: Miscellaneous .....	33
<b>Appendix A - Suggested Criteria for Local Water Agencies to Deny or Amend Water Transfers Proposed by Their Members and Customers</b> .....	35
<b>Appendix B - Glossary of Water Terms</b> .....	37

Voluntary water transfers have long been an important part of local water management. Beginning in 1979 and continuing during the next 16 years, the California Legislature enacted a series of statutes designed to promote and facilitate voluntary water transfers on a broader regional and statewide basis. Governor Pete Wilson successfully developed a market-based approach to deal with California's drought by creating the 1991 and 1992 Drought Water Banks. These statutes and administrative efforts reflect the view that voluntary transfers of water can help to allocate the available water supply to the benefit of all Californians.

Despite the success of the efforts by both the Wilson administration and the California Legislature, water transfers have yet to achieve their potential to improve the effectiveness of California's water system. In recognition of the need to maximize the effectiveness and flexibility of that system, the California Business Roundtable, the California Chamber of Commerce, the California Farm Bureau Federation, and the California Manufacturers Association joined together in 1994 in an effort to streamline the rules for voluntary water transfers in California. The sponsors support water transfers primarily as a flexible short-term solution to meet existing demands with our present system, recognizing that many long-term investments are necessary — Bay-Delta solutions in particular — to address California's critical water needs and to move water efficiently throughout the state. This study is part of the sponsors' efforts to maintain progress on California water issues and is based on the concept that, if properly developed, voluntary water transfers can improve the reliability and efficiency of California's water system.

In order to produce the report, the projects sponsors first enlisted a panel of academics with expertise in the subject to develop draft papers outlining the major water marketing issues. Then, through a series of regional focus groups, the academic drafts were distributed and critiqued by stakeholders throughout the state. A Model Water Transfer Act for California (Model Act) is the combined result of the academic drafting, the focus group insight, and the sponsors' efforts and desire to craft a consensus document that reflects the primary concerns of water users and communities throughout the state.

### **A Model Water Transfer Act for California - Issues and Solutions**

A clear and effective set of water transfer rules is needed to ensure that water transfers achieve their potential in California. The issues that need to be addressed and the solutions presented in the Model Act are described below.

#### ***Coherent Transfer Rules***

Issue: Numerous water transfer laws have been enacted over the past 16 years to promote voluntary transfers and to address specific problems that existed at the time. As a result, the transfer laws are ad hoc and in some cases inconsistent.

Solution: The Model Act establishes a single coherent and consolidated set of water transfer rules for the state of California. The rules in the Model Act are completely optional for holders of pre-1914 water rights, recognizing the concern by those water rights holders about any increased state infringement on their rights. Except for a provision concerning substitution of groundwater to replace surface water, the rules also do not apply to groundwater, again recognizing that application to groundwater would require much greater state intrusion.

### ***Protection of Water Rights***

Issue: Although current law provides a variety of protections for the rights of the parties involved in voluntary transfers, transferring parties (particularly sellers) remain concerned that their water rights will be diminished by participating in a transfer. Security of property rights is critical to the functioning of any market, including one for water.

Solution: The Model Act strengthens the legal protections afforded water rights holders and other water users who voluntarily transfer surface water. These enhanced legal protections apply to all transfers of surface water.

### ***Water Transfer Review Procedures***

Issue: Under current law, numerous local, state, and federal agencies have roles in reviewing voluntary water transfers within California based on a variety of laws. In some cases, the agency roles overlap; in others, there are inadequate safeguards to protect parties that may be adversely affected by a transfer.

Solution: The Model Act reduces the regulatory burden by streamlining the process for effective water transfers where it can be reasonably assured that the transfer will have minimal impacts on local communities. It does this in two ways:

Expedited Process: The Model Act provides an expedited process for short-term transfers of conserved water.

California Environmental Quality Act: The Model Act exempts from the California Environmental Quality Act short-term transfers (defined as less than two years) that require State Water Resources Control Board approval.

### ***Protection of Third-Parties***

Issue: Much of the historic controversy surrounding water transfers is the result of harm, or perceived harm, that could result from a water transfer to parties that do not directly participate in the transfer. Current law gives protection to other water right holders, but only sporadic protection to environmental and economic interests that could be affected by a transfer.

Solution: The Model Act provides appropriate and coherent protection of third-party interests to water transfers in numerous ways. Primarily, the Model Act sets up a priority system that streamlines the rules for transfers with the least potential to harm third-parties, while strengthening the rules



for transfers with the greatest potential to harm third-parties (for example, long-term transfers of water based on the retirement of agricultural lands).

### ***Transfers to Instream Uses***

Issue: One of the potential benefits of voluntary water transfers to environmental uses is the ability of both government and private agencies to purchase water to improve water quality and habitat. Under current law, however, water transfers to the environment will not, in most cases, create increased water flows because pre-existing streamflow requirements will simply absorb the transfers.

Solution: The Model Act addresses the lack of assurance under current law that transfers to the environment will increase streamflows by declaring that all water that is transferred to instream uses is in addition to regulatory requirements. The Model Act also allows transfers to be used to achieve these regulatory requirements on a voluntary basis.

### ***The Role of Local Water Agencies***

Issue: The rights to much of the developed water in the state are held by local water agencies rather than individual water users. As a result, there is a separation of the water right (held by the local agency) and the economic interest in the water (held by the water user). This separation has prompted proposals (including provisions in federal law) for vesting the authority to transfer water with the user rather than the agency. Some agencies and individual water users regard these proposals as being inconsistent with the underlying water right.

Solution: The Model Act allows water users to transfer water with the approval of the local water agency. This approval was maintained in the Model Act for two reasons: first, in deference to concerns that water rights would be diminished if the role of local agencies were reduced; second, in recognition that water users and local agencies are necessary partners in any transfer arrangement. The sponsors encourage local agencies to develop criteria to deny or amend water transfers proposed by their members and customers (suggested criteria are presented in Appendix A).

### ***Groundwater Replacement of Surface Water Transfers***

Issue: Transfer proposals for the sale of surface water have raised fears that the transferred surface water will simply be replaced by pumping groundwater, thereby allowing the sale of a common resource for individual gain. Current law is limited in its ability to ensure that groundwater basins are not damaged in this process.

Solution: To ensure that surface water transfers do not damage underlying groundwater basins, the Model Act prohibits the replacement of transferred surface water with groundwater in those basins where the Department of Water Resources has designated the basin as critically overdrafted. The Model Act is careful not to preclude conjunctive use programs to efficiently use the state's water resources in a manner that will not affect the long-term safe yield of groundwater basins.

### *Wheeling*

Issue: Critical to the success of a water transfer proposal is the access to conveyance systems by the transferring parties. This "wheeling" issue was addressed by the California Legislature in 1986. A number of outstanding issues remain, however, including what price can be charged for system access and how to ensure that water quality is maintained.

Solution: In order to ensure appropriate access to facilities necessary to transfer water, the Model Act clarifies the amount of capacity that should be made available to transferring parties and defines the way in which reimbursement to facility operators by transferring parties is determined. The Model Act maintains appropriate operating safeguards for agencies that control facilities, while at the same time clarifying the rules under which facilities can be used for wheeling.

Voluntary water transfers are needed to provide flexibility and efficiency to California's water system. Too often, water transfer proposals have divided water users, communities, and policymakers, in large part because the rules regarding water transfers lack clarity. The sponsors believe that a Model Water Transfer Act for California will shape our water transfer laws and policies in a way that protects water rights, allows for increased flexibility in our water-supply system, and avoids significant impacts to communities and other third-parties.

Section 101 *Declaration of Policies.*

The Legislature hereby declares that voluntary transfers of water are an integral part of water resources management and planning in this state. Voluntary water transfers improve the administration of California's existing water resources by increasing the flexibility of water supply and allocation, particularly during droughts and other water shortages.

The Legislature also declares that short-term and long-term water transfers are in the public interest and promote the purposes of Article X, Section 2 of the California Constitution. Water transfers serve the public interest by creating economic incentives to use water more efficiently and by allowing market processes to direct the distribution of developed water supplies.

The Legislature further declares that the recognition and protection of water rights are in the public interest and are necessary to facilitate voluntary transfers of water in California.

The Legislature recognizes that some water transfers may adversely affect a variety of third-parties, including other water right holders, other lawful water users, local water agencies, cities and counties, and other persons who use the state's water resources for their livelihood, recreation, and aesthetic enjoyment. To the extent that water transfers cause injury to other water users, water quality, fish and wildlife, other instream uses of water, groundwater resources, and the regional economies of areas from which water is transferred, these third-party interests must be appropriately protected or compensated.

The Legislature also recognizes that federal, state, and local water agencies exercise significant control over the distribution of water in California. The Legislature therefore further declares that such agencies should assist their members and customers who seek to transfer water and, subject to terms and conditions that protect the water supply obligations of the agencies, should make available their water transportation and distribution facilities to facilitate voluntary water transfers.

The Legislature finally declares that a variety of other institutional changes are required to encourage the voluntary transfer of water. These changes include revision of the law governing the State Water Resources Control Board's review of water transfers within its statutory jurisdiction, authorization of expedited transfers of conserved and salvaged water, improvement of the processes for transferring water to instream uses, authorization of regional

water banks, and clarification of the relationship between the water transfer laws and the California Environmental Quality Act.

**Section 102** *Purposes.*

In accordance with the policies set forth in Section 101, the Legislature hereby enacts a comprehensive set of laws to govern voluntary transfers of surface water and to protect the legitimate interests of others who may be affected by such transfers. The purposes of this Act include the following:

- a. Establishment of a unified code to govern voluntary transfers of surface water and voluntary changes in surface water rights;
- b. Authorization of short-term and long-term water transfer agreements as voluntarily agreed to by the parties and subject to the requirements of this Act;
- c. Revision of the standards governing transfers of water within or through the Sacramento-San Joaquin Delta;
- d. Clarification of rules applicable to the conjunctive use of groundwater to replace transferred surface water;
- e. Amendment of the California Environmental Quality Act, Division 13 (commencing with Section 21000) of the Public Resources Code, to exempt water transfer negotiations and certain water transfers from its provisions.
- f. Protection of water rights during the term, and after the conclusion, of water transfer agreements;
- g. Creation of economic incentives for, and legal protection of, water conservation and efficient use of developed water resources;
- h. Prevention of harm to third-party water rights holders and other legal water users from voluntary water transfers;
- i. Protection of groundwater resources, instream uses, fish and wildlife, and other environmental resources that may be adversely affected by voluntary water transfers;
- j. Establishment of economic and legal incentives to encourage voluntary water transfers that are unlikely to cause significant adverse environmental and economic harm to third-parties;
- k. Creation of an expedited process for transfers of conserved and salvaged water;
- l. Creation of a security system to provide for the monetary compensation of legal water users and other third-party interests injured by expedited transfers of conserved and salvaged water undertaken pursuant to this Act;

- m. Authorization of transfers of water to instream uses;
- n. Enactment of a water transfer fee to provide funding for the State Water Resources Control Board's review of voluntary water transfers within its statutory jurisdiction;
- o. Recognition and definition of the respective rights of local water agencies and their members and customers to transfer water and to receive transferred water;
- p. Revisions of the laws governing the transport of water through water supply facilities owned or operated by an entity other than the owner of the transported water;
- q. Authorization for the creation of a State Water Bank and local and regional water banks; and
- r. Establishment of a registry of water transfers to be administered or supervised by the State Water Resources Control Board.

**Section 103** *Title.*

This Act shall be titled the "California Water Transfer Act."

**Section 201** *Coverage of the Act and Definitions.*

The provisions of this Act shall apply to: (1) voluntary changes in surface water rights that do not involve a transfer of water from the existing water right holder to another user; (2) voluntary changes in surface water rights that do involve a transfer of water from the existing water right holder to another user; and (3) voluntary transfers of water that do not require a change in water rights.

All references in this Act to "water transfers" or to "transfers of water" shall include voluntary changes in surface water rights, voluntary transfers of surface water rights, and voluntary transfers of water. Water transfers include transfers of water held pursuant to a surface water right, water held pursuant to a contract right, and water distributed by any local water supply agency.

The provisions of this Act shall not apply to changes in pueblo rights or transfers of water based on pueblo rights. Except as set forth in Section 207, the provisions of this Act shall not apply to changes in riparian rights or transfers of surface water based on riparian rights. Except as set forth in Section 208, the provisions of this Act shall not apply to changes in groundwater rights or to transfers of groundwater.

**Section 202** *Authorization of Water Transfers.*

Notwithstanding any other provision of law, surface water rights and surface water (as set forth in Section 201) may be transferred in accordance with the provisions of this Act.

**Section 203** *Agreements to Transfer Water.*

Agreements to transfer water may include purchase and sales contracts, deeds, leases, exchange agreements, options, futures contracts, subordination agreements, gifts, agreements to forego the use of water, and other types of arrangements to transfer water that are mutually agreeable to the parties.

**Section 204** *Short-Term and Long-Term Water Transfers.*

Short-term proposals or agreements to transfer water are proposals or agreements the term of which is two years or less. Long-term proposals or agreements to transfer water are proposals or agreements the term of which is greater than two years. Long-term proposals and agreements include permanent changes in water rights and permanent transfers of water.

If a water right holder or water transferor enters into successive short-term agreements with the same party (or agents, representatives, subcontractors, assignees, or beneficiaries of the same party), and if such successive agreements have commencement dates within one year of each other and result in the transfer of water for a term in excess of two years, the agreements shall be regarded as a long-term agreement and the provisions of this Act governing long-term agreements shall apply to the second agreement and any successive agreements.

**Section 205** *Compliance With Other Laws.*

Throughout the term of all water transfer agreements, the parties to the agreement shall comply with all requirements of federal law and state law where applicable, including but not limited to: Article X, Section 2 of the California Constitution; sections 1410-1418 of the California Civil Code; other provisions of this Code; terms and conditions imposed by permit or license administered by the State Water Resources Control Board; and other judicial and administrative decisions respecting water rights, water quality, and other beneficial uses.

**Section 206** *Through-Delta Transfers.*

No transfer of water within or through the Sacramento-San Joaquin Delta (as defined in Section 12220 of this Code) shall cause a violation of the water quality standards (including flow requirements and temperature standards) applicable to the Delta as established under state and federal law. Within one hundred eighty days of the effective date of this Act, the State Water Resources Control Board shall promulgate regulations to implement this section. Following the promulgation of these regulations, all transfers of water shall be consistent with the regulations, and compliance with the regulations shall be deemed compliance with this section.

In the rulemaking proceedings required by this section, the Board shall determine whether transfers of water within or through the Sacramento-San Joaquin Delta should be accompanied by an additional amount of carriage water to ensure that such transfers do not cause a violation of applicable water quality standards. If the Board determines that additional carriage water is required, it shall include in the regulations a table that states the additional amount of carriage water that must accompany each transfer of water within or through the Delta for various hydrologic conditions and types of transfers.

The Board shall consult with the California Department of Water Resources, the California Department of Fish and Game, the United States Bureau of Reclamation, the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the United States Environmental Protection Agency before promulgating the draft of the regulations required by this section. The Board also shall submit the draft regulations to academic experts in the fields of hydrology, marine biology, water supply engineering, water quality, water rights, and related disciplines for peer review and comment before the Board promulgates final regulations.

**Section 207** *Transfers of Quantified Riparian Rights and Agreements to Forego the Use of Water Held Pursuant to Riparian Rights.*

Riparian rights that have been quantified by judicial decree issued pursuant to Chapter 3 (commencing with Section 2500) of Part 3 of this Code, and water held pursuant to such decreed rights, may be transferred in accordance with Parts D, E, and F of this Act. The court may enter a supplemental decree as necessary to modify the original decree to incorporate the transfer of water pursuant to this section.

Nothing in this Act or any other law shall preclude any agreement to forego the use of water held pursuant to riparian rights for any period established by the agreement.

**Section 208** *Surface Water Transfers and Groundwater Replacement.*

Transferors of surface water from groundwater basins subject to critical conditions of overdraft, as designated by the Department of Water Resources in the Bulletin 118 Series, shall not initiate or increase the use of groundwater to replace the transferred surface water if the surface water is exported for use outside the overdrafted groundwater basin. This prohibition shall not apply to the use of groundwater stored for the purpose of subsequent extraction for surface water replacement or direct transfer as part of a groundwater banking program carried out by direct recharge, delivery of surface water *in lieu of* groundwater pumping, or by other means.

Transferors of surface water from groundwater basins that are not subject to critical conditions of overdraft, as designated by the Department of Water Resources in the Bulletin 118 Series, may not initiate or increase the use of groundwater to replace the transferred surface water except in compliance with the following requirements:

1. The transferor has legal authority to use groundwater and such use does not exceed the transferor's groundwater rights under state and local law.
2. The transferor's use of groundwater is consistent with all valid laws that govern the extraction, appropriation, and use of groundwater, including groundwater management statutes, local groundwater management plans adopted pursuant to Sections 10750 through 10755.4 of this Code, city or county ordinances, judicial decisions and decrees governing the extraction and use of groundwater, and the provisions of Division 13 (commencing with Section 21000) of the Public Resources Code.
3. The transferor's use of groundwater does not cause the long-term operating safe yield of the groundwater basin to be exceeded.

The absence of a local groundwater management plan or city or county ordinance governing groundwater shall not preclude the use of groundwater to replace transferred surface water in accordance with the terms of this section.

**Section 209** *California Environmental Quality Act.*

The provisions of Division 13 (commencing with Section 21000) of the Public Resources Code shall not apply to short-term agreements or proposals to transfer water.

For other agreements and proposals to transfer water, the provisions of Division 13 (commencing with Section 21000) of the Public Resources Code shall be applicable only to the decision by a public agency whether to approve, to amend, to renew, or to rescind a long-term transfer. The provisions of Division 13 (commencing with Section 21000) of the Public Resources Code shall not apply to the consideration, negotiation, or execution of agreements or proposals to transfer water or to the payment of monetary or other consideration related to such agreements or proposals. The provisions of Division 13 (commencing with Section 21000) of the Public Resources Code also shall not apply to the termination of long-term agreements to transfer water at the conclusion of the term of such agreements.

**Section 301** *Protection of the Rights of the Transferor.*

The offer of water for transfer, the transfer negotiations, and the agreement to transfer water shall not be used as evidence of the transferor's waste or unreasonable use, or cessation of use, of the water or water rights made available for transfer. Nor shall the transfer of water cause, or be the basis of, a forfeiture or abandonment of any water rights, contract rights, or other right to use water.



**Section 302** *Protection of Water Rights During Transfer.*

Throughout the term of all water transfer agreements, compliance with Article X, Section 2 of the California Constitution; Sections 100 through 101, 1410, and 1675 of this Code; and any other legislative, administrative, or judicial limitation on water rights shall be determined based on an assessment of the reasonableness of the transferee's use of the transferred water.

Except for permanent transfers of water or water rights, if the transferee's right to use transferred water is reduced or divested on the basis of the transferee's abandonment, forfeiture, waste, or unreasonable use, the reduced or divested rights shall revert immediately to the transferor. In the case of permanent transfers of water or water rights that are reduced or divested on the basis of the transferee's abandonment, forfeiture, waste, or unreasonable use, the forfeited rights shall be extinguished.

**Section 303** *Protection of Water Rights After Transfer.*

Except for permanent transfers of water or water rights, at the conclusion of the term of a water transfer agreement, all rights in, and to the use of, the water subject to the transfer agreement shall revert back to the transferor. Following the conclusion of the term of a water transfer agreement, neither the transferee nor any other beneficiary of the transfer may bring any claim for a continuation of the water supply made available by the transfer agreement. Nor may the transferee or any beneficiary of the transfer claim any right to a continued supply of water based on reliance, estoppel, intervening public use, water shortage emergency, unforeseen or unforeseeable increases in demand, or any other cause.

**Section 304** *Water Conservation.*

The conservation, salvage, or other reduction in the use of water for the purpose of transferring the amount so conserved, salvaged, or reduced shall be deemed a reasonable and beneficial use of water.

**Section 401** *Coverage.*

Except for Expedited Transfers of Conserved Water pursuant to Part E, all transfers of water governed by this Act shall comply with the standards and procedures set forth in this Part.

**Section 402** *Jurisdiction of the State Water Resources Control Board.*

The State Water Resources Control Board shall have jurisdiction over transfers of water appropriated pursuant to water rights acquired under authority of the Water Commission Act or this Code and over transfers of water held pursuant to riparian rights that have been quantified by judicial decree issued pursuant

to Chapter 3 (commencing with Section 2500) of Part 3 of this Code, where the transfer requires an alteration of the purpose of use, place of use, point of diversion, point of return flow, or any other term or condition of the water right as set forth in the applicable permit, license, or decree.

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.

The State Water Resources Control Board shall review proposals to transfer water over which it has jurisdiction pursuant to the authority granted by this section in accordance with the procedures and standards set forth in Sections 403 and 404. All other transfers of water governed by this Part shall comply with the standards and procedures set forth in Section 405.

**Section 403** *Procedures for Review by the State Water Resources Control Board of Petitions to Transfer Water.*

The State Water Resources Control Board shall review proposals to transfer water in accordance with the procedures set forth in this section.

All petitions to transfer water shall be filed by the water right holder. If the proposed change or transfer is for the benefit of a contractor or user supplied directly or indirectly by the water right holder, the water right holder may authorize the contractor or user to participate as co-petitioner. The water right holder shall notify the Board in the petition of all co-petitioners. Co-petitioners shall have the same rights and responsibilities under this section as the petitioner.

- a. **Petition.** A water right holder who seeks to transfer water shall submit to the Board a petition to change the terms of the permit, license, or decreed right as required to accomplish the proposed transfer. The petition shall include a written explanation of the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, and water quality or instream flows that are likely to occur as a result of the proposed transfer. Where applicable, the petition shall be accompanied by a copy of the water transfer agreement. The petitioner may omit the financial terms of the agreement from its submission to the Board. The petitioner shall provide copies of these documents to the California Department of Fish and Game and to the Supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition.
- b. **Notice.** Within ten days of submission of the petition to the Board, the petitioner shall cause to be published in at least one newspaper of general circulation in the county or counties in which the petitioner currently stores or uses the water subject to the petition a notice of the petition and a brief description of the terms of the proposed water transfer. The Board shall publish general notice of the submission of the petition and of all subsequent actions taken on the petition. The Board may impose other reasonable notice requirements on the petitioner.

- c. Investigation.** Within ten days of receipt of the petition, the Board shall begin an investigation of the proposed water transfer. The Board shall determine and evaluate the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, and water quality or instream flows that would be likely to occur as a result of the proposal.
- d. Protests.** Water users that may be affected by the proposed water transfer and other interested parties may file written protests with the Board. Protests shall be filed no later than thirty days after publication of the notice required by subsection (b). Copies of the protest and supporting documentation shall be served on the petitioner, the California Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), and the proposed transferee.
- e. Analysis.** For petitions that involve a short-term proposal or agreement to transfer water, the Board shall complete its investigation and prepare a written analysis of the proposed transfer no later than thirty days after commencement of the investigation. For petitions that involve a long-term proposal or agreement to transfer water, the Board shall complete its investigation and prepare a written analysis of the proposed transfer no later than ninety days after the commencement of the investigation. For good cause, the Board may extend these time periods for no more than thirty days. Upon completion of the analysis of the proposal, the Board shall provide copies of the analysis to the petitioner, the California Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), the proposed transferee, and any party who has filed a written protest.
- f. Response.** The Board shall grant the petitioner, the California Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), the proposed transferee, and any party who has filed a written protest an opportunity to respond in writing to the Board's analysis of the proposed water transfer. All written responses shall be submitted to the Board no later than twenty days after receipt of the Board's analysis.
- g. Hearing.** The Board shall conduct a hearing on all petitions that involve a long-term proposal or agreement to transfer water within thirty days of completion of its analysis of the proposal. The Board shall provide individual notice to the petitioner, the California Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), the proposed transferee, and any party who has filed a written protest of the time and place of the hearing. If no protest was filed within the thirty days set forth in subsection (d), and if the petitioner waives its right to a hearing, the Board may act on the petition without a hearing.
- h. Decision.** For petitions that involve a short-term proposal or agreement to transfer water, the Board shall render a decision on the petition, without a hearing, no later than twenty days after receipt of the last timely filed

written response. For petitions that involve a long-term proposal or agreement to transfer water, the Board shall render a decision on the petition no later than thirty days after the conclusion of the hearing, or no later than thirty days after receipt of the last written response if there is no hearing. The petitioner may stipulate to an extension of the time for decision.

The Board shall grant the petition unless it determines, based on the evidence, that the proposed water transfer would not comply with the requirements of Section 404. The Board may grant the petition subject to conditions imposed by the Board to ensure compliance with the requirements of Section 404. If the Board grants the petition, it shall amend the terms and conditions of the permit, license, or decreed right as necessary to accomplish the water transfer.

The Board shall explain its decision in writing and shall serve copies of the decision on the petitioner, the Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), the proposed transferee, and any party who has filed a written protest.

i. **Judicial Review.** The petitioner, the proposed transferee, and any party who has filed a written protest in accordance with the requirements of this section may petition the Superior Court for a writ of mandate to review a decision of the Board rendered pursuant to this section and Section 404. The petition for writ of mandate shall be filed no later than thirty days after receipt of the decision of the Board. Venue shall be in the County of Sacramento and in the county or counties in which the water that is the subject of the transfer petition is currently stored or used. The Superior Court shall review the decision of the Board pursuant to the requirements of Section 1094.5 of the Code of Civil Procedure, except that in all cases the court shall sit without a jury and shall review the decision of the Board under the substantial evidence standard set forth in subsection 1094.5(c).

j. **Limitation on Damages.** Except as required by the California Constitution or by the Constitution of the United States, the courts shall have no authority to award damages or other monetary relief to the petitioner, the proposed transferee, or any other party alleged to be injured or aggrieved by a decision of the Board to deny, to grant, or to place conditions on a petition to transfer water pursuant to this section.

**Section 404** *Standards for Review by the State Water Resources Control Board of Petitions to Transfer Water.*

The State Water Resources Control Board shall review petitions to transfer water according to the standards set forth in this section.

a. **Short-Term Water Transfer Agreements.** For short-term water transfers, the Board shall approve the petition unless it concludes that the proposed transfer:

1. would result in significant injury to any legal user of water; or
2. would unreasonably affect fish, wildlife, or other instream beneficial uses.

The petitioner shall have the burden of producing *prima facie* evidence that the proposed transfer would comply with the standards set forth in this subsection. The establishment of a *prima facie* case shall shift the burden of proof to those parties (if any) that have filed protests in accordance with the requirements of Section 403 to prove that the proposed transfer would not comply with the standards set forth in this subsection. The standard of proof shall be by a preponderance of the evidence.

**b. *Long-Term Water Transfer Agreements.*** For long-term water transfers, the Board may approve the petition only if it concludes that the proposed transfer:

1. would not result in significant injury to any legal user of water; and
2. would not unreasonably affect fish, wildlife, or other instream beneficial uses.

The petitioner shall have the burden of proving that the proposed transfer would comply with the standards set forth in this subsection. The standard of proof shall be by a preponderance of the evidence.

**c. *Long-Term Agreements Based on Land Fallowing or Retirement.***

The Board may not approve a petition for a long-term water transfer based on the fallowing or retirement of previously irrigated land if it concludes that the proposed transfer would cause substantial harm to the economy in the area from which the water is to be transferred. The prohibition set forth in this subsection is in addition to the standards governing long-term transfers set forth in subsection (b).

In determining whether a proposed water transfer would violate the prohibition set forth in this subsection, the Board shall consider any actions that the petitioner or other parties to the transfer agreement have taken to mitigate harm to the economy in the area from which the water is to be transferred.

The petitioner shall have the burden of proving that the proposed transfer would comply with the standards set forth in this subsection. The standard of proof shall be by a preponderance of the evidence.

This subsection shall apply only to long-term water transfers that: (1) would obtain water for transfer by fallowing or retirement of land previously used for agricultural purposes; and (2) would change the place of use or transfer the water to uses outside the county or counties in which the water previously has been used.

This subsection shall not apply to long-term water transfers based on the fallowing or retirement of previously irrigated land within the San Joaquin Valley Drainage Program study area—as defined in the U.S. Department of the Interior & California Resources Agency's "A Management Plan for Agricultural Subsurface Drainage on the Westside of the San Joaquin Valley: Final Report of the San Joaquin Valley Drainage Program" (1990)—that the Board concludes would contribute to the reduction of agricultural drainage that adversely affects surface water or groundwater quality.

- d. *Transfers of Water Based on Consumptive Use or Irretrievable Loss.*** To the extent that any petition to transfer water includes water that, in the absence of the change or transfer, would be consumed by the petitioner in applying the water to reasonable and beneficial uses or would have been irretrievably lost to all beneficial uses, the Board shall calculate the quantity of such water in accordance with the standards set forth in Section 503. The Board shall apply a rebuttable presumption as to the water so quantified that the transfer would not result in significant injury to any legal user of water or unreasonably affect fish, wildlife, or other instream beneficial uses.

The burden of proving that a transfer of water quantified pursuant to this subsection and Section 503 would result in significant injury to any legal user of water or unreasonably affect fish, wildlife, or other instream beneficial uses shall be on those parties (if any) that have filed protests in accordance with the procedural requirements set forth in Section 403. The standard of proof shall be by a preponderance of the evidence.

This subsection shall apply only at the option of the petitioner.

- e. *Compliance With Permits and Licenses.*** If the Board determines that both the release of water for transfer and the diversion or redirection of the transferred water would comply with the terms and conditions of existing permits and licenses that protect other legal water users, fish, wildlife, and other instream beneficial uses affected by the appropriation and use of the water that is the subject of the petition, the proposed transfer shall be deemed to comply with the requirements of subsections (a) and (b).
- f. *Causation.*** In applying the third-party protection standards set forth in this section, the Board shall consider only the effects of the proposed transfer of water on such third-party interests. The Board shall not deny a petition to transfer water in order to protect third-parties from injury caused by factors other than the proposed water transfer. Nor shall the Board impose any conditions on its approval of a water transfer petition to mitigate adverse effects on fish, wildlife, or other instream beneficial uses, or to mitigate harm to the economy in the area from which the water is to be transferred, that would be caused by factors other than the proposed water transfer.

As used in this subsection, "factors other than the proposed water transfer" include, but are not limited to: drought or other water shortages; changes in the operation of water facilities not controlled by the petitioner or the other parties to the change in water rights or water transfer agreement; changes in river flows, groundwater extraction, or groundwater recharge not related to the proposed change in water right or water transfer; changes in commodities prices, cost of goods and services, or labor costs; changes in the general economic conditions of the region; and other hydrologic and economic conditions not related to the proposed water transfer.

**g. *Proof of Water Rights.*** In all cases, the petitioner shall have the burden of proving by a preponderance of the evidence that it has valid water rights to the water included in the petition to transfer water.

**Section 405** *Transfers of Water Not Subject to the Jurisdiction of the State Water Resources Control Board.*

Transfers of water that are not subject to the jurisdiction of the State Water Resources Control Board as defined in Section 402 shall comply with the procedures set forth in this section. This section shall not apply to transfers of water within a local water agency.

- a. *Notice.*** If the water transfer will alter the purpose of use, place of use, point of diversion, or point of return flow from that of the existing use, the water right holder or transferor shall:
1. submit to the State Water Resources Control Board a brief description of the proposed water transfer and a written explanation of the changes in water storage, timing and point of diversion, place and purpose of use, consumption, timing and point of return flow, and any changes in water quality or instream flows that are likely to occur as a result of the transfer; and
  2. provide a copy of the foregoing to the California Department of Fish and Game and to the Supervisors of the county or counties in which the water right holder or transferor currently stores or uses the water subject to the proposal.
- b. *Effective Date.*** The water transfer shall not become effective until the water right holder or transferor has complied with the notice requirements of subsection (a).
- c. *Compliance With Other Laws.*** Nothing in this section shall be construed to alter any other law that may be applicable to changes in water rights or transfers of water described in this section. This section shall not be construed to expand the jurisdiction of the State Water Resources Control Board over such changes in water rights or transfers of water except as provided by this section. Nor shall this section be construed to limit the jurisdiction of the courts to review changes in water rights or transfers of water.

**Section 406** *Optional Use of Expedited Transfer Procedures.*

If a petition to transfer water pursuant to this Part includes conserved water as defined in Section 501, the petitioner may transfer such water in accordance with the standards and procedures governing expedited transfers of conserved water set forth in Part E. In such a case, the portion of the petition that pertains to the conserved water shall be governed by the requirements of Part E and the remainder of the petition shall be governed by the requirements of this Part.

**Section 501** *Definition of Conserved Water.*

Except as set forth in Section 507, a water user who seeks to transfer "conserved water" may use the expedited procedures and standards set forth in this Part.

"Conserved water" is water that: (1) the transferor is legally entitled to use during the term of the transfer agreement pursuant to existing water rights, contracts, or other legal authority; and (2) the transferor has used within the five years immediately preceding the transfer agreement. Conserved water includes, but is not limited to: water that the transferor conserves through salvage of water irretrievably lost to all consumptive uses during storage, transportation, or distribution; increased efficiency of irrigation or other use; changes in the acreage or type of crop irrigated; land fallowing or retirement; changes in operations; reduction in demand within the transferor's place of use or service area; substitution of reclaimed or recycled water; pricing changes; and other conservation measures.

**Section 502** *Transfers of Conserved Water.*

Transfers of conserved water shall not exceed, for any water accounting year during the term of the transfer, the lesser of: (1) the amount of water that is both legally and physically available to the transferor during the water year; or (2) the average annual quantity of water consumed by the transferor, or irretrievably lost to all consumptive uses, during the ten water years immediately preceding the transfer.

**Section 503** *Quantification of Transferable Water.*

The quantity of water that may be transferred pursuant to the expedited procedures set forth in this Part shall be calculated in accordance with the following standards:

- a. *Changes in Acreage or Type of Crop Irrigated.* For water made available for transfer by changes in the acreage or type of crop irrigated by the transferor or by land fallowing or retirement, the "average annual quantity of water consumed by the transferor" as set forth in Section 502



shall be calculated by reference to the "Water Consumption Table for California Agriculture" promulgated by the Department of Water Resources. Actual consumption data shall not be used to calculate the quantity of conserved irrigation water made available for transfer pursuant to this subsection.

1. The Department shall promulgate a rule that sets forth the "Water Consumption Table for California Agriculture." The Department shall promulgate the Table within one year of the effective date of this Act and shall revise the Table whenever necessary to calculate more accurately water consumption by irrigated agriculture in any hydrologic region included in the Table.
  2. The Department shall include in the "Water Consumption Table for California Agriculture" a calculation of the water consumed in the irrigation and growth of each crop grown in California. The Department shall publish such water consumption data for each hydrologic region (as defined in Department of Water Resources Bulletin 160-93).
- b. *Changes in Efficiency of Water Use.*** For water made available for transfer by the salvage of water irretrievably lost to all consumptive uses, use of reclaimed or recycled water, pricing changes, reduction in demand, or other methods of conservation, the "average annual quantity of water consumed by the transferor" shall be calculated by reference to actual water consumption or water loss data.

**Section 504 *Notice of Intent to Transfer and Verification of Transferable Quantities.***

All notices of intent to transfer conserved water on an expedited basis shall be filed by the water right holder in accordance with the procedures set forth in this section. If the proposed transfer is for the benefit of a contractor or user supplied directly or indirectly by the water right holder, the water right holder may authorize the contractor or user to participate as co-transferor. The water right holder shall notify the Board in the petition of all co-transferors. Co-transferors shall have the same rights and responsibilities under this section as the water right holder.

- a. *Notice.*** The transferor shall submit to the State Water Resources Control Board a copy of the water transfer agreement and a written explanation of the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, and any changes in water quality or instream flows that are likely to occur as a result of the agreement. The transferor shall provide copies of these documents to the California Department of Fish and Game and to the County Supervisors of the county or counties from which the water will be transferred. The transferor also shall cause to be published in at least one newspaper of general circulation in the county or counties from which the water will be transferred a notice of the proposed transfer and a brief description of the terms thereof.

The Board shall publish general notice of the submission of the transfer proposal and of all subsequent actions taken on the proposal.

- b. *Verification.*** The transferor shall submit to the State Water Resources Control Board a declaration under penalty of perjury that explains the method of conservation and the transferor's calculation of the conserved water made available for transfer. The declaration shall include a verification that such calculations are accurate and consistent with the requirements of this Part. For transfers of conserved water from irrigation, the declaration also shall describe the land from which the water was conserved, the acreage subject to the transfer agreement, and the types of crops irrigated by the transferor on the land that is subject to the transfer agreement before and during the term of the agreement.
- c. *Comments.*** Any interested party may submit written comments regarding the transfer proposal to the State Water Resources Control Board.
- d. *Review.*** Within thirty days of receipt of the declaration set forth in subsection (b), the Board shall review the transferor's calculation of the quantity of conserved water available for transfer. The Board shall approve the transferor's calculations if they are accurate and conform to the requirements of this Part. The Board shall set forth its findings and conclusions in a brief memorandum, which the Board shall serve on the transferor. If the Board rejects any of the transferor's calculations, the Board shall state (to the extent feasible) its determination of the correct calculations and the quantity of conserved water that in its judgment is available for transfer.
- e. *Certificate of Transfer.*** If the Board approves the transferor's calculations, or if the transferor accepts the Board's calculations, the Board shall issue a "Certificate of Transfer" to the transferor. The Certificate of Transfer provides full legal authorization for the transfer. Where applicable, the Board shall amend the transferor's and transferee's permits or licenses as required to accomplish the transfer.
- f. *Approval by Default.*** If the Board fails to act on the transferor's declaration within thirty days of receipt, the transferor's calculation of the quantity of conserved water available for transfer shall be deemed approved. Upon request of the transferor, the Board shall immediately issue a Certificate of Transfer based on the transferor's calculation of the quantity of conserved water available for transfer.
- g. *Notice of Decision.*** The Board shall explain its decision to grant or to deny a Certificate of Transfer in writing and shall provide copies of the decision to the transferor, the Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), the proposed transferee, and any party who has filed a written comment pursuant to subsection (c).
- h. *Judicial Review.*** The transferor may petition the Superior Court for a writ of mandate to review a decision of the Board rendered pursuant to

this section. The petition for writ of mandate shall be filed no later than thirty days after receipt of the decision of the Board. Venue shall be in the County of Sacramento and in the county or counties in which the water that is proposed for transfer is currently stored or used. The Superior Court shall review the decision of the Board pursuant to the requirements of Section 1094.5 of the Code of Civil Procedure, except that in all cases the court shall sit without a jury and shall review the decision of the Board under the substantial evidence standard set forth in subsection 1094.5(c).

Except as required by the California Constitution or by the Constitution of the United States, the courts shall have no authority to award damages or other monetary relief to the transferor or to any other party alleged to be injured or aggrieved by a decision of the Board pursuant to this section.

- i. *Limitation on Collateral Challenge.*** Except as provided in subsection (h), the courts shall have no authority to review a decision of the Board rendered pursuant to this Part. Nor shall the courts have authority to award damages or other monetary relief to any party alleged to be injured or aggrieved by a decision of the Board pursuant to this section. A legal water user who is alleged to be injured or aggrieved by a decision of the Board pursuant to this section may file a claim for monetary compensation in accordance with the standards and procedures set forth in Section 506.
- j. *Determination of Water Rights.*** Neither the Board's approval of a transferor's calculation of conserved water available for transfer, nor the issuance of a Certificate of Transfer pursuant to subsections (e) or (f), shall constitute a determination or quantification of the water rights of the transferor or of the rights to use water by the transferor or any other person, except for the purpose of authorizing the transfer of conserved water pursuant to this section.

#### **Section 505 *Security.***

- a. *Coverage.*** Except as provided in subsection (b), every person or entity that acquires water transferred pursuant to this Part shall deposit with the State Water Resources Control Board a security in the amount of five dollars (\$5.00) per acre-foot of transferred water. The security required by this section shall be in the form of a cash deposit, money order, certified check, or bond payable to the State Water Resources Control Board.
- b. *Exemptions.*** If the transfer includes a Delta carriage water requirement imposed by the Board pursuant to Section 206, the transferee may exclude this water from its calculation of the amount of the security required by this section. Transfers of water between users located in the same local water agency also are exempt from the requirements of this section.
- c. *Management of Security Deposits.*** The transferee shall deposit the security with the Board at least ten days before the date on which the physical transfer of water commences. The Board shall hold the security deposited for each transfer in a separate account and shall not commingle

the security deposits from one transfer with the security deposits from other transfers.

The California Treasurer shall invest the money in each account in a prudent manner that (1) does not place the principal in the fund at risk and (2) provides adequate liquidity to pay claims or to discharge the security in accordance with Section 506.

- d. **Price Adjustment.** The Board annually shall adjust the amount of the security required by this section based on changes in the Consumer Price Index published by the United States Department of Commerce. The Board also shall have authority by regulation to adjust the amount of the security requirements if it determines that these requirements will generate insufficient or excess funds to provide fair compensation to third-party claimants under Section 506. The Board shall have sole discretion to adjust the amount of the security requirements set forth in this section.
- e. **Restriction on Expenditures.** The proceeds of security deposited with the Board pursuant to this section shall be used exclusively for the purposes set forth in this Part. These funds shall not be part of the general budget of the State and shall not be impounded or used to meet general State obligations.

#### Section 506 *Claims for Compensation.*

Third-parties alleged to be injured by expedited transfers of conserved water authorized by this Part may file claims for compensation in accordance with the procedures and standards set forth in this section. The compensation system established by this section shall not apply to transfers of water between users located in the same local water agency.

- a. **Eligibility.** The California Department of Fish and Game, the county or counties from which water is transferred, and any legal water user who is alleged to be injured by an expedited transfer of conserved water may file a claim for compensation.
- b. **Compensable Injuries.** Injuries that are compensable under this section are limited as follows:
1. The California Department of Fish and Game may seek compensation for reduction in water quantity or flows and diminution in water quality caused by the transfer that adversely affects fish and wildlife, recreation, other instream uses, aquatic and riparian habitat, or wetlands.
  2. The county or counties from which water is transferred may seek compensation for loss of tax revenues and increased social services costs caused by the transfer.
  3. Other legal water users may seek compensation for reduction in the supply of water that the claimant is legally entitled to use, diminution

in water quality that adversely affects the claimant's water use, and increased pumping costs caused by the transfer.

c. **Procedures.** Except as provided in this section, arbitration of disputes under this Part shall be conducted pursuant to the provisions of Sections 1280, 1280.1, 1281.9, 1282(e), and 1282 through 1284.2 of the Code of Civil Procedure.

1. The claimant shall file a claim with the State Water Resources Control Board and serve copies of the claim on parties to the transfer, the California Department of Fish and Game, the Supervisors of the county or counties from which the water is transferred, and other parties designated by the Board.
2. The claimant shall publish notice of the filing of the claim, along with a brief description of the nature and legal basis of the claim and the amount of damages the claimant seeks, in at least one newspaper of general circulation in the counties from which and to which the water is transferred.
3. The Board shall publish general notice of the filing of the claim and of all subsequent actions taken on the claim.
4. The Board shall appoint a single neutral arbitrator to adjudicate the claim and to render a final judgment in accordance with the law and evidence.
5. If more than one claim is filed with respect to a single transfer, the Board shall assign all such related claims to the same arbitrator. The arbitrator shall coordinate the arbitration of related claims and shall have authority to consolidate such related claims into a single arbitration.
6. The parties to the transfer shall serve the claimant with a response to the claim within thirty days of receipt of the copy of the claim. The response shall contain an admission or denial of each element of the claim, with a brief explanation of the reasons and legal bases for each denial. The respondents also shall serve copies of the response on the arbitrator, the Board, the California Department of Fish and Game, the Supervisors of the county or counties from which the water is transferred, and other parties designated by the arbitrator or by the Board.
7. The arbitrator may extend the time in which the respondents have to respond to the claim if the arbitrator determines that additional time is necessary to prepare the response. The arbitrator also may require the parties to file legal memoranda, motions, offers of proof, and other legal and evidentiary documents that in the arbitrator's judgment would assist the arbitrator in rendering judgment on the claim.

d. **Burden and Standard of Proof.** The burden of proof shall be on the claimant. To prevail on the merits of the claim, the claimant must establish by a preponderance of the evidence that the claimant's injuries were caused by the water transfer and not by other factors. These other factors

shall include, but are not limited to: drought or other water shortages; changes in the operation of water facilities not controlled by the parties to the transfer; changes in river flows, groundwater extraction, or groundwater recharge not related to the transfer; changes in commodities prices, cost of goods and services, or labor costs; changes in the general economic conditions of the region; and other hydrologic and economic conditions not related to the transfer.

- e. **Judgment and Relief.** The arbitrator shall render judgment on the claims in accordance with the evidence and the standards set forth in this section. The arbitrator shall explain the judgment in a written opinion and provide copies of the opinion and judgment to the Board, the claimant, the respondents, the California Department of Fish and Game, the Supervisors of the county or counties from which the water is transferred, and other parties designated by the arbitrator or by the Board. The arbitrator shall have no authority to provide any relief other than monetary compensation as provided by subsection (f).
- f. **Compensation.** A claimant who prevails on the merits of the claim shall be entitled to monetary damages in the amount that the arbitrator determines is adequate to compensate the claimant for the injuries caused by the water transfer. The arbitrator shall not award damages in excess of the amount of the security posted by the transferee in accordance with the requirements of Section 505.

In arbitrations involving multiple claims, if the aggregate damages exceed the amount of the security, the arbitrator shall apportion the available funds in an equitable manner among the prevailing claimants.

Compensation received by the California Department of Fish and Game shall be used by the Department for the protection, restoration, and enhancement of water quality, instream flows, fish and wildlife, aquatic and riparian habitat, wetlands, and other features of the natural environment. The Department shall give first priority to mitigation and restoration of harm to those resources caused by the water transfer that was the subject of the arbitration.

- g. **Disbursement of Funds.** Following entry of judgment, the arbitrator shall collect the proceeds of the security, and any interest or income earned on the investment of the security, from the Board and shall disburse such funds in accordance with the judgment.
- h. **Finality.** The judgment of the arbitrator shall be final. Except as provided in subsection (i), the courts shall have no jurisdiction to review the judgment of the arbitrator.
- i. **Enforcement.** The judgment of the arbitrator shall be enforceable in court as authorized by Sections 1285 through 1294.2 of the Code of Civil Procedure.

- j. **Limitation on Claims.** All claims for compensation must be filed within one hundred eighty days of the date on which the alleged injury occurred.
- k. **Costs and Attorneys Fees.** The reasonable fees and expenses of the arbitrator, and the other costs and attorneys fees incurred by the parties, shall be borne by the parties. As directed by the Board, the parties shall make periodic payments to the arbitrator for the reasonable fees and expenses incurred during the arbitration.
- l. **Return of Security and Discharge of the Bond.** Following entry of the arbitrator's judgment, the Board shall ensure the return to the transferee of all proceeds from the security, plus interest earned on investment of the security, that are not required to satisfy the judgment. If the transferee posted a bond as security, the Board shall discharge the bond after ensuring that all claimants have been paid in accordance with the judgment of the arbitrator.

If no claims are made pursuant to this section, or if a claim is withdrawn before the judgment of the arbitrator is entered, the Board shall return the security to the transferee in accordance with the following rules:

1. For short-term transfers, the security shall be returned to the transferee (or the bond discharged) one hundred eighty days after the conclusion of the short-term water transfer agreement.
2. For long-term transfers, the security shall be returned to the transferee (or the bond discharged) five years after the commencement of the first physical transfer of water pursuant to the long-term water transfer agreement.

**Section 507 *Long-Term Transfers Based on Land Fallowing or Retirement.***

The provisions of this Part shall not apply to long-term agreements to transfer conserved water that (1) would obtain water for transfer by fallowing or retirement of land previously used for agricultural purposes and (2) would transfer the water to uses outside the county or counties in which the water was used before the transfer occurred. Such transfers shall not be eligible for the expedited procedures set forth in this Part and instead shall be governed by the standards and procedures set forth in Part D.

**Section 601 *Transfers of Water to Instream Uses.***

All water right holders and other legal users of water may transfer all or a portion of their water or water rights to instream uses. Transfers of water to instream uses shall comply with the general standards and procedures governing transfers of water set forth in Part D or the standards and procedures governing expedited transfers of conserved water set forth in Part E.

For purposes of this Part, the term "instream uses" includes the restoration, protection, and enhancement of water quality, instream flows, fish and wildlife, wetlands, riparian and estuarine habitat, recreation, and other instream beneficial uses.

**Section 602** *Relationship to Other Instream Protection and Water Quality Laws.*

Water that is transferred to instream uses pursuant to the authority granted in Section 601 shall be in addition to all water devoted to instream uses as required by federal, state, and local regulatory requirements governing water quality, instream flows, fish and wildlife, wetlands, riparian and estuarine habitat, recreation, and other instream beneficial uses. Federal, state, and local agencies, as well as the courts, shall exclude water transferred to instream uses pursuant to Section 601 from their determination of the amount of water or flows required to comply with these regulatory requirements.

The regulatory requirements described in this section include, but are not limited to, the following laws and their implementing regulations: the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, as amended; the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, as amended; the National Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271 *et seq.*, as amended; Article X, Section 2 of the California Constitution; the California Wild and Scenic Rivers Act, Natural Resources Code §§ 5093.50 *et seq.*, as amended; Fish and Game Code § 5937; other applicable provisions of this Code; terms and conditions imposed by permit or license administered by the State Water Resources Control Board; and other judicial and administrative decisions respecting water rights, water quality, and other beneficial uses.

**Section 603** *Transfers of Water to Comply With Instream Protection and Water Quality Laws.*

Notwithstanding the provisions of Section 602, water right holders and other legal users of water may transfer water to instream uses for the purpose of satisfying, or partly satisfying, their obligations under the regulatory requirements described in Section 602. If the water right holder or legal water user so indicates, the water shall be credited to the water right holder or legal water user and shall be included in the determination of the amount of water or flows required of the water right holder or legal water user to comply with such regulatory requirements.

**Section 701** *Coverage.*

- a. ***Obligation to Pay Fees.*** Except as provided in subsection (b), every person or entity that acquires water transferred pursuant to Part D or E shall pay to the State Water Resources Control Board a fee based on the Water Transfer Fee Schedule authorized in Section 702.



- b. **Exemptions.** The water transfer fees shall not be applicable to transfers of water over which the Board has no jurisdiction as set forth in Section 402, unless the water right holder files a petition with the Board pursuant to Section 403. The water transfer fees also shall not be applicable to dedications or transfers of water to instream uses as authorized by Part F.
- c. **Compliance Dates.** The transferee shall pay the water transfer fees at least ten days before the date on which the physical transfer of water commences.
- d. **Carriage Water.** If the transfer includes a Delta carriage water requirement imposed by the Board pursuant to Section 206, the Board shall not include such carriage water in its calculation of the amount of the water transfer fees required by this section.

**Section 702 Water Transfer Fee Schedule.**

- a. **Creation of the Schedule.** Within ninety days of the effective date of this Act, the State Water Resources Control Board shall promulgate regulations that establish a "Water Transfer Fee Schedule" in accordance with the requirements of this Part. The fee schedule shall contain separate fees for water transfers governed by Part D and for expedited transfers of conserved water governed by Part E, and the fees shall decline as the quantity of water proposed for transfer increases to account for economies of scale in the review process.
- b. **Maximum Amounts of Fees.** The water transfer fees shall be adequate, but no greater than necessary, to pay for all expenses incurred by the Board in its review of water transfer petitions governed by Parts D and E. The water transfer fees shall not exceed:

Up to 10,000 acre-feet	\$1.00/acre-foot	\$.50/acre-foot
Next 10,000 to 49,999 acre-feet	\$.75/acre-foot	\$.35/acre-foot
Next 50,000 to 100,000 acre-feet	\$.50/acre-foot	\$.25/acre-foot
Increments above 100,000 acre-feet	\$.25/acre-foot	\$.25/acre-foot

- c. **Price Adjustment.** The Board annually shall revise the Water Transfer Fee Schedule based on changes in the Consumer Price Index published by the United States Department of Commerce. The Board also shall revise the Water Transfer Fee Schedule whenever it determines that the fees are generating insufficient funds to fulfill the purposes of this Part or are producing excess funds in light of the purposes of this Part. The maximum fees set forth in subsection (b) shall automatically adjust annually based on changes in the Consumer Price Index.

**Section 703** *Use of Funds.*

The State Water Resources Control Board shall use the water transfer fees to implement the requirements of Parts D and E. The Board may use any residual proceeds generated by the water transfer fees to support its other administrative responsibilities.

**Section 704** *Restriction on Expenditures.*

The proceeds of the water transfer fees shall be used exclusively for the purposes set forth in this Part. These funds shall not be part of the general budget of the State and shall not be impounded or used to meet general State obligations.

**Section 801** *Transfers of Water by Local Water Agencies.*

Local water agencies shall have authority to enter into contracts to transfer water to purchasers located outside the service area of the local agency and to transfer water according to the following rules:

- a. ***Water Owned by the Agency.*** A local water agency may transfer: (1) water to which the agency has water rights or contract rights that is in excess of the reasonable and beneficial demands of its members and customers; and (2) water that is made available for transfer by conservation measures undertaken or funded by the agency.

Without the consent of the member or customer, the agency shall not declare as "excess" water that a member or customer of the agency has authority to use, or to transfer pursuant to Section 802, during the term of the transfer proposed by the agency, if the member or customer has applied the same quantity of water to a beneficial use, or has transferred the same quantity of water pursuant to the provisions of Section 802, at least once during the preceding five years.

- b. ***Water Made Available by Members or Customers of the Agency.*** With the consent of individual members or customers who make water available for transfer, a local water agency may transfer water for the benefit of such members and customers or for the benefit of the agency. The financial terms and operational conditions of such transfers shall be established by agreement between the local agency and the members or customers who participate in the transfer.
- c. ***Water Owned by Members or Customers of the Agency.*** Without the consent of the member or customer, a local water agency shall not transfer or otherwise claim water to which the member or customer holds the water right or that the member or customer has the right to use by contract with a party other than the local water agency.

**Section 802** *Transfers of Water by Members and Customers of Local Water Agencies.*

Members and customers of local water agencies may transfer water with the approval of the governing board of the agency. The financial terms and operational conditions of such transfers shall be established by agreement of the local agency and the members or customers who participate in the transfer.

**Section 803** *Transfers of Water to Local Water Agencies.*

Local water agencies may acquire transferred water for distribution to the agency's members or customers, on behalf of the agency's members or customers, and for other reasonable and beneficial uses within the agency's water storage and service areas.

**Section 804** *Transfers of Water to Members and Customers of Local Water Agencies.*

Members and customers of a local water agency may acquire transferred water from sources other than the local water agency. If the transfer requires use of the agency's water supply system, the respective rights and responsibilities of the agency and the members and customers who seek to use the water supply system shall be governed by the provisions on wheeling set forth in Part I. The agency shall not impose any conditions or charges on the transfer of such water, except for use of the agency's water supply system as authorized by Part I.

**Section 805** *Definition of Local Water Agency.*

The term "local water agency" includes irrigation districts, county water districts, California water districts, California water storage districts, reclamation districts, county waterworks districts, county drainage districts, water replenishment districts, levee districts, municipal water districts, water conservation districts, cities and counties, all water agencies authorized by the special legislation codified in the Appendices to this Code, mutual water companies, canal companies, water supply cooperatives, groundwater management districts, and other public agency or private water company that provides local or regional water service to members or customers. The term "local water agency" does not include the United States Bureau of Reclamation, the Army Corps of Engineers, or the California Department of Water Resources.

**Section 901** *Use of Water Supply Systems.*

a. *Authorization of Wheeling.* A legal water user who transfers water or who receives transferred water may use up to seventy percent of the unused capacity of water supply systems owned or operated by public water supply agencies to transport the water. The legal water user shall have the right to use this portion of the agency's water supply system throughout the term of the water transfer agreement.

b. **Definitions.** As used in this Part, the following terms shall have the following meanings:

1. The term "water supply system" shall include all of the public water supply agency's diversion, storage, transportation, treatment, distribution, and related facilities required to accomplish the transfer of water by the legal water user.
2. The term "unused capacity" shall mean the portion of the public water supply agency's supply system, if any, not required by the agency during the term of the water transfer agreement to supply water obtained by the agency or its members and customers from water rights, contracts, or other entitlements that exist at the time the legal water user requests permission to use the agency's water supply system.
3. The term "public water supply agency" includes the United States Bureau of Reclamation, the California Department of Water Resources, irrigation districts, county water districts, California water districts, California water storage districts, reclamation districts, county water works districts, county drainage districts, water replenishment districts, levee districts, municipal water districts, water conservation districts, cities and counties, all water agencies authorized by the special legislation codified in the Appendices to this Code, groundwater management districts, and other public water agencies that provide local or regional water service to members or customers.

Section 902 ***Procedures Governing Agency Review of Wheeling Requests.***

The use of water supply systems to transport water as authorized by Section 901 shall be governed by the procedures set forth in this section.

- a. ***Request for Use of System.*** The legal water user who seeks to use the public agency's water supply system shall submit to the agency a written request to use the system and to determine the amount of unused capacity available to transport the water. The request shall include a statement of the source and destination of the water proposed for wheeling through the agency's system, the dates on which the legal water user seeks to use the agency's system, the portion of the system included in the request, and other information required to permit the agency to evaluate the request in accordance with the provisions of Section 903. If the legal water user has obtained authorization from the State Water Resources Control Board to transfer water or has signed a water transfer agreement, the user shall include a copy of the authorization or agreement with the request.
- b. ***Determination of Unused Capacity.*** The agency shall promptly determine the amount of unused capacity available for use by the legal water user throughout the period of requested use. The agency's determination of unused capacity shall comply with the definition of that term set forth in Section 901(b)(2). The agency also shall define the terms and conditions

that will govern the use of its water supply system in accordance with the standards set forth in Section 903.

- c. **Decision and Notice.** Within thirty days of receipt of the request to use the system, the agency shall provide written notice to the legal water user of its determination of unused capacity available for use by the legal water user, and of the terms and conditions applicable to the use of its water supply system. The agency shall include an explanation of the reasons for its decision, including all data used to calculate unused capacity.
- d. **Good Faith.** In making the determinations or calculations required by this section, the agency shall act in a reasonable and good faith manner consistent with the requirements of law to facilitate the voluntary transfer of water.

**Section 903** *Standards Governing Agency Review and Financial Requirements.*

The use of water supply systems to transport water as authorized by Section 901 shall be governed by the standards set forth in this section. Except as authorized by this section, public water supply agencies shall not impose any conditions, charges, or taxes on the use of their water supply systems pursuant to the provisions of this Part.

- a. **Water Quality and Blending of Water.** The agency shall have authority to deny, or to place conditions on, requests to transport water through the unused capacity of its water supply system only in accordance with the following standards:
  1. If the transfer can be implemented only by blending the transferred water with other water in the agency's supply system, the agency may charge the legal water user for any additional costs of treatment of the blended water attributable to the addition of the transferred water to the system.
  2. If the transfer can be implemented only by blending the transferred water with other water in the agency's supply system, and the addition of the transferred water would diminish the quality of the water in the system to such an extent that the blended water could not be treated for distribution to the agency's other members and customers using the agency's existing water treatment facilities, the agency may prohibit or place conditions on the transfer as required to protect the water quality within its system.
  3. The agency may impose other reasonable terms and conditions on the use of its water supply system to comply with all applicable water quality and environmental standards.
- b. **Fair Reimbursement.** The agency shall have authority to charge the legal water user for the following costs attributable to the legal water user's use of the unused capacity in the agency's water supply system:

1. the portion of the capital, operation, maintenance, and replacement costs paid by the agency for the portion of the unused capacity made available by the agency for the transfer of water by the legal water user;
2. the cost of supplemental power purchased or used by the local water agency to transfer the additional water for the benefit of the legal water user;
3. the additional cost of treating the water in the agency's water supply system caused by the blending of the water transferred by the legal water user with the other water in the agency's system; and
4. a reasonable fee for the administrative costs incurred by the agency in its review of the legal water user's request to use the unused capacity in the agency's water supply system.

The agency shall credit to the legal water user the value of any benefits to the agency's water supply system that result from the transport of water for the benefit of the legal water user, including any decrease in power or treatment costs.

As used in this subsection, "replacement costs" are limited to the reasonable portion of costs associated with material acquisition for the correction of unrepairable wear or other deterioration of parts of the water supply system that have an anticipated life that is less than that of the water supply system and which costs are attributable to the transfer of water for the benefit of the legal water user.

- c. *Legal Restrictions.*** The agency shall have authority to deny, or to place reasonable terms and conditions on, the use of its water supply system by private persons or private entities to ensure that the private use of the agency's system does not jeopardize the agency's tax-exempt status, affect the agency's authority to issue tax-exempt bonds, or violate the requirements or limitations of federal law.

#### **Section 904 *Arbitration and Judicial Review.***

- a. *Arbitration.*** Disputes arising under Section 903(c) shall be subject to judicial review. All other disputes arising under this Part shall be subject to binding arbitration.
- b. *Procedures.*** Except as provided in this section, arbitration of disputes under this Part shall be conducted pursuant to the provisions of Sections 1280, 1280.1, 1281.9, 1282(e), and 1282.2 through 1284.2 of the Code of Civil Procedure.
  1. Arbitration proceedings may be commenced by either the agency or by the legal water user who seeks to use the agency's system to transport water pursuant to the authority granted in this Part.

2. The party that commences the arbitration shall serve a demand for arbitration on the other party. The demand for arbitration shall describe the nature and legal basis of the claim and shall set forth the relief requested.
  3. The party that commences the arbitration also shall file a copy of the demand for arbitration with the State Water Resources Control Board. Within ten days of receipt of the copy of the demand, the Board shall appoint a single neutral arbitrator to conduct the arbitration. If the parties have stipulated to the appointment of a specific person, the Board shall appoint that person as the arbitrator. If the parties have not so stipulated, the Board shall appoint the arbitrator from a list of potential arbitrators maintained by the Board.
  4. The respondent shall serve a response to the demand for arbitration on the demanding party within twenty days of receipt of the demand. The response shall contain an admission or denial of each of the claims set forth in the demand, with a brief explanation of the reasons and legal bases for each denial. The respondent also shall file a copy of the response with the Board and with the arbitrator.
  5. The arbitrator may allow the respondent to file cross-demand for arbitration against the demanding party. The cross-demand for arbitration shall describe the nature and legal basis of the claim and shall set forth the relief requested.
  6. The arbitrator may require the parties to file legal memoranda, motions, offers of proof, and other legal and evidentiary documents that in the arbitrator's opinion would assist the arbitrator in rendering judgment on the claims.
- c. *Burden and Standard of Proof.*** In all proceedings under this section, the public water supply agency shall have the burden of proving its compliance with the standards and procedures set forth in this Part. The burden of proof shall be by a preponderance of the evidence.
- d. *Judgment and Relief.*** The arbitrator shall render judgment on the claims in accordance with the law and evidence. If a party fails to respond to a demand or cross-demand for arbitration, the arbitrator shall enter judgment against the party by default.
1. The arbitrator shall have authority to declare the rights and obligations of the parties and to compel the parties to comply with the requirements of this Part.
  2. The arbitrator shall have authority to award monetary damages only for violations of subsections 903(a) and 903(b).
  3. The arbitrator shall have no authority to award punitive damages or to impose any other form of relief.

- e. **Finality.** The judgment of the arbitrator shall be final. Except as provided in subsection (f), the courts shall have no jurisdiction to review the judgment of the arbitrator.
- f. **Enforcement.** The judgment of the arbitrator shall be enforceable in court as authorized by Sections 1285 through 1294.2 of the Code of Civil Procedure.
- g. **Limitation on Claims.** All demands for arbitration must be filed within one hundred eighty days of the date of discovery of the alleged violation.
- h. **Costs and Attorneys Fees.** The party that loses on the merits of the arbitration claim, as determined by the arbitrator, shall pay the opposing party's costs and reasonable attorneys fees incurred in the arbitration.

**Section 905** *Rulemaking Authority.*

Public water supply agencies may promulgate rules, bylaws, and other policies to govern the transport of water through their water supply systems that are consistent with the provisions of this Part.

**Section 1001** *State Water Bank.*

- a. **Authorization.** The Governor is authorized to establish a State Water Bank to be administered by the California Department of Water Resources. The State Water Bank may be established on a temporary or permanent basis at the discretion of the Governor, based on the Governor's determination that the allocation of water resources would be improved by direct State participation in water transfers through a State Water Bank.
- b. **Powers.** The State Water Bank shall have authority to take any action to facilitate voluntary transfers of water, including the acquisition of water or water rights for subsequent transfer to willing buyers or for other state purposes, including augmentation of water supplies to wetlands, fish and wildlife, and other instream beneficial uses. The Governor may assign additional responsibilities to the State Water Bank.
- c. **Consistency with Water Transfer Laws.** The provisions of this Act shall govern all transfers of water by or through the State Water Bank.
- d. **Jurisdiction.** During its existence, the State Water Bank shall not have exclusive jurisdiction over water transfers. Any person or entity may transfer water without the involvement of the State Water Bank.
- e. **California Environmental Quality Act.** The establishment and operation of the State Water Bank, and all short-term agreements to transfer water by or through the State Water Bank, shall be exempt from the



provisions of Division 13 (commencing with Section 21000) of the Public Resources Code.

The California Department of Water Resources shall review and revise, at least once every five years, the 1993 environmental impact report entitled "State Drought Water Bank: Program Environmental Impact Report" to ensure the currency and accuracy of information required to assess the environmental consequences of State Water Bank operations.

f. **Delegation of Authority.** The Governor may delegate to the State Water Bank authority to administer the provisions of Part E for expedited transfers of conserved water by or through the State Water Bank. When exercising this authority, the State Water Bank shall perform all functions assigned to the State Water Resources Control Board by the provisions of Part E, and the Board shall have no authority over such expedited water transfers.

#### Section 1002 *Regional Water Banks.*

a. **Authorization.** Local water agencies, cities, counties, other local governmental agencies, and other interested parties are authorized to establish regional water banks. A regional water bank may be established by a single party or by agreement between two or more parties. A regional bank may be established on a temporary or permanent basis. The purpose of regional water banks is to facilitate voluntary transfers of water within the region.

b. **Powers.** Regional water banks shall have authority to take any action to facilitate voluntary transfers of water, including but not limited to:

1. establishment of a list of current offers to sell and to purchase water and water rights;
2. acquisition of water for subsequent sale or distribution to members of the water bank or for sale to willing buyers outside the water bank;
3. acquisition and storage of water during periods of surplus for sale and distribution during periods of shortage;
4. acquisition and sale of water transfer options, water futures, subordination agreements, and other types of arrangements to transfer water for the benefit of the members of the water bank;
5. establishment of a local or regional program for the conjunctive management and use of surface and groundwater supplies owned or controlled by members of the water bank;
6. augmentation of water supplies to wetlands, fish and wildlife, and other instream beneficial uses;

7. facilitation of transfers by management of water storage, water delivery, accounting, financing, or other matters relevant to the interests of the members of the water bank;
  8. provision of assistance to potential transferors and transferees in the negotiation and implementation of transfer agreements; and
  9. creation of an insurance system to pay claims for compensation brought by third-parties against water transfers implemented through the bank on behalf of the members of the bank.
- c. ***Consistency with Water Transfer Laws.*** The provisions of this Act shall govern all transfers of water by or through regional water banks.
- d. ***Jurisdiction.*** Regional water banks shall not have exclusive jurisdiction over water transfers. Any person or entity may transfer water without the involvement of a regional water bank.
- e. ***California Environmental Quality Act.*** The establishment of a regional water bank shall be subject to the provisions of Division 13 (commencing with Section 21000) of the Public Resources Code. Short-term agreements to transfer water by or through a regional water bank shall be exempt from the provisions of Division 13 (commencing with Section 21000) of the Public Resources Code.
- f. ***Delegation of Authority.*** The State Water Resources Control Board may delegate to a regional water bank the authority to administer the provisions of Part E for expedited transfers of conserved water by or through the regional bank. When exercising this authority, the regional bank shall perform all functions assigned to the State Water Resources Control Board by the provisions of Part E, and the Board shall have no authority over such expedited water transfers. The Board may delegate administrative authority pursuant to this subsection only if it concludes that the regional water bank is capable of implementing and enforcing the requirements of Part E.

**Section 1101** *Continuing Authority.*

The State Water Resources Control Board shall retain its full authority to enforce the terms and conditions of water rights permits or licenses during the term of all water transfers governed by this Act. The Board also shall retain its full authority to ensure that, throughout the term of all water transfers, the impoundment, storage, diversion, distribution, use, and return flow of water comply with applicable pollution control and water quality standards; are consistent with the requirements of Article X, Section 2 of the California Constitution and this Code; and comply with all other applicable federal and state laws.

**Section 1102** *Water Transfer Registry.*

The State Water Resources Control Board shall create and maintain a "Water Transfer Registry" of all final agreements to transfer water and water transfers governed by this Act. The Registry shall include the names of the parties to the transfer; a brief description of the transfer; and an explanation of the changes in water storage, timing and point of diversion, place and purpose of use, consumption, and timing and point of return flow caused by the transfer.

The Board shall revise the Registry to incorporate each final water transfer agreement and each water transfer governed by this Act. The Board shall ensure that the Water Transfer Registry is available in print form and over the Internet.

**Section 1103** *Rulemaking Authority.*

Within one year of the effective date of this Act, the State Water Resources Control Board shall review its existing rules and policies and amend such rules and policies as necessary to ensure that they comply with the terms of this Act. The Board also shall have authority to promulgate other rules that it determines would assist in the implementation of the Act.

**Section 1201** *Repeal of Existing Law.*

Upon the effective date of this Act, the following sections of the Water Code are repealed: §§. 109, 380-387, 470-484, 1020-1030, 1435-1442, 1700-1707, 1725-1745.11 and 1810-1814.

**Section 1202** *Judicial Authority.*

The courts shall have authority to enforce the requirements of this Act. The courts shall have no authority to adjudicate disputes arising under Parts D, E, and I, except as specifically provided therein.

**Section 1203** *Reference to Statutes.*

Whenever reference is made in this Act to any other statute, the reference shall apply to all amendments to the other statute.

The agency may deny or place terms and conditions on water transfers proposed by their members and customers in accordance with the following standards:

- a. The agency shall have authority to ensure that the transfer does not deprive members and customers of the agency who do not participate in the transfer of surface water, surface runoff, return flow, percolating water, or groundwater to which the nonparticipating members and customers would have been entitled under contract, agency regulation, bylaw, or other legal authority if the proposed transfer did not occur.
- b. The agency shall have authority to protect the groundwater resources over which it has jurisdiction or proprietary rights from exceedence of the long-term sustainable yield of the groundwater basin caused by the transfer or to which the transfer would contribute significantly.
- c. The agency shall have authority to protect the land, wetlands, surface water, groundwater, fish and wildlife, and other natural resources within its jurisdiction from pollution or degradation that would be caused by the transfer or to which the transfer would contribute significantly.
- d. The agency shall have authority to ensure that the transfer does not increase the cost of water or other service provided by the agency to its members and customers who do not participate in the transfer.
- e. The agency also may charge a reasonable fee for the administrative expenses and operation and maintenance costs incurred in the review, negotiation, or implementation of the transfer (including any additional power costs required to effectuate the transfer). The agency shall credit to the transferor any operation and maintenance cost savings (including any decrease in power costs) attributable to the transfer.

This document is intended only as an informal aid to readers of this publication and includes descriptions that should not be considered comprehensive or legal definitions.

<b>Appropriative rights</b>	rights based on physical control over water or based on permits or licenses for its beneficial use; dependent upon continued use and may be lost by non-use; long-term storage is acceptable use; may be sold or transferred; entitlements to specific amounts of water
<b>Article X, Section 2, California Constitution</b>	constitutional declaration that the state's water resources must be put to beneficial use and that the right to use surface water does not extend to its waste or unreasonable use, method of use, or method of diversion
<b>Beneficial use</b>	irrigation, domestic, municipal and industrial, hydroelectric power, recreation, fish protection and enhancement, wildlife habitat and aesthetic enjoyment are considered beneficial; reasonable use varies with circumstances but excludes wastefulness
<b>California Environmental Quality Act (CEQA)</b>	requires public agencies that transfer water to prepare an Environmental Impact Report on the proposed transfer if the agencies' actions may have a significant impact on the environment. The review provisions also apply to the State Water Resources Control Board when it reviews water transfer petitions. The requirements are applicable throughout the entire transfer process, but do not apply to short-term transfers.
<b>Carriage water</b>	upstream reservoir releases required to maintain certain salinity standards at specific points in the Delta at certain times of year

<b>Conjunctive use</b>	the planned use and storage of surface water in conjunction with groundwater to improve water supply reliability, including the use of reclaimed/recycled and imported water or artificial groundwater recharge
<b>Conservation</b>	measures that reduce consumption and waste; in agriculture, can include new irrigation systems, new cropping patterns, and reducing drainage that cannot be recycled or reclaimed; in urban use, include low-water-use landscaping, low-flow toilets, sinks and showers, increased industrial water-use efficiencies
<b>Consumptive use</b>	use of water that consumes it and does not permit reclamation/recycling or return to instream use
<b>Contract rights</b>	contractual rights to obtain water from holders of appropriative rights; numerous water districts contract with the State of California and the U.S. Bureau of Reclamation for water through the State Water Project and Central Valley Project, respectively
<b>Estuarine</b>	relating to an inlet or arm of the sea or where salt and fresh water intermingle at the wide mouth of a river
<b>Groundwater</b>	water that has seeped beneath the earth's surface and is stored in the pores and spaces between particles/layers of sand, gravel, and clay or is trapped within hard rock formations; California groundwater is largely unregulated
<b>Hydrology</b>	science of surface and groundwater distribution, including evaporation, precipitation and stream flow
<b>In-basin use</b>	use of water that does not entail exporting water out of the basin or watershed in which it naturally occurs
<b>Instream use</b>	use of water within a stream, such as provision of habitat, fishing, recreation, and scenic beauty
<b>Land fallowing/ retirement</b>	leaving usable farmland unplanted on a temporary or permanent basis

<b>Point of diversion</b>	point at which surface water is diverted from its natural streambed via pumps or other means for agricultural or other use
<b>Point of return flow</b>	point at which water that has been applied to a crop but not consumed is returned to its natural streambed for possible downstream use
<b>Pueblo rights</b>	rights of certain cities that are successors of Spanish/Mexican pueblos to beneficial use of water arising from the watersheds in which the pueblos were located; cannot be used or sold outside current city limits
<b>Riparian rights</b>	water rights based on ownership of land bordering a stream, pond, lake, or well-defined underground channel; amount of water that rights pertain to is seldom quantified; cannot be used outside its watershed of origin
<b>Salvaged water</b>	water of unacceptable quality as a result of a prior use that is treated to permit its reuse
<b>Surface water</b>	water that remains on the earth's surface in rivers, streams, lakes, reservoirs, or oceans
<b>Third-party impacts</b>	direct and indirect economic, social, or environmental effects of a water transfer to a party other than the seller or buyer
<b>Third-party rights holder</b>	holder of water rights other than either the transferor or transferee in a water transfer transaction
<b>Transferee</b>	the party to which water is transferred
<b>Transferor</b>	the party that transfers water to another
<b>Wetlands</b>	areas that permanently or seasonally hosts standing water; they provide critical habitat for waterfowl and other wildlife, recharge groundwater, control flooding, and improve water quality
<b>Wheeling</b>	using the water supply facilities of one entity to transport water, the rights to which are held by another entity, for a fee

