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**WATER AGENCIES AND WATER TRANSFERS
IN CALIFORNIA: A CASE STUDY OF
THE KERN COUNTY WATER AGENCY**

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Moving the West's Water to New Uses:
Winners and Losers

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I. INTRODUCTION

A. Summary

California's modern system of water resource allocation is marked by a high degree of consolidation of ownership of water rights and contract entitlements to water. Indeed, most of the surface water supplied in the state is owned or controlled by public agencies that represent numerous individual water users. One important consequence of this consolidation of ownership is that the management of California's water resources has been removed from the ultimate user.

In this paper, I will explore the effects of this division between management and use on California's efforts to promote the voluntary transfer of water among existing users. Taking the Kern County Water Agency as a case study, it is the thesis of this paper that the consolidation of control over the state's water resources may frustrate the purposes of the water transfer laws enacted during the last decade.

B. References

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II. THE HISTORICAL TREND TOWARD CONCENTRATED OWNERSHIP AND CONTROL OF CALIFORNIA'S WATER RESOURCES

A. Early Water Resources Development: 1850-1872

1. Individual riparian and appropriative rights for mining and agriculture.
2. Community water rights for cities in Southern California.
3. Private utility supplies for the Bay Area.
4. First Water Commission laws enacted.

B. The Rise of Irrigated Agriculture: 1872-1887

1. First State Water Code and Irrigation District Act enacted in 1872.
2. Agriculture surpasses mining as California's largest economic sector.
3. San Joaquin and Kings River Canal Company formed.
4. Lux v. Haggin.

C. The Wright Act: 1887-1897

1. Consolidation of water rights.
2. 49 Irrigation Districts formed, covering 2 million acres of land.
3. Restrictions on new districts.

D. The Effects of Federal and State Legislation: 1897-1926

1. Reclamation Act of 1902.
2. Irrigation District Act of 1911.
3. Water Commission Act of 1913.
4. Omnibus Adjustment Act of 1926.

E. Statewide Water Supply Systems: 1926-1980

1. Central Valley Project: 97 contractors.
2. State Water Project: 30 contractors.
3. Separation of water rights from both districts and ultimate users.

III. CALIFORNIA WATER TRANSFER LAWS

A. The Early Common Law

1. Kidd v. Laird, 15 Cal. 161 (1860): "[I]n the absence of injurious consequences to others, any change which the party chooses to make is legal and proper."
2. Davis v. Gale, 32 Cal. 26 (1867): "Appropriation, use, and non-use are the tests of [an appropriator's] rights; and place of use and character of use, are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at

any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges."

3. *Butte T.M. Co. v. Morgan*, 19 Cal. 609, 615 (1862): The transfer of water or water rights "must not be to the prejudice of the rights of others." According to this principle, an appropriator may not move its point of diversion or return flow or alter the place or purpose of use if the change would deprive other junior or senior water rights holders of water to which they are legally entitled.

B. Early Statutory Law

1. The Water Commission Act of 1913, which created the first permit system for appropriative rights, also established a mechanism for changing those rights.
2. Water Code section 1700: "Water appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose, but the purpose of the use of such water may be changed as provided in this code."
3. Although this statute does not refer specifically to water transfers, it is applicable to those transfers of water or water rights that require an alteration of the point of diversion or return flow or a modification of

the place or purpose of use.

4. Water Code Section 1701: Subject to the approval of the State Water Resources Control Board, "an applicant, permittee, or licensee may change the point of diversion, place of use, or purpose of use from that specified in the application, permit, or license."
5. The Board may grant the petition only if it finds that the requested change in the appropriative right "will neither in effect initiate a new right nor injure any other appropriator or lawful user of water."

C. The Modern Statutory Law

1. Legislative Policies

- a. In 1980, the California Legislature announced that "the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights." Water Code § 109(a).
- b. In furtherance of this finding, the Legislature declared that it is "the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public interest in the place of export and the place of import." Id.
- c. In 1982, the Legislature also directed the Department of Water Resources, the Board, and "all other appropriate state agencies to encourage voluntary

transfers of water and water rights" and "to identify and implement water conservation measures which will make additional water available for transfer." Water Code § 109(b).

- d. In 1986, the Legislature added that (1) "voluntary water transfers between water users can result in a more efficient use of water, benefiting both the buyer and the seller"; (2) "transfers of surplus water on an intermittent basis can help alleviate water shortages, save capital outlay development costs, and conserve water and energy"; and (3) the public interest requires water conservation and "the coordinated assistance of state agencies for voluntary water transfers to allow more intensive use of developed water resources in a manner that fully protects the interests of other entities which have rights to, or rely on, the water covered by a proposed transfer." Water Code § 475.

2. Temporary Changes

- a. Water Code Section 1728 defines a Temporary Change as "any change of point of diversion, place of use, or purpose of use involving a transfer or exchange of water or water rights for a period of one year or less."
- b. A permittee or licensee may engage in a Temporary Change if it meets two criteria:
 - (1) The transfer must involve only the amount of water

that the transferor would have "consumptively used or stored" during the period of the transfer. The statute defines "consumptive use" as "the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion." Water Code § 1725.

(2) The change must not "injure any legal user of the water" or "unreasonably affect fish, wildlife, or other instream beneficial uses." Id.

- c. The potential transferor must notify the Board of the proposed Temporary Change. The notice must contain "information indicating the amount of water proposed for transfer, the parties involved in the transfer, and any other information the board by rule may prescribe." Water Code § 1726.
- d. Following receipt of this notice, the Board may approve the change without conducting a public hearing if it concludes both of the following:
- (1) The proposed temporary change would not injure any legal user of water, during any potential hydrological condition, through resulting significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the watershed of the transferor.

- (2) The proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. Water Code § 1727.
- e. If the Board cannot make the requisite findings within sixty days of its receipt of the notice of proposed temporary change, the Board must conduct a public hearing on the matter. Water Code § 1727(c).
 - f. Following the "expiration of a temporary change period, all rights shall automatically revert to the original holder of the right without any action by the board." Water Code § 1731.

3. Long-Term Transfers

- a. Water Code Section 1735 defines a Long-Term Transfer as one "for any period in excess of one year and states that the Board "may consider a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use."
- b. Section 1736 then authorizes the Board, "after providing notice and opportunity for a hearing, [to] approve such a petition for long-term transfer where the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses."
- c. The statute does not place any limits on the duration

of a Long-Term Transfer. As with the Temporary Change laws, however, it does provide that "[f]ollowing the expiration of the long-term transfer period, all rights shall automatically revert to the original holder of the right without any action by the board." Water Code § 1737.

4. Transfers of Conserved and Surplus Water

- a. The conserved and surplus water transfer laws are the principal sections of the Water Code that address transfers by water agencies.
- b. These laws have two distinguishing characteristics:
 - (1) They expressly authorize the transfer of water that either is surplus to the needs of the transferor or is conserved by the transferor for the purpose of transferring it to another user.
 - (2) They decentralize the process of water transfers by empowering local agencies to sell water and to serve as brokers between individual users within their jurisdiction and potential purchasers of the water.
- c. Consistent with these purposes, section 380 recognizes that the "various regions of the state differ widely in the availability of water supplies and in the need for water to meet beneficial uses" and that "[d]ecisions regarding operations to meet water needs depend in part upon regional differences."
- d. Section 380 also declares that "[m]any water management

decisions can best be made at a local level, to the end that local and regional operational flexibility will maximize efficient statewide use of water supplies" and that the policy of encouraging local agencies to transfer water based on local and regional economic considerations is "in furtherance of" the reasonable and beneficial use doctrine of Article X, Section 2 of the California Constitution and section 109 of the Water Code.

- e. To clear away any uncertainty over the power of local water agencies to transfer water outside their jurisdictional boundaries, section 382 provides that "[n]otwithstanding any other provision of law, every local or regional public agency authorized by law to serve water to the inhabitants of the agency may sell, lease, exchange, or otherwise transfer water that is surplus to the needs of the agency's water users for use outside the agency."
- f. Section 381 supplements this declaration by directing that the authority of local and regional agencies "pursuant to this chapter shall control over any other provision of law which contains more stringent limitations on the authority of a particular public agency to serve water for use outside the agency, to the extent those other laws are inconsistent with the authority granted therein."

- g. Section 383 defines "surplus water" in three different ways:
- (1) Section 383(a) applies to "water to which the right is held by the agency." It authorizes the transfer of water "which the agency finds will be in excess of the needs of water users within the agency for the duration of the transfer."
 - (2) Section 383(b) also applies to "water to which the right is held by the agency." It authorizes the transfer of conserved water, which it defines as water "of which any water user agrees with the agency on mutually satisfactory terms, to forego use for the duration of the transfer."
 - (3) Section 383(c) authorizes an individual water user within an agency, rather than the agency itself, to negotiate a transfer of water that is surplus to the user's needs. It provides that "the water user and the agency [may] agree, upon mutually satisfactory terms, that the water user will forego use for the period of time specified in the agreement" with the transferee and directs that the agency "shall act as agent for the water user to effect the transfer."
- h. In addition to the existence of surplus water, three other requirements must be met before water may be transferred pursuant to sections 380 through 387:
- (1) Section 385 provides that "[n]o water may be

transferred pursuant to this chapter for use within the boundaries of a local or regional public agency that furnishes the same water service to the transferee without the prior consent of that agency." Thus the water agency with jurisdiction over the area to which the water will be transferred must approve the agreement.

(2) Section 384 requires that all transfers of surplus and conserved water comply with the general laws governing changes in place and purpose of use.

(3) Section 386 provides the Board may approve a transfer of conserved or surplus water only if it finds that "the change may be made without injuring any legal user of water and without unreasonably affecting fish, wildlife, or other instream beneficial uses and does not unreasonably affect the overall economy of the area from which the water is being transferred."

- i. These provisions reveal a tension between individual decisions to transfer, local agency control, and the general supervisory jurisdiction of the Board.

IV. THE KERN COUNTY WATER AGENCY

A. Organization and Purposes

1. Established by special legislation in 1961.
2. Primary purpose was to contract with the Department of Water Resources for water from the State Water Project

for distribution to its member districts.

3. Other purposes include provision of flood control, groundwater management, and operation of a groundwater bank, and administration of the Cross-Valley Canal.
4. KCWA has 16 member districts, of which 12 are suppliers of irrigation water and three are municipal suppliers; one provides water for both purposes.
5. The KCWA enabling act states that the "Agency may transfer . . . water . . . for use outside the Agency upon a finding by the Board that the water . . . involved will not be needed for use within the Agency."

B. Water Supply Contracts

1. KCWA's contract with the Department of Water Resources is for up to 1,153,400 afa from the State Water Project. KCWA's subcontracts with its member districts are for 134,00 afa for municipal supply and 1,019,400 afa for irrigation supply.
2. Area served: 8,064 square miles encompassing all of Kern County. Population served: 340,000 (1980 census).
3. KCWA's contract with DWR provides: "Project water delivered to the agency pursuant to this contract shall not be sold or otherwise disposed of by the Agency for use outside the Agency without the prior written consent of the State."
4. KCWA's subcontracts with its member districts provide: "Project water delivered to the Member Units pursuant

to this contract shall not be sold or otherwise disposed of by the Member Unit without the prior written consent of the Agency."

C. The Wheeler Ridge to Improvement District No. 4 Transfer

1. Wheeler Ridge is a member of KCWA and is entitled to 263,200 afa of SWP water. Improvement District No. 4 also is a member of KCWA and is entitled to 77,000 afa of SWP water.
2. In 1988, Wheeler Ridge permanently transferred 10,276 afa of its SWP entitlement to the Improvement District No. 4.
3. Wheeler Ridge engaged in the transfer because, at approximately \$64.00 per acre foot, the cost of the water rendered it unprofitable to use for irrigation. Inasmuch as Improvement District No. 4 could receive the water further "upstream" on the California Aqueduct than Wheeler Ridge, it could avoid \$23.00 per acre foot of the non-SWP transportation costs incurred by Wheeler Ridge. Thus, Improvement District No. 4 paid only \$41.00 per acre foot for the water.
4. KCWA approved the transfer because the water would stay within the Agency's service area.

D. The Proposed Berrenda Mesa Water District Sale

1. Berrenda Mesa Water District is a member of KCWA and is entitled to 155,100 afa of SWP water.
2. Beginning in 1986, Berrenda Mesa offered permanently to

transfer up to 50,000 afa of its entitlement for a one-time price of \$1,000.00 per acre foot.

3. Berrenda Mesa proposed to make the water available for transfer by retiring agricultural land.
4. Berrenda Mesa discussed the offer with a number of public water supply agencies located outside of Kern County, including the Marin Municipal Water District, Castaic Lake Water Agency, the City and County of San Francisco, the Moulton-Nigel Water District, and the City of San Diego.
5. KCWA opposed the transfer because the water would be used outside of the Agency.

E. The KCWA to Westlands Water District Transfer

1. As a result of the 1987-1989 drought and the projected 50 percent reduction in supply from the SWP, many farmers in the Kern County area were unable to receive financing for the planting of row crops in 1989. Because of the greater than normal rain and snowfall during March 1989, however, DWR was able to provide to KCWA its full entitlement. This left KCWA with a temporary surplus.
2. Initially, KCWA planned to use the surplus for aquifer recharge and storage for later years. Following a request by Westlands, which was facing critical shortages as a result of the drought, KCWA agreed instead to transfer 50,000 acre feet in the form of a

temporary transfer and future exchange.

3. Westlands agreed to pay \$20.00 per acre foot for the water in 1989 plus transportation costs of approximately \$12.00 per acre foot. In addition, Westlands will reimburse KCWA for the water itself over a ten year period.
4. Westlands plans to transfer water back to KCWA during wet years when it can acquire sufficient additional supplies from the Bureau of Reclamation at a projected cost to Westlands of \$17.00 per acre foot. If Westlands makes the exchange deliveries during dry years, however, KCWA will pay a rebate of between \$5.00 and \$15.00 per acre foot.
5. This is one of the few transfers of water between state and federal contractors and represents the first transfer of SWP water from a state contractor to a non-state contractor. Thus, to accomplish the transfer, it was necessary for the State Water Resources Control Board temporarily to change the place of use of DWR's water rights for the SWP to include Westlands.

F. The KCWA Plan For Redistribution of SWP Water

1. Background: "Increases in farming costs, accompanied by low farm commodity prices, are threatening the formerly dynamic farm economy in Kern County. Over the past three or four decades, strong demand for San Joaquin Valley farm products has encouraged expansion of farm

lands into areas requiring high pump lifts from the California Aqueduct that are now proving to be unprofitable. . . . It now appears that some of the lands in water districts that receive water from higher pumping lifts from the California Aqueduct have been priced out of the farm picture. The lands most seriously affected are those where mainly cotton was grown. With costs of district water in range of \$60 to \$75 an AF, and the price of cotton at very low levels, it is no longer possible to produce cotton or various other field crops."

2. Objectives: "One of the basic objectives in considering reallocation . . . of water supplies that are excess to a Member Unit's needs should be to maintain the financial viability of the State Water Project in Kern County. Also, the County remains short of water, and every effort should be made to retain the water within the County, subject to financial means to do so."
3. Policy: "[T]he Agency's first priority in dealing with excess water is to assure that the State Project allocation to Kern County remains available to Kern County users."
4. Redistribution Plan:
 - a. "State Project water that is excess to the current needs of Member Units should be transferred to other

Member Units, water districts or entities that have a need for water within Kern County before there is consideration of reductions in Agency entitlement or transfers of water out of the County."

- b. "If the Agency finds that it requires more funds to maintain its State Water Project entitlement than provided by Member Unit payments and Zone of Benefit collections, it should utilize an advisory election to determine if Kern County taxpayers would support additional Zone of Benefit assessments, or other means of assessment, as an alternative to reducing Agency entitlement or transferring water out of the County."
- c. "If the amount of State Project water in excess of current needs of Member Units cannot be transferred within the County and the State payments exceed the financial ability of the Agency and the Member Units, the Agency may consider deferment of some of the entitlement as a way of reducing the Agency's financial obligations and preserving the water for future use in Kern County."
- d. "If it is determined that some of the State Project entitlement cannot be retained within the County because of the inability of both the Agency and the Member Units to meet the payments to the State for such water, and the deferment of the payments within the State Project financial structure would unduly increase

costs to all Member Units, then the Agency may consider transfer of water out of the County or permanent reduction of the Agency entitlement."