

2018 California Water Law Symposium

Use of Water Transfers to Recharge Groundwater Basins

Eric N. Robinson¹

- I. What do water transfers have to do with the Sustainable Groundwater Management Act (SGMA) and recharge of groundwater basins?
 - A. SGMA requires sustainable groundwater use in 127 high- and medium-priority groundwater basins/subbasins throughout California
 1. Groundwater sustainability plans (GSPs) must be adopted for the 127 subbasins
 - a. Due in 2020 for subbasins designated as critically overdrafted
 - b. Due in 2022 for all other SGMA-regulated subbasins
 2. GSPs generally must achieve/ensure sustainability by 20 years after adoption
 3. Many expect GSPs in overdrafted subbasins to require groundwater pumping cuts to stop overdraft and to ensure long-term sustainability
 4. Groundwater pumping cuts could dramatically shrink overlying economy and cut jobs, public services
 - B. Transfers of water into a SGMA-regulated groundwater basin can provide a new water supply for use in lieu of groundwater pumping
 1. Called "in lieu recharge"
 2. Use of transfer water in lieu of existing groundwater pumping preserves natural recharge to help avoid or correct overdraft
 - C. Transfers of water can be percolated or injected into a SGMA-regulated basin to artificially augment natural groundwater recharge
 1. Percolation ponds
 2. Injection wells (running groundwater production wells in reverse)
 3. Aquifer storage and recovery programs ("ASR" programs) can "deposit" transfer water into a basin for later withdrawal.
 4. Sometimes called "water banking"
 5. Commercial water banking programs often keep percentage of deposits to benefit the basin and limit recovery operations to avoid short-term impacts
—Semitropic Water Storage District example: 10% of deposits to basin; 3-year/15-foot rule administered by monitoring committee

¹ Mr. Robison is a shareholder attorney who manages the water group at Kronick, Moskovitz, Tiedemann & Girard. His written and oral comments are personal and not of his firm or clients.

- D. Transfers of groundwater within a SGMA-regulated basin
1. Groundwater sustainability plans (GSPs) that create transferrable production allocations will facilitate transfer market allowing groundwater to move toward higher-value uses (e.g., alfalfa irrigation to wine grapes or urban water service)
 2. Review of proposed transfers to avoid injury to basin/other pumpers
—Maximize basin's operational yield by avoiding over-concentration of pumping in one area creating cone of depression affecting third-party wells or other resources
- II. From a legal perspective, what are water transfers?
- A. Change in use of an existing appropriative surface water right
—Point of diversion
—Place of use
—Purpose of use
- B. General Water Code authorities for transfers:
1. Water Code § § 1700 et seq.: Appropriator may change the point of diversion, place of use, or purpose of use
 - (a) State Water Resources Control Board (SWRCB) approval process
 - (b) SWRCB enforces no-injury rule
 2. Water Code § 1706: Pre-1914 appropriators may change the point of diversion, place of use, or purpose of use
 - (a) No SWRCB approval process
 - (b) No-injury rule enforced by lawsuits
 3. Water Code § 1725: Allows temporary transfers
 - (a) Exempt from CEQA
 4. Water Code § 1736: Allows long term transfers
- C. Water Code provisions for no-injury rule
1. Post-1914 water rights transfers—Water Code § 1702: “Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.”
 2. Pre-1914 water rights transfers—Water Code § 1706: “The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change....”

3. Temporary post-1914 water rights transfers—Water Code § 1725: “A permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change [and] would not injure any legal user of the water. . . .”
4. Long-term post-1914 water rights transfers—Water Code § 1736: “The board . . . may approve such a petition for a long-term transfer where the change would not result in substantial injury to any legal user of water....”

D. Common means of making surface water available for transfer

1. Releases from storage (called reservoir reoperation)
2. Groundwater substitution
3. Fallowing/idling farmland/crop-shifting (to less thirsty crop)

E. Water Code authorities on making surface water available for transfer

1. **Water conservation preserves right to conserved surface water**—Water Code § 1011(a): “When any person entitled to the use of water under an appropriative right fails to use all or any part of the water **because of water conservation efforts, any cessation or reduction in the use** of the appropriated water **shall be deemed equivalent to a reasonable beneficial use** of water to the extent of the cessation or reduction in use.”
2. **Conserved water is transferrable**—Water Code § 1011(b) “**Water**, or the right to the use of water, the use of **which has ceased or been reduced as the result of water conservation efforts** as described in subdivision (a), **may be sold, leased, exchanged, or otherwise transferred** pursuant to any provision of law relating to the transfer of water or water rights. . . .”

— *But see* SWRCB Order WR 2000-01 re *Natomas Central Mutual Water Company* (declining to approve transfer of conserved water):
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/natomas_central/
3. **Use of desal/recycled water in lieu of surface water preserves right to foregone surface water**—Water Code § 1010(a)(1) “The **cessation of, or reduction in, the use of water . . . as the result of the use of recycled water, desalinated water, . . .** is deemed equivalent to, and for purposes of maintaining any right **shall be construed to constitute, a reasonable beneficial use** of water to the extent and in the amount that the recycled, desalinated, or polluted water is being used not exceeding, however, the amount of such reduction.”
4. **Desal/recycled water transfers**—Water Code § 1010(b): “**Water**, or the right to the use of water, the use of **which has ceased or been reduced as**

the result of the use of recycled, desalinated water as described in subdivision (a), **may be sold, leased, exchanged, or otherwise transferred** pursuant to any provision of law relating to the transfer of water or water rights. . . .”

III. Resources to learn more about water transfers

A. State Water Resources Control Board

1. Water Transfers Program webpage:
https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_transfers/
2. 1999 Draft Guide to Water Transfers:
https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_transfers/docs/watertransferguide.pdf

B. California Department of Water Resources (DWR)

1. Water transfers webpage: <http://www.water.ca.gov/watertransfers/>
2. DWR-U.S. Bureau of Reclamation "Water Transfer White Paper":
http://www.water.ca.gov/watertransfers/docs/2016_Water_Transfer_White_Paper.pdf

C. Public water service industry

1. Association of California Water Agencies: https://www.acwa.com/wp-content/uploads/2017/03/acwa-water-transfers-and-markets-recommendations_april-2016-1.pdf

D. Environmental advocacy industry

1. Public Policy Institute of California (PPIC)
 - a. California's Water Market:
<http://www.ppic.org/publication/californias-water-market/>
 - b. California's Water Market by the Numbers (2012 Update):
<http://www.ppic.org/publication/californias-water-market-by-the-numbers-update-2012/>
 - c. Who should be allowed to sell water in California? Third-party issues and the water market: <http://www.ppic.org/publication/who-should-be-allowed-to-sell-water-in-california-third-party-issues-and-the-water-market/>
 - d. California's Water Market, By the Numbers (2002):
<http://www.ppic.org/publication/californias-water-market-by-the-numbers/>
2. Environmental Defense Fund:
<https://www.edf.org/sites/default/files/california-water-market.pdf>
3. Natural Heritage Institute: http://n-h-i.org/wp-content/uploads/2017/01/Water-Growth-in-the-West_G.Thomas.pdf