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by David J. Guy[*]

I. Introduction

No issue has bewitched California's farmers and ranchers more than water transfers. Opinions of water transfers vary widely from unequivocal opposition to those who believe in a free market for water. Despite these divergent views, the agricultural community in the past several years has generally come to recognize that water transfers are an important part of water management in California, and if done properly, can both protect and benefit farmers and ranchers in all parts of the state.

To assure that California's farmers and ranchers have a reliable and affordable water supply for the 21st century, the California Farm Bureau Federation[1] has pledged to promote constructive dialogue on water transfers and to forge general agreement among water users and other relevant interests. As part of its commitment, the California Farm Bureau Federation joined with the California Business Roundtable, the California Chamber of Commerce, and the California Manufacturers Association to co-sponsor A Model Water Transfer Act for California (Model Act).[2]

The Model Act is not an academic exercise to California's farmers and ranchers, whose livelihood and way of life depends upon a reliable and affordable water supply. Instead, the Model Act is intended to maintain the momentum of California water issues that began in 1994, following on the heels of the Cal-Fed Framework Agreement,[3] the (so-

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1. The California Farm Bureau Federation is the state's largest general agricultural organization, representing more than 70,000 families—more than 80% of the state's commercial agricultural producers. These farm and ranch families use water from nearly all of the water courses in California, including small and large private diversions, as well as the state and federal projects, and nearly all groundwater basins. More than 90% of California farmers qualify as small businesses with annual gross receipts of less than $500,000.

2. A MODEL WATER TRANSFER ACT FOR CALIFORNIA [hereinafter MODEL ACT] *reprinted in* 4 WEST-NORTHWEST 3. The Model Act was originally introduced in the California legislature as Pre-print S.B. 15 (1995), co-authored by Senator Costa and Assemblyman Katz. A discussion paper entitled *Financing Options for Water-Related Infrastructure in California* was also released as a complement to the Model Act.

3. Cal-Fed was formed in June of 1994 by the "Framework Agreement Between the Governor's Water Policy Council of the State of California and the Federal Ecosystem Directorate." The purpose of the agreement was to establish a comprehensive program for coordination and communication between the Council and the Federal Ecosystem Directorate (FED) with respect to environmental protection and water supply dependability in the San Francisco Bay, Sacramento-San Joaquin Delta Estuary and its watershed (Bay-Delta Estuary). In particular, the agreement was intended to increase communication with respect to "development of a long-term solution for fish and wildlife, water supply reliability, flood control, and water quality problems in the Bay-Delta Estuary." FRAMEWORK AGREEMENT BETWEEN THE GOVERNOR'S WATER POLICY COUNCIL OF THE STATE OF CALIFORNIA AND THE FEDERAL ECOSYSTEM DIRECTORATE (June 1994) (on file with West-Northwest).

called) Bay-Delta Accord,[4] the Water Supply Planning Act,[5] the Safe, Clean, Reliable Water Supply Act[6] and the California Bay-Delta Enhancement and Water Security Act.[7] These important water measures have been the result of unprecedented agreement throughout California on water issues that have typically been very divisive. The sponsors of the Model Act are optimistic that this momentum and desire to work together for a reliable water supply will continue with the passage of a comprehensive water transfer legislation.

The Model Act has been released at an opportune time. In addition to the momentum already described, water policy regarding transfers is best made during a wet period,[8] when the ominous pressures of drought are not driving the process. Additionally, the State of California and the federal government (Cal-Fed) are currently engaged in an unprecedented effort to devise a long-term solution for the Sacramento-San Joaquin Delta—the hub of California's major water system.[9] At the same time, important efforts are being made to fully utilize the Colorado River within California.[10] It appears that water transfers will be an integral part of both efforts.

To assure that water is managed wisely throughout the state, California needs a comprehensive and cogent framework for water transfers. Current provisions regarding water transfers, although adequate in many instances, were enacted in response to specific problems during droughts and are now scattered throughout the Water and Civil Codes.[11] This lack of coherence, coupled with the experience during the last decade, discussed in Part II, make the provisions governing water transfers particularly eligible for reform. The Model Act is an excellent starting point for this reform, providing a relatively simple, concise and well organized set of rules regarding water transfers.[12]

II. Water Transfers and Agriculture

Water transfers are not new to California's farmers and ranchers. Agricultural water users throughout California's history have transferred water to balance supplies and demand within their local area. Additionally, water transfers have occurred when urban growth expanded onto agricultural land and the water used for irrigation shifted simultaneously and incrementally with the land as it became part of the new urban water supply. In these local situations, the transfer of water was typically subtle and raised little public concern.

Water transfers changed drastically when the Los Angeles Department of Water and Power exploited the Owens Valley in the early 1900's. In this case, Los Angeles purchased agricultural land and the associated water rights in the distant Owens Valley so that the water could be permanently stripped from the land and then transferred to a growing Southern California.[13] Needless to say, this transfer provoked significant controversy and

4. Formally known as the "Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government," this agreement established a Bay-Delta protection plan that included certain water quality standards to be set by the State Water Resources Control Board (SWRCB). PRINCIPLES FOR AGREEMENT ON BAY-DELTA STANDARDS BETWEEN THE STATE OF CALIFORNIA AND THE FEDERAL GOVERNMENT (Dec. 15, 1994).

5. 1995 Cal. Stat. 881; CAL. WATER CODE §§ 10910–10915 (West 1996); *See* Mary-Ann Warmerdam & David J. Guy, *New Requirements to Balance California's Water Budget: Coordinating Water Supply and Land Use Planning*, 6 CAL. WATER L. AND POL'Y RPTR. 41, 44 (1995). The premise of this legislation is that any large new development must identify a water supply that is legally and physically available before obtaining certain land use approvals.

6. 1996 Cal. Stat. 135. This bill is a bond measure (Proposition 204), which was passed by California voters on November 5, 1996 (codified at CAL.WATER CODE § 78684 (West 1996)). This Act will provide a total funding amount of $995 million for environmental and water supply programs in California.

7. California Bay Delta Enhancement Water Security Act, Pub. L. No. 104-333, 110 Stat. 4093 (1996). This federal act, which was triggered by the passage of Proposition 204, authorized $430 million for Cal-Fed ecosystem improvements.

8. The previous two years have been above-average water years in California. *See* CAL. DEP'T OF WATER RESOURCES, BULLETIN 120-95 (1995); CAL. DEP'T OF WATER RESOURCES, BULLETIN 120-96 (1996).

9. The Cal-Fed process for determining a long-term solution includes water transfers. Memorandum from Lester Snow, Executive Director of the Cal-Fed Bay Delta Program, to the Bay-Delta Advisory Council (November 8, 1996) (on file with author).

10. Discussions are currently underway between the Imperial Irrigation District and the San Diego County Water Authority to transfer Colorado River water from the Imperial Valley to San Diego County. *See* SAN DIEGO COUNTY WATER AUTHORITY AND IMPERIAL IRRIGATION DISTRICT, COOPERATIVE WATER CONSERVATION AND TRANSFER PROGRAM, SUMMARY OF DRAFT TERMS (July, 1996). For a general discussion of transfers on the Colorado River, see David E. Lindgren, *The Colorado River: Are New Approaches Possible Now that the Reality of Over Allocation is Here?*, 38 ROCKY MTN. MIN. L. INST. 25-1 (1992); David J. Guy, *When the Law Dulls the Edge of Chance Transferring Upper Basin Water to the Lower Colorado River Basin*, 1991 UTAH L. REV. 25 (1991).

11. For a discussion on existing provisions regarding transfers, see generally Kevin M. O'Brien, *Water Marketing in California*, 19 PAC. L.J. 1165 (1988); Brian E. Gray, *A Primer on California Water Transfer Law*, 31 ARIZ. L. REV. 745 (1989); Kevin M. O'Brien & Robert Gunning, *Water Marketing in California Revisited. The Legacy of the 1987–92 Drought*, 25 PAC. L.J. 1053 (1994); DELTA WATER TRANSFER HANDBOOK (1996) (prepared by Bookmon-Edmonston Engineering, Inc., for the Authority for Environmental Analysis of Water Transfers). Also, for the Civil Code provisions regarding water transfers, see CAL. CIV. CODE, § 330.24 (West 1996).

12. The Model Act is the product of significant discussion and refinement that took place over several years. *See* Richard M. Rosenberg, *Introduction*, 4 WEST-NORTHWEST 1 (1996).

13. *See* WILLIAM L. KAHRL, WATER AND POWER (1982). Signs along California highways still proclaim "Owens Valley" as an expression of rural concerns about water transfers.

still to this day haunts California water policy and sets the tone for the water transfer debate. This type of transfer was radically different from the previous types of water transfers, because a significant block of water was transferred away from agricultural land for distant urban uses. As a result, the Owens Valley has never flourished as an agricultural area, and in many ways it remains a colony for the City of Los Angeles. The Owens Valley thus stands both as a pragmatic lesson and as a vivid symbol to farmers and rural communities of the potential consequences of an ill-conceived transfer.

Yet, even though the significant impacts to agricultural and rural communities are fairly evident, this type of transfer has continued to be embraced during the past several decades by those who believe that the solution to California's increasing water demands is to simply reallocate water from agricultural to urban uses.[14] This dogma was evident in several water transfer bills that were introduced in the California Legislature during the early 1990's,[15] as well as the transfer provisions of the Central Valley Project Improvement Act.[16] As would be expected, these proposals engendered strong and often emotional responses from farmers, ranchers, and rural communities,[17] and thus offered no meaningful solutions to California's water problems.[18]

Interestingly, while these rather theoretical water transfer discussions were underway, several important water transfers were taking place with little objection. Two of these transfers are particularly instructive to understand the type of transfer that will work for the agricultural community and thus for California.

The first example is the Drought Water Bank,[19] which in 1991 and 1992 procured 820,805 acre-feet and 193,193 acre-feet, respectively.[20] Many commentators have examined the Bank in detail,[21] but from a practical standpoint, the success was very simple—farmers, ranchers and the agricultural community generally embraced the Bank. There were several reasons for this. Foremost, agricultural water rights were protected[22] and the transfers were short-term (one year) transfers. Additionally, California was in the middle of a six year drought, with no end in sight. Farmers recognized the importance of water transfers as a flexible management tool to satisfy other urban and environmental demands during this crisis situation. Finally, transferors received significant remuneration for their willingness to transfer water.[23] These collective features made the Drought Water Bank generally acceptable to the agricultural community,[24] which in turn made the program a success and will likely make water banks an important and viable option for future droughts.

The other transfer of note was the initial Imperial Irrigation District (IID) transfer to Metropolitan Water District (MWD). In this case, IID agreed to transfer up to 106,000 acre-feet to MWD that accrued from MWD's investment in lining the All American Canal.[25] Importantly, the water conserved by the canal lining would otherwise flow into the Salton Sea, thus no other water users in the Untied States would be adversely affected.[26] This transfer shows that, while short-term transfers are strongly preferred over long-term transfers, there are circumstances where long-term arrangements make sense and are necessary for financing. Again, the key to this transfer was the lack of opposition by farmers and ranchers.

14. Lawrence J. MacDonnell & Theresa A. Rice, *Moving Agricultural Water to Cities: The Search For Smarter Approaches*, 2 WEST-NORTHWEST 27 (1994).

15. *See e.g.*, A.B. 2090 (Katz) in 1991; A.B. 97 (Cortese) as originally introduced in 1993.

16. Central Valley Project Improvement Act (CVPIA), Pub. L No. 102–575, § 3405, 106 Stat. 4600 (1992).

17. A good example of a transfer proposal that incited an emotional response was the Option Agreement to Transfer Central Valley Project water between Arelas Dairy Farms and Metropolitan Water District in 1994. Farmers were nearly unanimous in opposition to this transfer. It should be noted that, although the proposed Arelas transfer was the first proposal under the CVPIA, the first approved transfer under the CVPIA was a local transfer from the Redfern Ranch to other properties that it owns in the Mendota area.

18. The concerns from the agricultural community are largely justified. Assuming that California's population will increase from its present 31 million people to 49 million people by the year 2020, then this increasingly large number of people will not only need water in the urban areas, but they will also need food and will appreciate the aesthetic and habitat values of California's agricultural lands. When considered in this light, the mass reallocation of agricultural water to other uses is therefore very short-sighted, particularly when it has become obvious that additional water storage must be developed in California to meet the growing demands for water.

19. Cal. Exec. Order No. 91-W-3; DEPARTMENT OF WATER RESOURCES, STATE OF CAL., THE 1991 DROUGHT WATER BANK (1991).

20. O'Brien & Gunning, *supra* note 11, at 1095.

21. *See e.g.* Ray Cappock, et al., *California Water Transfers: The System and the 1991 Drought*, in SHARING SCARCITY: GAINERS AND LOSERS IN WATER MARKETING 21 (Harold O. Carter, et al. eds., 1994); O'Brien & Gunning, *supra* note 11, at 1053.

22. *See e.g.*, CAL. WATER CODE § 1745.07 (West 1996), which was part of the legislative package adopted to facilitate the Bank.

23. In 1991, water was purchased for $125 per acre-foot and in 1992, for $50 per acre-foot. O'Brien & Gunning, *supra* note 11, at 1095.

24. Like any initiative of this magnitude, these were farmers who claimed that they were adversely affected by the bank. Lessons learned from the bank will hopefully avoid many of these issues in the future.

25. All American Canal Lining Act, Pub. L. No. 100-675, §§ 201-209, 102 Stat. 4005 (1988).

26. The Coachella Valley Water District, with a junior claim to Imperial Irrigation District, received 50,000 acre-feet of water as part of a settlement to avoid litigation. For a good discussion of this arrangement, see MARC REISNER & SARAH BATES, OVERTAPPED OASIS, app. A, at 150 (1990).

With the experience of these successful transfers and several others,[27] there is now general recognition that water transfers are an important tool for water management in California. The common thread in all successful transfers is that the viability of agriculture is maintained, which leads to political support from farmers, ranchers, and their communities. Without this support, transfers will not have a place in California water policy.

The pendulum for water transfers, which began to swing in one direction with the Owens Valley saga and continued through the early 1990s, has now swung back towards a more balanced approach to water transfers that reflects the important and legitimate interests of California agriculture. It is a balanced approach to water transfers that is embodied in the Model Act and which California's farmers and ranchers will likely embrace. The remainder of this article will describe the balanced approach in the Model Act, focusing upon the components of the Model Act that are important to farmers and ranchers.

III. A Balanced Approach to Water Transfers

To build upon the momentum in California water policy, the Model Act is an effort to compile and reflect the numerous views on water transfers that have been expressed throughout the state. To be sure, the Model Act is not an ideal model from the agricultural perspective, nor, we suspect, from any other particular perspective. Instead, the Model Act provides a balanced approach to water transfers that should satisfy many different interests throughout California, and which will make the incremental progress that is necessary for California water policy.

From an agricultural perspective, the balance necessary for good transfer legislation can be visualized as a tripod with adjustable legs. For the tripod to remain balanced, over time, each leg must provide support equal to that of the other two. For water transfers, the three equal legs must include (1) the protection of water rights, (2) the protection of affected interests, and (3) flexibility to assure a reliable water supply for a growing population.

A. The Protection of Water Rights

The protection of water rights is fundamental to water transfers. Water transfers are based on a confirmation of the water rights priority system that not only respects the underlying water rights, but also works within the structure of this system to satisfy other demands for water. This conf rmation of water rights is very important for farmers and ranchers who depend upon water rights that are generally senior in priority, but which are increasingly being undermined and threatened by new demands for urban and environmental purposes. As these demands for water increase, farmers are continually faced with the choice of voluntary transfers or a more regulatory approach. With voluntary transfers water rights are protected, the farmer can control his or her destiny, and remuneration is received for on-farm improvements, making the choice rather obvious for farmers.

The Model Act provides that "the recognition and protection of water rights is in the public interest and is necessary to facilitate voluntary transfers of water in California."[28] Because the protection of the underlying water right is the key to water transfers, the transferor must be secure in his or her water rights and the future ability to use the water. The Model Act specifically provides that the transferor's water right will not be diminished during the terms of the transfer and at the conclusion of the transfer agreement, the water reverts back to the transferor.[29] This is reinforced by prohibiting the transferee or any other beneficiary of the water from bringing a claim for a continued supply, including any claims based on reliance, estoppel, intervening public use, water shortage emergency, unforeseen or unforeseeable increases in demand or any other cause.[30] Additionally, to help assure that the water reverts back to the transferor, the California Environmental Quality Act (CEQA) does not apply to the termination of a transfer agreement.[31]

In addition to the express protection of water rights, the process required to transfer water in the Model Act assures certain protections for water right holders. In all cases, the petition to transfer water must be filed by the water right holder, which assures that the water right is not diminished by transfers without the consent of the water right holder.[32] Additionally,

27. *See*, Brian E. Gray, *Water Transfers in California, 1981–1989, in* LAWRENCE J. MACDONNELL, ED., THE WATER TRANSFER PROCESS AS A MANAGEMENT OPTION FOR MEETING CHANGING WATER DEMANDS (1990). Of particular note, the Yuba County Water Agency transferred surplus water to Department of Water Resources (DWR) in 1987 (83,100 af), 1988 (125,000 af), 1989 (110,000 af), and 1990 (109,000 af).

28. MODEL ACT § 101.

29. *Id.* § 301.

30. *Id.* § 303.

31. *Id.* § 209.

32. *Id.* §§ 403, 801(c). So-called user-initiated transfers were the major issue that divided the different interests during the debates in the early 1990s. Under these types of transfers, an individual could transfer water from within a district that held a water right without the approval of the district's governing board. There is general recognition amongst farmers and ranchers, as well as other water users, that user-initiated transfers are not a necessary (nor prudent) part of California water transfer policy. These types of transfers are not allowed under the Model Act. For further discussion of this issue, see O'Brien & Gunning, *supra* note 11, at 1077.

when the water rights are held by local water agencies, the governing board of the local water agency must approve any transfers from within its jurisdiction.[33] In all cases, the burden of proving a valid water right is on the petitioner—the water right holder.[34]

The scope of the Model Act also provides certain protections for water rights. The Model Act applies to appropriative surface water rights, which by their nature have long been transferrable in California.[35] On the other hand, other rights that are important to farmers, and which have not historically been transferrable, are not transferrable under the Model Act. For example, riparian rights are not transferrable under the Model Act unless they have been quantified and adjudicated by a court in accordance with the statutory streamwide adjudication procedures.[36] The Model Act does, however, allow a riparian right holder to forego his or her right by leaving the water in the stream system.[37] Additionally, the Model Act does not apply to the transfer of groundwater, which in California is governed by a separate set of rules.[38] Both riparian and groundwater rights are directly related to the land; thus, any transfer would jeopardize the underlying water right that is part and parcel of the land.[39] By not allowing for the transfer of these rights, the Model Act preserves these important water rights that are crucial to farmers throughout California.

In addition to the water right that is being transferred, other water rights are expressly protected under the Model Act. The Model Act follows the traditional no-injury rule, which provides that a water transfer cannot take place if it "would result in significant injury to any legal user of water...."[40] The State Water Resources Control Board (SWRCB) must make this finding for transfers that require its approval.[41] For short-term transfers (less than two years) the petitioner has the prima facie burden to show that the transfer will not injure any legal user of water, which if met, shifts the burden to any protesting party.[42] For long-term transfers, the burden is entirely on the petitioner.[43]

B. Protection of Affected Interests

The protection of interests not directly involved in the water transfer has always been the most difficult to articulate in water transfer legislation. The protection of affected interests, sometimes referred to as third party interests, includes the protection of other water right holders,[44] as well as other interests that require protection from transfers, such as communities, other farmers and the environment.

1. *Notice*

The key to protecting affected interests is a notice requirement that provides other water users and any interested party the opportunity to participate in the water transfer process. This does not mean that all parties receiving notice have a legitimate interest in a particular water transfer, but it opens the process to the public and provides the opportunity for all legitimate concerns to be brought into the process for consideration. Experience in California has shown that broad notice is essential to good planning and decision making. In addition to providing an opportunity for meaningful comment, notice can be used to the advantage of the transferring parties to foreclose collateral attacks after the comment period has closed. It also avoids the perception that "deals" are being made behind closed doors.

For all transfers under the Model Act, the petition must be provided both to the California Department of Fish and Game and to the Board of Supervisors of the county or counties in which the transferor stores or uses water.[45] The petition is also given to the SWRCB, which will publish notice in the newspaper in the same counties, and the notice will be provided to all interested parties on the SWRCB mailing lists.[46] There are also certain procedures in CEQA that require notice to interested parties.[47] Once a transfer is finalized, it will be included on a water transfer registry compiled by the SWRCB, which will be available for review by all interested parties.[48]

33. MODEL ACT §§ 801, 802.

34. *Id.* § 404(g).

35. *See* Davis v. Gale, 32 Cal. 27 (1867); Kidd v. Laird, 15 Cal. 162 (1860); Maeris v. Bicknell, 7 Cal. 261 (1857). *See also* Lawrence J. MacDonnell, *Transferring Water Uses in the West*, 43 OKLA. L. REV. 119, 123 (1990).

36. MODEL ACT §§ 201, 207. *See also* CAL. WATER CODE § 1740. (West 1996).

37. MODEL ACT § 207.

38. *Id.* §§ 201, 202. WELLS A. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS (1956).

39. For a discussion on riparian rights, see Gray, *supra* note 11, at 763–766. For groundwater, see David J. Guy, *Protecting Landowners' Rights to Groundwater*, CAL. REAL PROP. J. (Winter 1995), at 23.

40. MODEL ACT, § 404. These protections apply to all users of surface and groundwater. For a detailed discussion of the no-injury rule, see Kevin M. O'Brien, *Water Marketing in California*, 19 PAC. L.J. 1165, 1169 (1988).

41. MODEL ACT, § 404. Readers should note that due to a technical oversight, a no-injury rule was mistakenly deleted for pre-1914 rights. A provision similar to Water Code § 1706 is necessary in the Model Act. *See* CAL. WATER CODE § 1706 (West 1996).

42. MODEL ACT § 404(a).

43. *Id.* § 404(b).

44. *See supra* Part III.A.

45. MODEL ACT §§ 403(a), 405(a)(2).

46. For pre-1914 appropriative rights, where the water transfer changes the purpose of use, place of use, point of diversion, or point of return flow, and the change is not within a local water agency, the notice must be provided to the SWRCB even though it does not have jurisdiction over the transfer. *Id.* §405(a)(2).

47. CAL. PUB. RES. CODE §§ 21092, 21092.2 (West 1996).

48. MODEL ACT § 1102.

2. *Protections*

a. Communities

Determining and then defining the role of communities[49] in water transfers is daunting. On one hand, communities clearly have an important stake in the water that is leaving the area. But on the other hand, the water transfer process cannot, as a practical matter, consider every potential or conceivable impact on nearby communities. The Model Act makes a serious effort to balance these concerns and to address the potential impacts on communities in a workable manner.

The notice requirements previously discussed are fundamental to these protections. Any concerned member of the community has the opportunity to receive notice of almost any proposed transfer.[50] Additionally, a copy of a petition for transfer will be provided to the Board of Supervisors, which, as the most representative local government in California, has the obligation to look after the health, safety and welfare of the county, as well as its economic well-being.[51] The County therefore serves a critical role as an interested party with the resources to represent the collective interests of the community.

Additionally, local water agencies represent a certain community interest. The Model Act requires the governing body to approve any transfer from within an agency that holds the water rights.[52] As elected boards that hold water rights in trust for landowners and others within its boundaries, these boards are accountable to the communities that they represent. Although local agencies vary widely throughout the state, this protection broadens the area of interest and provides protections for communities.

With respect to the particular concerns of communities, the Model Act contains two important themes that are intended to protect communities. Because most concerns about community interests have generally focused upon the fallowing or retirement of agricultural land, these practices are discouraged under the Model Act as a means to transfer water.[53] The other pervasive theme is to encourage short-term transfers (less than two years) rather than long-term transfers, which have a much more lasting impact on communities and cannot be reviewed as easily to reflect changing conditions. For this reason, the scrutiny imposed on long-term transfers is greater than on short-term transfers, particularly when fallowing or land retirement is involved. To avoid loopholes, successive short-term agreements are considered as long-term agreements for purposes of the Model Act.[54]

b. The Environment

The Model Act provides significant protections for the environment. With respect to traditional protections, a copy of the transfer petition must be provided to the Department of Fish and Game for its review[55]; a transfer cannot unreasonably affect fish and wildlife[56], and the SWRCB is required to promulgate regulations to assure that transfers through the delta do not violate water quality standards.[57] This may include carriage water requirements, if appropriate.[58]

There are also opportunities in the act to improve the instream environment. For example, water can be transferred for instream uses.[59] Water that is transferred in this manner must be in addition to water that is already required for instream uses,[60] although the transferor may specifically transfer water to satisfy regulatory requirements and thus receive credit for meeting this obligation.[61] It is likely that these provisions will be exercised with more frequency as demands for water increase.

Finally, CEQA plays an important role in protecting the environment. Although it has always been easy to criticize CEQA, it is the master planning process for the state of California that cannot be ignored. If CEQA is used properly, the process can benefit all interested parties. For those concerned about the effect of a transfer on the environment, CEQA is an important venue in which to raise these concerns. For project proponents, CEQA is a useful vehicle to avoid collateral challenges at a later time. In all cases, only the effects of the proposed transfer will be considered, not effects caused by other factors.[62]

49. "Communities" in this article refers broadly to those with a common interest in the water resources at issue.

50. *See supra* text accompanying notes 43–46.

51. Cal. Const. art. XI, §§ 1, 7; Cal. Gov't Code §§ 23000–23732 (West 1996).

52. Model Act §§ 801, 802.

53. *Id.* §§ 404(c), 507.

54. *Id.* § 204.

55. *Id.* §§ 403(a), 405(a)(2), 504(a).

56. *Id.* §§ 404(a)(2), 404(b)(2).

57. *Id.* § 206.

58. *Id.* Views on the carriage water requirement are very divergent. Many believe that there should be no carriage requirement and others believe that it should be specifically prescribed in any legislation. Under the Model Act, the SWRCB must set a requirement as part of a rulemaking. This allows full public input from all interested parties in the rulemaking process to guide the SWRCB in its formulation of any carriage requirement.

59. *Id.* § 601. Readers should note that existing law allows for transfers to instream uses. *See* Cal. Water Code § 1707 (West 1996). To the best of the authors knowledge, this provision has never been exercised.

60. Model Act § 602. A water transfer registry maintained by the SWRCB will assist in assuring that transferred water can be properly tracked. *Id.* § 1102.

61. *Id.* § 603.

62. *Id.* § 404(f).

As California continues to urbanize, agriculture is an increasingly important part of the environment that must be considered in the CEQA process.[63] CEQA requires that there must be no significant effects on the environment that have not been mitigated.[64] This includes not only the instream environment, but also the protection of farmland and agricultural values, which are an increasingly important part of the environment and the public interest in California agriculture.[65] The Legislature has specifically provided that CEQA "plays an important role in the preservation of agricultural lands"[66] and that the conversion of agricultural lands to non-agricultural use or the impairment of agricultural productivity is normally a significant effect on the environment.[67] As the environmental values of agriculture gain in importance, CEQA will continue to be a valuable tool to assure that the importance of agriculture will be recognized in the water transfer process.

3. *Challenges*

An aggrieved party that has formally filed a protest to the transfer, including counties and the Department of Fish and Game, may challenge the SWRCB's decision by filing a petition for writ of mandate.[68] Similar relief is available against parties to the transfer when the SWRCB does not have jurisdiction over the transfer. CEQA also provides an opportunity for parties to challenge a decision of not only the SWRCB, but other public agencies that have failed to comply with CEQA.[69]

C. Flexibility in Water Management

As demands for water in California increase, flexible management of water resources is critical. The past several droughts have shown that there is very little surplus water in the system and that it has become very difficult to satisfy all demands during drought.[70] Assuming that the previously mentioned water rights and other affected interests can be protected, water transfers are an important tool for flexible management of California water. In almost all cases, water transfers are preferred over a regulatory approach that might otherwise be necessary to satisfy California's water demands.

From an agricultural perspective, this flexibility can best be accomplished by short-term transfers of water to satisfy other demands, particularly during drought. The Model Act contains several incentives for short-term transfers, including an exemption from CEQA,[71] an abbreviated process that does not require a hearing,[72] a relaxed burden on the petitioner,[73] and an expedited process for the transfer of conserved water that meets certain requirements.[74] Short-term transfers are particularly important when coupled with the provisions for water banks, which can be established by the Governor on a statewide basis,[75] or on a more regional basis by local agencies.[76] The Drought Water Banks created by the Department of Water Resources during 1991 and 1992 were good examples of short-term transfers that provided flexibility in managing water demands during a difficult drought.[77] It is highly likely that similar banks will be used in the future.

63. 1993 Cal. Stat. 812.

64. CAL. PUB. RES. CODE § 21081 (West 1996). In limited circumstances, findings of overriding considerations can also be made in accordance with § 21081(b). *Id.*

65. *See* Cal. CONST. art. XIII, § 8; CAL. GOV'T CODE §§ 51220–51295 (West 1996). These values are particularly important in the delta. *See* CAL. PUB. RES. CODE § 29703 (West 1996).

66. 1993 Cal. Stat. 812, § 1 provides in full: "(a) Agriculture is the state's leading industry and is important to the state's economy; (b) The continued productivity of agricultural lands in California is important in maintaining a healthy agricultural economy; (c) The conversion of agricultural lands to non-agricultural uses threatens the long-term health of the state's agricultural industry; (d) The California Environmental Quality Act plays an important role in the preservation of agricultural lands."

67. CAL. CODE REGS. tit. 14 §§ 15000–15387 (1996); STATE CEQA GUIDELINES, app. G(y).

68. MODEL ACT §§ 403(i), 504(h). Monetary relief will generally not be available, except for transfers under the expedited process. *Id.* §§ 403(j), 504(h), 504(i). The procedures for compensation claims under the expedited process are set forth in § 506. *Id.* § 506.

69. CAL. PUB. RES. CODE §§ 21168, 21168.5 (West 1996).

70. CAL. DEP'T OF WATER RESOURCES, BULLETIN 160-93 (1993).

71. MODEL ACT § 209. Current law provides a California Environmental Quality Act (CEQA) exemption for one year. CAL. WATER CODE §§ 1728, 1729 (West 1996). This is an extremely controversial issue that will receive considerable attention. It is the intent of the Model Act that the short-term CEQA exception will provide an incentive to pursue short rather than long-term transfers of water.

72. MODEL ACT § 403.

73. *Id.* § 404(a).

74. *Id.* §§ 501–507. Although the section on expedited transfers provides an interesting approach to transfers, it is not well-grounded in practice, nor does it have the support of farmers and ranchers. Existing California Water Code § 1011 provides for the transfer of conserved water, yet it has been the subject of differing interpretations by those who want to transfer water that is made available by their efforts, and other water users who claim that they have a right to the water that is supposedly "conserved." *See* CAL. WATER CODE § 1101 (West 1996). As a result, very little water has been transferred under California Water Code § 1011, nor have courts provided any guidance to assist with this issue. The provisions in the Model Act for the transfer of conserved water do not clarify these issues, but instead only confuse the issue further.

75. *Id.* § 1001.

76. *Id.* § 1002.

77. *See* SHARING SCARCITY: GAINERS AND LOSERS IN WATER MARKETING, *supra* note 21.

Although there is a preference for short-term transfers in the Model Act, there is also the recognition that long-term transfers are important and necessary in circumstances when financing or other long-term demands require a long-term arrangement. In those situations, there is still flexibility to manage the system, but the scrutiny is greater in proportion to the potential for impacts.

Several other provisions in the Model Act also allow for more flexibility and water management. This includes water transfer fees, which are never popular, but which under the Model Act will be used entirely by the SWRCB to administer the provisions of the Model Act.[78] These fees will assure that the SWRCB has adequate staffing devoted to these important issues, therefore ensuring responsiveness and thus flexibility when needed.[79] There are also detailed provisions on wheeling of water through water supply systems owned or operated by public water supply agencies.[80] These provisions give flexibility by allowing up to 70% of the unused capacity of the system to be used for transferred water.[81]

IV. Conclusion

As California begins to define water transfers for the next century, the discussion will be much different than in the 20th century. Rather than merely a scheme for reallocating agricultural water, the water transfer debate will be framed by farmers, ranchers, and the increasing public interest in agriculture. As the relationship between land and water in California becomes better understood, society will recognize the problems with transferring water separate from agricultural land. Additionally, society will increasingly recognize the positive values of agriculture, not only as a producer of food, fibre, and flowers, but also as an important part of the environment, the tax base, and the economy. Finally, there will be a recognition that the success of any proposal depends upon the willingness and ability of farmers and ranchers to transfer water in a way that does not adversely affect agriculture or its communities.

A Model Water Transfer Act for California contains a balanced approach to transfers that provides an unprecedented starting point to begin the next generation of legislative deliberations. It is now incumbent upon California water users and the legislature to enact a sound water transfer policy that will maintain the momentum on California water issues.

The Model Act alone, however, is only a small part of the larger effort that is needed to assure reliable and affordable water supplies for all Californians. A long-term Delta solution, additional water storage, and the maximum utilization of the Colorado River will be necessary to satisfy the population growth that is projected for California. If done properly, water transfers will complement these actions, thereby helping to ensure a secure water future for California.

78. MODEL ACT §§ 701, 702.

79. *Id.* §§ 703, 704.

80. *Id.* § 901.

81. *Id.* The definitions which govern here are in section 901(b), and the procedures and standards regarding wheeling are set forth in sections 902, 903, 904 and 905.