

means of achieving efficient water use. Nonetheless, as illustrated in this case study, without the board's finding of IID's waste and unreasonable use of water, and without the subtle threats that continued waste could result in the loss of that water, IID and MWD might never have concluded a conservation agreement.

*Attorney's Work Product
Let's see*

Source: Marc Reisner and Sarah Bates (1990) Overtapped Oasis; Reform or Revolution For Western Water; Island Press, Washington, D. C., pages 167 - 178.

*See interpretation in Water Transfer in the West
National Research Council, National Academy of
Science, Washington D.C., (1990), pp 89-90.*

Appendix B

Department of the Interior Water Transfer Policy

Principles Governing Voluntary Water Transactions That Involve or Affect Facilities Owned or Operated by the Department of the Interior

PREAMBLE

Transactions that involve water rights and supplies are occurring pursuant to State law with increasing frequency in the Nation, particularly in the Western United States. Such transactions include direct sale of water rights; lease of water rights; dry-year options on water rights; sale of land with associated water rights;

This policy statement was released by the Department of the Interior in December 1988; the following "Voluntary Water Transactions Criteria and Guidance" text came out in early 1989.

and conservation investments with subsequent assignment of conserved water.

The Federal government, as owner of a significant portion of the Nation's water storage and conveyance facilities, can assist State, Tribal, and local authorities in meeting local or regional water needs by improving or facilitating the improvement of management practices with respect to existing water supplies. Exchanges in types, location or priority of use that are accomplished according to State law can allow water to be used more efficiently to meet changing water demands, and also can protect and enhance the Federal investment in existing facilities. In addition, water exchanges can serve to improve many local and Indian reservation economies.

DOI's interest in voluntary water transactions proposed by others derives from an expectation that, to an increasing degree, DOI will be asked to approve, facilitate, or otherwise accommodate such transactions that involve or affect facilities owned or operated by its agencies. The DOI also wishes to be responsive to the July 7, 1987, resolution of the Western Governors' Association, which was reaffirmed at the Association's July 12, 1988, meeting, that the DOI "develop and issue a policy to facilitate water transfers which involve water and/or facilities provided by the Bureau of Reclamation."

The following principles are intended to afford maximum flexibility to State, Tribal, and local entities to arrive at mutually agreeable solutions to their water resource problems and demands. At the same time, these principles are intended to be clear as to the legal, contractual, and regulatory concerns that DOI must consider in its evaluation of proposed transactions.

For the purpose of this statement of principles, all proposed transactions must be between willing parties to the transaction and must be in accordance with applicable State and Federal law. Presentation of a proposal by one party, seeking Federal support or action against other parties, will not be considered in the absence of substantial support for the proposal among affected non-Federal parties.

VOLUNTARY WATER TRANSACTION PRINCIPLES

1. Primacy in water allocation and management decisions rests principally with the States. Voluntary water transactions under this policy must be in accordance with applicable State and Federal laws.

2. The Department of the Interior (DOI) will become involved in facilitating a proposed voluntary water transaction only when it can be accomplished without diminution of service to those parties otherwise being served by such Federal resources, and when:
 - (a) there is an existing Federal contractual or other legal obligation associated with the water supply; or
 - (b) there is an existing water right held by the Federal government that may be affected by the transaction; or
 - (c) it is proposed to use federally-owned storage or conveyance capacity to facilitate the transaction; or
 - (d) the proposed transaction will affect Federal project operation; and
 - (e) the appropriate State, Tribal, or other non-Federal political authorities or subdivisions request DOI's active involvement.
3. DOI will participate in or approve transactions when there are no adverse third-party consequences, or when such third-party consequences will be heard and adjudicated in appropriate State forums, or when such consequences will be mitigated to the satisfaction of the affected parties.
4. As a general rule, DOI's role will be to facilitate transactions that are in accordance with applicable State and Federal law and proposed by others. In doing so, DOI will consider the positions of the affected State, Tribal, and local authorities. DOI will not suggest a specific transaction except when it is part of an Indian water rights settlement, a solution to a water rights controversy, or when it may provide a dependable water supply the provision of which otherwise would involve the expenditures of Federal funds. Such a suggestion would not be carried out without the concurrence of all affected non-Federal parties.
5. The fact that the transaction may involve the use of water supplies developed by Federal water resource projects shall not be considered during evaluation of a proposed transaction.
6. One of DOI's objectives will be to ensure that the Federal government is in an acceptable financial, operational, and contractual position following accomplishment of a transaction under this policy. Unless required explicitly by existing law, contracts, or regulations, DOI will refrain from burdening the transaction with additional costs, fees, or charges, except for those costs actually incurred by DOI in performance of its functions in a particular transaction.

7. DOI will consider, in cooperation with appropriate State, Tribal and local authorities, necessary measures that may be required to mitigate any adverse environmental effects that may arise as a result of the proposed transaction.

Voluntary Water Transactions Criteria and Guidance

To assist in the implementation of the December 16, 1988, principles, the following criteria and guidance are provided. It is anticipated that each specific proposed voluntary water exchange will be unique, and that it should be evaluated on its own merits under the overall guidance of this policy statement.

Principle 1. Primacy in water allocation and management decisions rests principally with the States. Voluntary water transactions under this policy must be in accordance with applicable State and Federal laws.

Criterion: Does the proposed exchange comply with applicable State and Federal laws?

Guidance: Apparent conflicts with State laws or water rights will be reconciled with the appropriate State agency. State laws generally provide procedures for transferring water rights, and should be the primary mechanism for protecting the sellers/lessors of water, as well as third parties.

Proposed transactions that involve a new use not specifically authorized as a Federal project purpose, or that propose a place of use not within the Federal project service area, may require authorizing legislation. The primary responsibility for such legislation will rest with those entities proposing the transaction.

Principle 2. The Department of the Interior (DOI) will become involved in facilitating a proposed voluntary water transaction only when it can be accomplished without diminution of service to those parties otherwise being served by such Federal resources, and when:

1. There is an existing Federal contractual or other legal obligation associated with the water supply; or
2. There is an existing water right held by the Federal Government that may be affected by the transaction; or
3. It is proposed to use federally-owned storage or conveyance capacity to facilitate the transaction; or
4. The proposed transaction will affect Federal project operations; and
5. The appropriate State, Tribal, or other non-Federal political authorities or subdivisions request DOI's active involvement.

Criterion: Does the proposed action involve water that is encumbered by an existing Federal contractual obligation?

Guidance: If revision of existing water service or repayment contracts is required to facilitate an otherwise desirable water exchange proposal, negotiations for those changes will be initiated expeditiously under the guidance of these principles and the appropriate legal authorities pertaining to the subject water.

Criterion: Does the proposed action potentially affect a Federal water right?

Guidance: In those instances where the United States' water rights may be affected by a water transaction, DOI will work to facilitate the transfer so long as its rights or the rights of its contractors are protected or adequately compensated. In the evaluation of a proposed action, effects on existing water rights should be an initial consideration. If the proposed action would appear to involve lengthy and costly legal procedures in either the State or Federal courts, this information should be provided to the proposing parties. The policy does not provide for the avoidance of State and Federal laws and procedures in the establishment of water allocations and water rights.

Criterion: Does the proposed action propose the use of Federal storage/conveyance capacity?

Guidance: Federal facilities may be used to store/transfer both federally and non-federally supplied water. The Warren Act provides the basis for storage/transfer of non-federally supplied water for irrigation. Storage/transfer

of non-federally supplied water for municipal and industrial (M&I) purposes can be accomplished generally under the authority of section 9(c) of the Reclamation Project Act of 1939.

Except by mutual consent of affected parties, contracts for additional storage/conveyance will take into account existing Federal contracts, conveyance capacity and project obligations which must be honored as a first priority.

Approval to transfer water cannot obligate the Federal Government to incur extra nonreimbursed expense to store water or to convey it to a new location.

Approval to transfer water will not establish any right to future transfers beyond those expressly provided for in negotiated agreements.

Use of storage/conveyance will require a supporting contract to use federally built storage/conveyance systems.

Charges will be set to recover normally allocable storage, delivery, or extra costs incurred by the U.S.

If any additional pumping power is needed to effect a given transfer, the transfer entities must provide or pay for such power, and may have to secure it from non-Federal sources.

Proposals may involve the Corps of Engineers' facilities or projects. In these cases, consideration of their concerns will be included in the evaluation of the specific proposal.

Criterion: Does the proposed action affect existing Federal project operations?

Guidance: With a change in type, location, or priority of use, the potential for effects on the authorized purposes and project operations must be investigated. For example, such effects could result from changes in operation of a reservoir or delivery system, that might change minimum stream flow or power generation. If these potential effects are identified, avoidance of these consequences, or mitigation of such consequences to the satisfaction of the affected party, is necessary.

As stated in the guidance area 2(b), DOI will work to facilitate the proposed transfer so long as its (water)

rights or the (water) rights of its contractors are protected or adequately compensated; and in guidance area 2(c), except by mutual consent of affected parties, contracts for additional storage/conveyance will take into account existing Federal contracts and project obligations.

Power interference charges or similar compensation measures will be the responsibility of those entities proposing the transaction.

In addition to the evaluation of effects on existing project operations, and authorized project beneficiaries, the following general issues must also be addressed:

1. Third-party effects. See Principle 3.
2. Documentation for compliance with NEPA. See Principle 7.
3. Land Classification. If the proposed action is a change in location of use for irrigation water, land classification is necessary to ensure that the land is capable of sustaining irrigation activities without damage to the land or water resource. Demonstration that sufficient payment capacity exists during the term of the transfer may also be required. The level of detail, amount of original work, and depth of analysis will be determined on the merits of each situation.
4. Reclamation Reform Act of 1982. If the existing contract must be changed to allow the proposed exchange, the discretionary provisions of the Reclamation Reform Act of 1982 must be considered. For further guidance on supplemental or additional benefits and the amendments to existing contracts, refer to the Solicitor's memorandum dated May 20, 1988, "Interpretation of Section 203(a) of the Reclamation Reform Act of 1982 and Sections 105 and 106 of Public Law 99-546." Additional guidance is contained in the Acreage Limitation Rules and Regulations on contracts, additional and supplemental benefits, and water transfers.

Criterion: Does the proposed action stem from a request by a State, Tribe, or non-Federal agency?

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Guidance: DOI will continue its policy of providing technical assistance to State, Tribal, or local agencies. A positive and expeditious technical assistance/consultation program will continue within available budget resources.

The specific involvement of DOI necessary to accommodate the requested exchange will determine the type of Reclamation involvement. Existing procedures for approving new or amendatory contracts should be followed.

Principle 3. DOI will participate in or approve transactions when there are no adverse third-party consequences, or when such third-party consequences will be heard and adjudicated in appropriate State forums, or when such consequences will be mitigated to the satisfaction of the affected parties.

Criterion: Concerns for third-party effects must be addressed from both the State and the Federal perspective. Any consideration of the "public trust doctrine" is left to the State.

Guidance: Concerns for authorized project functions and operations were addressed in Principle 2. This principle addresses the concerns for "third-party" effects. Third parties are identified as those entities who may have some identifiable interest in the exchange, and would have a legal standing in an adjudication process in an appropriate State forum. The identification of these entities, the validity of their concerns, and the appropriate satisfaction of their concerns rests with the States and their adjudication process.

Principle 4. As a general rule, DOI's role will be to facilitate transactions that are in accordance with applicable State and Federal law and proposed by others. In doing so, DOI will not suggest a specific transaction except when it is part of an Indian water rights settlement, a solution to a water rights controversy, or when it may provide a dependable water supply, the provision of which otherwise would involve the expenditure of Federal funds. Such a suggestion would not be carried out without the concurrence of all affected non-Federal parties.

Criterion: Does the proposed action displace the need for expenditure of Federal funds?

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Guidance: Within Reclamation's resource management program, opportunities will be explored to achieve management objectives through the use of voluntary exchanges of water. The intent of this policy is to ensure that voluntary exchanges of water are considered as alternatives in water resource management within Reclamation's planning, operation, and other resource development programs. For example, a water exchange may be considered as an alternative to construction of a storage or delivery facility that otherwise would or could require Federal investment.

Criterion: Does the proposed action provide for an opportunity for the Indian tribe or community to benefit economically from the lease or transfer of water rights that may be secured under a settlement with the Federal Government or with non-Federal parties?

Guidance: It is a common situation that the water rights available to Indian tribes represent a significant portion of their resource base. It also is a common situation that the use of those water resources for agricultural purposes is marginally feasible, and that local water demands by non-Indians are such that the lease or transfer of the tribal water resources can be a mutually beneficial transaction.

DOI will facilitate transfers, in its capacity as a trustee, for an Indian tribe to the extent that it results in assisting local water users in resolving their water resource management problems within appropriate state law. The specific authorities involved will be determined on a case specific evaluation of the water rights, Federal and State laws, and the specific nature of the proposed transaction.

Principle 5. The fact that the transaction may involve the use of water supplies developed by Federal water resource projects shall not be considered during the evaluation of a proposed transaction.

Criterion: Is the water to be transferred, exchanged, leased, sold, etc., available by virtue of a Federal Reclamation project?

Guidance: If the Federal Government is not made worse off financially by the transaction, if the proposed transaction has been approved by the State and local authorities, and if the proposed transaction complies with Federal and State law; then it may be in the public interest to allow federally developed water to be employed. The fact that it was developed by virtue of a subsidized Federal project or program should not, in and of itself, be a barrier to the transaction.

On the other hand, DOI should seek the most appropriate source for water to be transferred, exchanged, leased, or sold without regard to presently available supplies from Federal projects.

Principle 6. One of DOI's objectives will be to ensure that the Federal Government is in an acceptable financial, operational, and contractual position following accomplishment of a transaction under this policy. Unless required explicitly by existing law, contracts, or regulations, DOI will refrain from burdening the transaction with additional costs, fees, or charges, except for those costs actually incurred by DOI in performance of its functions in a particular transaction.

Criterion: The financial terms negotiated between entities do not concern DOI.

Repayment subsidies associated with the original type of use of the water are not transferable to a different type of use of the water.

Exchanges cannot result in a reduction in the present worth of the outstanding obligations remaining to be repaid to the Federal Government.

If the proposed exchange would involve the execution of a contract with a "new" entity, that entity must have sufficient legal authority to enter into such a contract and be able to perform all functions required by the contract.

Any additional costs associated with the transfer shall be advanced or repaid in a manner negotiated by the entities involved.

Guidance: A distinction must be made between financial terms between the entities proposing the exchange and Fed-

eral repayment considerations associated with the water. Financial terms between the non-Federal entities are extraneous to the repayment considerations discussed herein.

1. The costs or subsidies associated with the *original* use are not transferable to a *different* use of the water.
2. A change in use from irrigation to municipal and industrial purpose would require a change in the repayment of costs to include interest during construction and interest on investment, but only to the extent of the remaining years in the payout period. It is not the intent of this water transfer policy to recover subsidies originally allocated to that block of transferred water during the time it served the irrigation.

A short-term transfer should recognize the repayment of the appropriate cost, with the repayment interest rate, calculated for the year of the transfer, after which the irrigation rate would be reestablished.

Any repayment of principal above the level that would have been repaid by the irrigators (i.e., the power assistance amount) should be reflected in a reduction in the amount to be repaid through power assistance.

3. An exchange involving change in location and contracting entities, but not a change in use (i.e., irrigation to irrigation), could involve the continuation of the repayment subsidies.
4. An exchange in which there would be a change in use from reimbursable function (e.g., irrigation to anadromous fishery) will require special negotiations. In lieu of special legislation, specific contractual obligations will be identified to ensure that repayment to the Federal Government after the exchange will be no less than the conditions that existed prior to the exchange.
5. To the maximum extent possible, financial or economic disincentives to the transfer or exchange are to be avoided. The additional costs to the transfer or exchange are to be avoided. The additional costs to

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the water users, as discussed in these principles (i.e., NEPA documentation, power interference charges, recalculation of water rates, or incremental pumping costs), are all required by existing law, contracts, or regulations. While these are costs to the water user, they are not the disincentives that are to be avoided.

The disincentives to be avoided can be characterized as charging a percentage of any "profit" that might be envisioned as the difference between appropriate costs and the market value of the water.

Principle 7. DOI will consider, in cooperation with appropriate State, Tribal, and local authorities, necessary measures that may be required to mitigate any adverse environmental effects that may arise as a result of the proposed transaction.

Criterion: Is approval of the transaction subject to NEPA requirements?

Guidance: Documentation for compliance with NEPA could range from a categorical exclusion to an environmental impact statement. The type of documentation required will be a function of the specific action being proposed. Any Federal NEPA compliance costs associated with the transfer shall be advanced or repaid in a manner negotiated by DOI and the entities involved.

Appendix C

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