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### Legal Protection for the Exporting Region

Gary D. Weatherford

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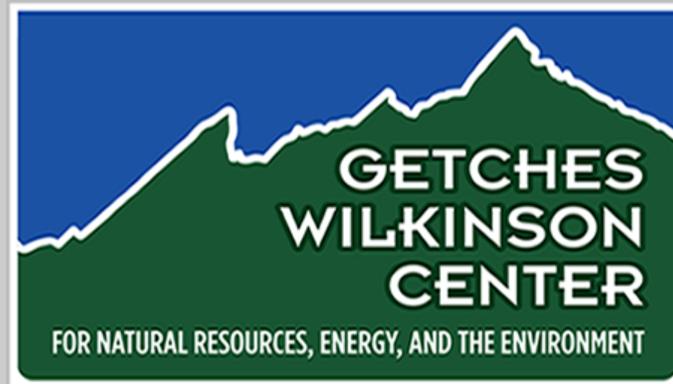
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LEGAL PROTECTION FOR THE EXPORTING REGION

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New Sources of Water for Energy  
Development and Growth: Interbasin Transfers

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##### References

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- Weatherford (Ed.) et al., Acquiring Water for Energy (Water Resources Publications, Littleton, CO, 1982).

LEGAL ASPECTS OF INTERREGIONAL  
WATER DIVERSION

Gary D. Weatherford

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### C. Needed Economic Guidelines

Future discussions of interregional water transfer would be more productive if an objective and comparatively disinterested body could suggest some economic ground rules for the resolution of the following issues.

#### 1. How Will the Regional Public be Defined?

Water is an economic growth factor, therefore economic consequences will flow from the determination of the boundaries of the regions of origin and delivery. The river basin as a planning, development, and administration unit comes highly recommended,<sup>225</sup> but other such units, such as political jurisdictions and trade areas, are also available. Economic considerations ought to inform the final political determination of the regional public which is to benefit, receive protection and incur obligations in any interregional water transfer project.

#### 2. How Will Regional Water "Surplus," "Deficiency" and "Need" Be Defined?

Claims and counterclaims of water need, shortage, and surplus, rivaling the proverbial confusion of tongues, will surround any proposal for interregional water transfer. In accordance with the inexorable rule of political self-interest, each region involved can be expected both to exaggerate its own present and future water needs, while discrediting those of the other, and to give conservative estimates of its own water resources, while inflating those of the other.

Economists recognize that such factors as "need" and "surplus" are relative to demand,<sup>226</sup> as such, they cannot be defined in permanent or absolute terms. This is one reason why reliable long-range economic forecasts in the water resources field are difficult, if not impossible, to make.

Reciprocal protection, however, presumes some certainty of terms. Assume, for example, that a region of origin is granted a perpetual right to recapture exported water once its own need for the water arises. Such a putative right, without further clarification of the term "need," would be an open invitation to dispute. It would provide little protection upon which either region could rely. What

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<sup>225</sup> See, e.g., Water Resources Planning Act of 1965, § 244, 42 U.S.C. § 1962 (1966).

<sup>226</sup> See, e.g., WATER SUPPLY, *supra* note 193, at 3-4, 78. "The idea of 'needs' or 'requirements' for water has an appealing ring of calculable definitionness about it, as compared with the connotation of words like 'demands,' 'claims,' or 'desires.' But, in fact, the former means nothing more than the latter . . . . Finally, even if any sense could be made of the idea that men 'need' water in certain calculable amounts, it could not be inferred that regions 'need' water, since men will choose what regions they desire to live in on the basis of water availability combined with all other considerations." *Id.* at 35.

criteria would be used to measure need? What level of need would trigger the right to recapture? Who would make the finding of fact that need does or does not exist? A dilemma is posed. To adopt a fixed definition today of the need for water tomorrow is to be arbitrary—and to risk miscalculation. To defer the determination to a future date, when reliable data would be available, is to sacrifice present protection.<sup>227</sup> The same problem is raised with respect to definitions of water “surplus” and “deficiency.”

The very relativity of these terms, which will appear and reappear in debates over large-scale water transfers, points out the need for some basic criteria to guide discussion.

## IX. CONCLUSION

Western water has left its natural course many times to follow canals championed by water-deficient areas and charted by advancing technology. The law has adjusted the claims and defined the rights of the areas of origin and delivery created by these water diversions. As the foregoing discussion illustrates, there is no universal rule of law for determining either the legality of a particular diversion or the forms of legal protection to be accorded the areas affected.

Meaningful and detailed forms of legal protection for regions of origin and delivery cannot be recommended in the abstract but must be formulated within the context of concrete proposals for interregional water transfer. The general guidelines set out in the Appendix are offered for exploratory purposes with the hope that other students of water law will add to the literature on the subject.

While it must be recognized that political allocation will be the hallmark of any future interregional water transfer project, the law should not be viewed simply as a handmaid of local and regional interests in this process. The natural resource lawyer, cognizant that law is an instrument of public policy, should actively and responsibly participate in the formulation of that policy. There are definite signs that a *national* public interest is developing with respect to water resources planning and allocation in general, and to water quality and water-related recreation in particular. The public interest in water resources is continuously being declared anew. Each new declaration, quite predictably, will be the result of political accommodation; it will satisfy neither the strict standards of economic efficiency nor

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<sup>227</sup> Arguably, questions of future need for areas of origin in California are largely deferred. Reliance is placed upon water development funds and state action for the physical solution of prospective problems.

the traditional social preferences of federal reclamation policy. Nonetheless, if it causes wise adjustment to the present and future national needs of an increasingly urban society it will be worth the effort.

## APPENDIX

### I. GUIDELINES FOR RECIPROCAL PROTECTION

The following discussion of reciprocal protection for two hypothetical regions is based on two assumptions: (1) the transfer of water from one of the regions to the other, whatever the merits, is in the offing, and (2) the transfer will occur as a result of federal-state cooperation and within the framework of a subsidized-price water economy. For the most part the particular forms of reciprocal protection presented have been proposed elsewhere.

#### A. *Institutional Framework*

It shall be assumed for the purposes of discussion that each region is represented by a duly authorized interstate water agency empowered to negotiate the terms of an interstate compact which, upon ratification by the states involved and the United States, will be binding upon the participating states.

#### B. *Identification of Allotments*

##### 1. *Subsisting Rights*

Vested and subsisting rights in the water of the river, covering the full array of consumptive and non-consumptive uses, should be identified and inventoried.

##### 2. *Reserve Allotment*

Long-range water demand in the region of origin cannot be projected with scientific accuracy, but a reasoned estimate of the quantity of water necessary to supply future demands in the region should be made. The estimate should cover a specified period of time, hereafter referred to as the allotment term. All the water-related needs which are likely to arise during the allotment term should be identified and inventoried, including municipal, industrial, agricultural, fish and wildlife, hydro-power generation, pollution control, recreation and conservation needs. The reserve allotment should be equal to the amount of water necessary to satisfy those projected needs, maintain ecological balance, and preserve a healthy living environment within the region.

##### 3. *Export Allotment*

Any unappropriated water remaining after the deduction of the quantities needed to satisfy the subsisting rights and the reserve allotment

should be designated surplus available for export. Water users within the region of delivery should be given a contractual right to the export allotment, under a priority system (*see* section D *infra*) that will provide requisite security for water development and water right transfers.

#### C. *The Allotment Term*

The reserve and export allotments, and priorities attached thereto, should be operative for a fixed term of years, *e.g.*, 75 years, exceeding in length the period set for the amortization of the diversion facilities and related water development works. Thereafter, a succeeding term could be established with a new schedule of allotments, priorities and conditions.

#### D. *Establishment of Priorities*

The following priorities, which would be subject to dominant federal interests, *e.g.*, navigational servitudes, are suggested.

1. Water rights in the river which are vested and subsisting at the time the export is authorized should compose the first priority.

2. Water rights established by users in the region of origin during the allotment term, within the limits of the reserve allotment, should be given the second priority, whether they are senior or junior in time to rights established within the export allotment.

3. The export allotment would hold the third priority, subordinate to rights established within the reserve allotment.

4. In the event that the initial projection of region-of-origin needs proves inaccurate and the reserve allotment becomes exhausted within the allotment term, any additional water rights established thereafter by users in the region should be subordinated, during the term, to the rights established within the export allotment.

#### E. *Point of Diversion*

The point on the mainstream at which water is diverted can be of obvious consequence. The lower the diversion point the greater the range of upstream flow for non-consumptive uses. Engineering and pumping costs vary according to varying topography. Some diversion points make "piggy-back" projects along the route of the canal feasible; others may render such projects infeasible. The point of diversion should be selected only after all the interests of the respective regions have been taken into account.

#### F. *Interregional Integration of Water Development*

The diversion facilities may be capable of serving water demands in the region of origin in route to the points of delivery. "Piggy-back" projects could be authorized as part of the diversion project. The diversion canal could be used to develop hydro-electric power or recreational lakes for the

nify them for their losses, provided that if the annual losses of water exceeded the amount of water exported during that year the fund would not be used to indemnify the excess loss.

3. **Exhaustion of Surplus Water.** In the event that all the unappropriated water in the river becomes utilized under vested consumptive and non-consumptive rights, the fund proceeds would become payable as follows. If replacement water, in an amount equal or in excess of the export allotment, is delivered to the river from sources outside the region of origin within a specified time period, the complete fund would be payable to the region of delivery, to be apportioned among the states therein on the basis of their contributions. If replacement water is not made available within the specified period, or before the termination of the allotment period, the region of origin could have the option of receiving the complete fund, whereby the region of delivery would be given a right in perpetuity, to the export water, or to recapture the export water.

#### *J. The Establishment of a New Allotment, Priority and Term Schedule*

In advance of the end of the first allotment term, negotiations should commence to determine export and reserve allotments, and related priorities, for a new allotment term. Experience with the initial arrangement could lead to new departures. Priorities within the reserve and export allotments could be established, for instance, which subordinate low-value uses to higher-value uses. Higher-value uses within the region of delivery could be given precedence over lower-value uses within the region of origin, providing incentive for the exchange of water rights within the region of origin. The export allotment could be increased, subject to appropriate conditions upon water use. The allotment term could be shortened to provide for more flexibility and more frequent review of water supplies and demands. The possible variations are many; whatever form the new arrangements took, it would be informed by new data concerning water supply and demand.

## II. CONCLUSION

Because the above guidelines are framed against the backdrop of political allocation, they share many of the imperfections of that system. Perhaps they even compound some of those imperfections. But, again, the concept of regional protection owes its existence to an imperfect economic world. Legal protection designed to accommodate regional interests to the political allocation process is itself the creature of political negotiation and compromise. Any attempt to insulate the formulation of reciprocal protection from the national legislative process raises the possibility of political back-scratching on an interregional scale. For the national welfare, attempts must be made to face realistically the regional spheres of interest, on the one hand, and to take advantage of opportunities which arise to protect both regional and national interests, on the other. One thing is certain: a great deal of "water statesmanship" will be required in the coming years.

region of origin. Any additional water necessary to serve such interests would come out of the reserve allotment.

#### G. *Water Conservation*

Both regions should be required to pursue water conservation practices, pursuant to standards set out in the compact or federal legislation. Provision could be made for evaporation control, pollution abatement, canal-lining, metering, treatment and reuse, and other appropriate measures.

#### H. *Water Right Transfers*

The various states in both regions could conceivably agree to remove any legal impediments on the transfer of water rights (created within the reserve and export allotments) from lower uses to higher uses. This might be accomplished on a graduated basis to permit an opportunity for economic adjustment. The federal legislation authorizing the diversion project might make provision for both the assignment of repayment obligations and water rights to maximize the possibility of water exchanges within the region of delivery during the allotment term.

#### I. *Regional Guarantee and Development Fund*

The region of delivery should be obligated to establish a guarantee and development fund, the proceeds of which would become payable to the region of origin or returned to the region of delivery upon the occurrence of certain specified events. Each state within the region of delivery would contribute to the fund on the basis of the benefits received from the diversion project. The fund could be held and managed by a private third-party institutional depository or the federal government. Contributions to the fund could be made in lump sum or in installments. Prudent investment of a set percentage of the fund could be permitted. Interest or income on the principal would be plowed back into the fund.

The fund could represent a multi-state obligation, separate and distinct from the federal aspects of the diversion project. The obligation, once assumed, could not be legally impaired by legislative action on the federal or state level.

Monies from the fund could be made payable under the following conditions:

1. **Water Development Costs in Region of Origin Increased by Export.** Upon a showing that the costs of a water development project in the region of origin are increased as a result of the water diversion, a sum equaling the amount of that increase would be contributed to the project.
2. **Water Shortage Detrimental to Lower Priority Holders of Rights.** In the event that a water shortage arises which deprives the non-priority holders of water rights, the fund could be used to indem-