

AMENDED IN SENATE MAY 28, 1999

AMENDED IN SENATE APRIL 13, 1999

SENATE BILL

No. 970

Introduced by Senator Costa

February 26, 1999

An act to amend Sections 1011 and 1707 of, to add Sections 1014, 1015, 1016, and 1017 to, and to repeal and add Sections 1726, 1727, and 1732 of, the Water Code, relating to water.

LEGISLATIVE COUNSEL'S DIGEST

SB 970, as amended, Costa. Water rights.

(1) Existing law declares that when any person entitled to the use of water under an appropriative right fails to use all or part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriative water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. Existing law declares that where water appropriated for irrigation purposes is not used by reason of land fallowing, the reduced usage shall be deemed to constitute water conservation for the purposes of that provision.

This bill would, instead, provide that where water appropriated for irrigation purposes is not used by reason of temporary land fallowing, the reduced usage shall be deemed to constitute water conservation for the purposes of that provision.

(2) Existing law regulates water transfers.

This bill would provide that the transfer of water, or the offer of water for transfer, shall not cause, or be the basis for, a forfeiture, abandonment, or modification of any water right, contract right, or other right to the use of that water. The bill would prohibit certain transactions relating to the transfer of water from being used as evidence of waste or unreasonable use, or of cessation of use, of the water made available for transfer. The bill would require, during the term of a temporary change, as defined, if an enforcement action or other proceeding is commenced that alleges that the use of water violates certain limitations on the water that is subject to that water transfer, that the determination of the alleged violation be based on an assessment of the transferee's use of the transferred water. The bill would require a transferred water right to revert from the transferee to the transferor under specified conditions. The bill would prohibit a transferee or any beneficiary of a transfer from bringing any claim for a continuation of the water supply made available by a transfer agreement or otherwise claiming any right to a continued supply of water as a result of the transfer beyond the term of the transfer agreement. The bill would prohibit any transfer of water pursuant to any law from causing a forfeiture, diminution, or impairment of any water right and would require a transfer of water that is approved pursuant to that specified existing law to be deemed to be a beneficial use of that water by the transferor.

(3) Existing law authorizes a person entitled to the use of water to petition the State Water Resources Control Board for a change in a point of diversion, place of use, or purpose of use of that water for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water, if the state board determines that the proposed change meets specified requirements.

This bill would provide that, upon the request of the petitioner, the state board may specify as part of its approval of the petition that any water that is subject to the approval shall be in addition to water that is required, if any, to be used for instream purposes to meet certain federal, state, or local regulatory requirements. The bill would, except as provided, require water that is subject to a petition granted pursuant to



these provisions to be used to meet, in whole or in part, those requirements, as prescribed. The bill would specify related matters.

(4) Existing law provides procedures for temporarily changing the point of diversion, place of use, or purpose of use involving the transfer of water.

This bill would revise and recast those procedures, including prescribed procedures for petition, notice, review, ~~protest~~ *comment*, and decision regarding a proposed change.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. This act shall be known and may be cited
2 as “The Water Rights Protection and Expedited
3 Short-Term Water Transfer Act of 1999.”

4 SEC. 2. Section 1011 of the Water Code is amended to
5 read:

6 1011. (a) When any person entitled to the use of
7 water under an appropriative right fails to use all or any
8 part of the water because of water conservation efforts,
9 any cessation or reduction in the use of the appropriated
10 water shall be deemed equivalent to a reasonable
11 beneficial use of water to the extent of the cessation or
12 reduction in use. No forfeiture of the appropriative right
13 to the water conserved shall occur upon the lapse of the
14 forfeiture period applicable to water appropriated
15 pursuant to the Water Commission Act or this code or the
16 forfeiture period applicable to water appropriated prior
17 to December 19, 1914.

18 The board may require that any user of water who
19 seeks the benefit of this section file periodic reports
20 describing the extent and amount of the reduction in
21 water use due to water conservation efforts. To the
22 maximum extent possible, the reports shall be made a
23 part of other reports required by the board relating to the
24 use of water. Failure to file the reports shall deprive the
25 user of water of the benefits of this section.



1 For purposes of this section, the term “water
2 conservation” shall mean the use of less water to
3 accomplish the same purpose or purposes of use allowed
4 under the existing appropriative right. Where water
5 appropriated for irrigation purposes is not used by reason
6 of temporary land fallowing or crop rotation, the reduced
7 usage shall be deemed water conservation for purposes of
8 this section.

9 (b) Water, or the right to the use of water, the use of
10 which has ceased or been reduced as the result of water
11 conservation efforts as described in subdivision (a), may
12 be sold, leased, exchanged, or otherwise transferred
13 pursuant to any provision of law relating to the transfer
14 of water or water rights, including, but not limited to,
15 provisions of law governing any change in point of
16 diversion, place of use, and purpose of use due to the
17 transfer.

18 (c) Notwithstanding any other provision of law, upon
19 the completion of the term of a water transfer agreement,
20 or the right to the use of that water, that is available as a
21 result of water conservation efforts described in
22 subdivision (a), the right to the use of the water shall
23 revert to the transferor as if the water transfer had not
24 been undertaken.

25 SEC. 3. Section 1014 is added to the Water Code, to
26 read:

27 1014. The transfer of water, or the offer of water for
28 transfer, shall not cause, or be the basis for, a forfeiture,
29 abandonment, or modification of any water right,
30 contract right, or other right to the use of that water. An
31 offer of water for transfer, contract negotiations, or a
32 transfer agreement shall not be used as evidence of waste
33 or unreasonable use, or of cessation of use, of the water
34 made available for transfer.

35 SEC. 4. Section 1015 is added to the Water Code, to
36 read:

37 1015. During the term of a temporary change, as
38 defined in Section 1728, if an enforcement action or other
39 proceeding is commenced that alleges that the use of
40 water violates Section 2 of Article X of the California



1 Constitution, Sections 100, 101, 1410, and 1675, or any
2 other legislative, administrative, or judicial limitation on
3 the water that is subject to that water transfer and the
4 water involved is, at the time of the alleged violation,
5 subject to a water transfer, the determination of the
6 alleged violation shall be based on an assessment of the
7 transferee's use of transferred water. If a transferee's
8 right to use transferred water is divested, in whole or in
9 part, on the basis of the transferee's abandonment,
10 forfeiture, waste, or unreasonable use of the transferred
11 water, the divested portion of the right shall revert
12 immediately to the transferor.

13 SEC. 5. Section 1016 is added to the Water Code, to
14 read:

15 1016. (a) At the conclusion of the term of a water
16 transfer agreement, all rights in, and the use of, the water
17 subject to the agreement revert back to the transferor.

18 (b) After the conclusion of the term of a water transfer
19 agreement, the transferee or any beneficiary of the
20 transfer shall not do either of the following:

21 (1) Bring any claim for a continuation of the water
22 supply made available by the agreement.

23 (2) Claim any right to a continued supply of water as
24 a result of the transfer, based on reliance, estoppel,
25 intervening public use, prescription, water shortage
26 emergency, or unforeseen or unforeseeable increases in
27 demand, or any other cause.

28 SEC. 6. Section 1017 is added to the Water Code, to
29 read:

30 1017. No transfer of water pursuant to Section 1011 or
31 any other provision of law shall cause a forfeiture,
32 diminution, or impairment of any water right. A transfer
33 of water that is approved pursuant to Section 1011 or any
34 other provision of law shall be deemed to be a beneficial
35 use of that water by the transferor.

36 SEC. 7. Section 1707 of the Water Code is amended to
37 read:

38 1707. (a) (1) Any person entitled to the use of water,
39 whether based upon an appropriative, riparian, or other
40 right, may petition the board pursuant to this chapter,



1 Chapter 6.6 (commencing with Section 1435) or Chapter
2 10.5 (commencing with Section 1725) for a change for
3 purposes of preserving or enhancing wetlands habitat,
4 fish and wildlife resources, or recreation in, or on, the
5 water.

6 (2) The petition may be submitted for any of the
7 purposes described in paragraph (1) and may, but is not
8 required to, be submitted in combination with a petition
9 to make any other change authorized pursuant to this
10 part. The petition shall specify the time, location, and
11 scope of the requested change, and other relevant
12 information relating thereto.

13 (b) The board may approve the petition filed pursuant
14 to subdivision (a), subject to any terms and conditions
15 which, in the board's judgment, will best develop,
16 conserve, and utilize, in the public interest, the water
17 proposed to be used as part of the change, whether or not
18 the proposed use involves a diversion of water, if the
19 board determines that the proposed change meets all of
20 the following requirements:

21 (1) Will not increase the amount of water the person
22 is entitled to use.

23 (2) Will not unreasonably affect any legal user of
24 water.

25 (3) Otherwise meets the requirements of this division.

26 (c) (1) Upon the request of the petitioner, the board
27 may specify, as part of its approval of the petition, that the
28 water that is subject to the approval pursuant to this
29 section shall be in addition to water that is required, if any,
30 to be used for instream purposes to satisfy any applicable
31 federal, state, or local regulatory requirements governing
32 water quantity, water quality, instream flows, fish and
33 wildlife, wetlands, recreation, and other instream
34 beneficial uses. If the request is approved by the board,
35 state and local agencies, as well as the courts, shall not
36 credit the water subject to that petition towards
37 compliance with any of the regulatory requirements
38 described in this subdivision. A federal agency shall
39 comply with the requirement imposed by this paragraph



1 to the extent required by federal law, or to the extent that
2 it chooses to comply.

3 (2) For the purposes of this subdivision,
4 “requirements” includes requirements or obligations
5 that have not been formally established or allocated at the
6 time of the petition, and obligations under any agreement
7 entered into to meet those requirements. Neither any
8 petition filed pursuant to this section nor any documents
9 or statements made in connection therewith shall be
10 construed or used as an admission, evidence, or indication
11 of any obligation to meet any of the requirements
12 described in this subdivision.

13 (d) Except as provided in subdivision (c), water that
14 is subject to a petition granted pursuant to this section
15 shall be used to meet, in whole or in part, any
16 requirement described in subdivision (c) if any of these
17 requirements exist. The water shall be credited to the
18 petitioner, or to any other person or entity designated by
19 the petitioner, whenever that person or entity has, or may
20 have, obligations to meet one or more of the
21 requirements described in subdivision (c). The water
22 shall be credited towards compliance with any
23 requirements described in subdivision (c), by state and
24 local agencies, as well as the courts. A federal agency shall
25 comply with the requirement imposed by this subdivision
26 to the extent required by federal law, or to the extent that
27 it chooses to comply.

28 SEC. 8. Section 1726 of the Water Code is repealed.

29 SEC. 9. Section 1726 is added to the Water Code, to
30 read:

31 1726. (a) (1) A permittee or licensee who proposes
32 a temporary change shall submit to the board a petition
33 to change the terms of the permit or license as required
34 to accomplish the proposed temporary change. Any
35 petition for a temporary change shall be filed by the
36 permittee or licensee. If the proposed temporary change
37 is for the benefit of a contractor or user supplied directly
38 or indirectly by the permittee or licensee, the permittee
39 or licensee may authorize the contractor or user to



1 participate as a copetitioner. The permittee or licensee
2 shall identify any copetitioner in the petition.

3 (2) A contractor or user described in paragraph (1),
4 whether or not designated as a copetitioner, and the
5 person to whom the water is proposed to be transferred,
6 shall be named as parties to the proceeding, with the
7 same rights to receive notices, respond to board
8 determinations, and petition for writ of mandate as the
9 petitioner.

10 (b) A petition shall include both of the following:

11 ~~(1) Proof that the transferor has the legal right to use~~
12 ~~the water proposed to be transferred throughout the~~
13 ~~term of the proposed temporary change.~~

14 *(1) Reference to the permit or license that serves as*
15 *the basis for the water transfer.*

16 (2) A written description of the changes in water
17 storage, timing, and point of diversion, place and purpose
18 of use, timing and point of return flow, and water quality
19 of instream flows that are likely to occur as a result of the
20 proposed temporary change.

21 (c) A petitioner shall provide a copy of the petition to
22 the Department of Fish and Game, the board of
23 supervisors of the county or counties in which the
24 petitioner currently stores or uses the water subject to the
25 petition, and the board of supervisors of the county or
26 counties to which the water is proposed to be transferred.

27 (d) Within 10 days of the date of submission of a
28 petition to the board, the petitioner shall publish in not
29 less than one newspaper of general circulation, in the
30 county or counties in which the petitioner currently
31 stores or uses the water subject to the petition, a notice of
32 the petition and a brief description of the terms of the
33 proposed temporary change. The board shall, in a timely
34 manner, provide to the petitioner a list of water right
35 holders of record on file with the board who may be
36 affected by the transfer, and the petitioner shall provide
37 written notice to those water right holders not later than
38 10 days after the date on which the petition is submitted.
39 The board shall post the notice of petition on its Internet
40 web site not later than 10 days after the date on which the



1 petition is submitted. The notice of the petition shall
2 specify the date on which protests are due. The board
3 may impose on the petitioner any other notice
4 requirement it determines to be necessary.

5 (e) Within 10 days of the date of receipt of a petition,
6 the board shall commence an investigation of the
7 proposed temporary change. Pursuant to that
8 investigation, the board shall determine if the water
9 proposed to be transferred would have been
10 consumptively used or stored pursuant to the petitioner's
11 permit or license in the absence of the proposed transfer
12 or conserved pursuant to Section 1011. The board also
13 shall evaluate the changes in water storage, timing and
14 point of diversion, place and purpose of use, timing and
15 point of return flow, water quality, and instream flows,
16 and other changes that are likely to occur as a result of the
17 proposed temporary change.

18 (f) Water users that may be affected by a proposed
19 temporary change and any other interested party may
20 file a written ~~protest~~ *comment* regarding a petition with
21 the board. ~~Protests~~ *Comments* shall be filed not later than
22 30 days after the date that the notice was published
23 pursuant to subdivision (d). The board shall evaluate and
24 take into consideration all ~~protests~~ *comments* that are
25 filed in a timely manner.

26 (g) (1) Except as specified in paragraphs (2) and (3),
27 the board shall render a decision on the petition not later
28 than ~~30~~ 35 days after the date that investigation
29 commenced or the date that the notice was published,
30 whichever is later. The board's decision shall be in
31 accordance with the substantive standards set forth in
32 Section 1727. The board shall explain its decision in
33 writing and shall send copies of the decision to the
34 petitioner, the Department of Fish and Game, the board
35 of supervisors of the county or counties described in
36 subdivision (c), the proposed transferee, and any party
37 who has filed a written ~~protest~~ *comment* in accordance
38 with subdivision (f).



1 (2) If ~~protests~~ *comments* are filed in accordance with
2 subdivision (f), or for any other good cause, the board
3 may extend the date of its decision for up to 20 days.

4 (3) If the board or the petitioner determines that an
5 additional extension of time for a decision is necessary for
6 the board to make the findings required by Section 1727,
7 or that a hearing is necessary for the board to make those
8 findings, the board may extend the time for a decision
9 with the consent of the petitioner. If the petitioner agrees
10 to a hearing, the board shall identify the issues for which
11 additional evidence is required and shall fix a time and
12 place for the hearing. The board shall provide notice of
13 the time, place, and subject matter of the hearing to the
14 petitioner, the Department of Fish and Game, the board
15 of supervisors of the county or counties described in
16 subdivision (c), the water right holders of record
17 identified pursuant to subdivision (d), the proposed
18 transferee, and any party who has filed a written ~~protest~~
19 *comment* in accordance with subdivision (f).

20 SEC. 10. Section 1727 of the Water Code is repealed.

21 SEC. 11. Section 1727 is added to the Water Code, to
22 read:

23 1727. (a) The board shall review a petition for a
24 temporary change of water rights in accordance with this
25 section.

26 (b) The board shall approve a temporary change if it
27 determines that a preponderance of the evidence shows
28 both of the following:

29 (1) The proposed temporary change would not injure
30 any legal user of the water, during any potential
31 hydrologic condition that the board determines is likely
32 to occur during the proposed change, through significant
33 changes in water quantity, water quality, timing of
34 diversion or use, consumptive use of the water, or
35 reduction in return flows.

36 (2) The proposed temporary change would not
37 unreasonably affect fish, wildlife, or other instream
38 beneficial uses.

39 (c) The petitioner shall have the burden of
40 establishing that a proposed temporary change would



1 comply with paragraphs (1) and (2) of subdivision (b).
2 If the board determines that that petitioner has
3 established a prima facie case, the burden of proof shall
4 shift to any party that has filed a ~~protest~~ *comment*
5 pursuant to subdivision (f) of Section 1726 to prove that
6 the proposed temporary change would not comply with
7 paragraphs (1) and (2) of subdivision (b). *The board may*
8 *make a determination required by this subdivision*
9 *without a hearing.*

10 (d) In reviewing a petition for a temporary change,
11 the board shall not modify any term or condition of the
12 petitioner's permit or license, including those terms that
13 protect other legal users of water, fish, wildlife, and other
14 instream beneficial uses, except as necessary to carry out
15 the temporary change in accordance with this article.

16 (e) In applying the standards set forth in paragraphs
17 (1) and (2) of subdivision (b), the board shall not deny,
18 or place conditions on, a temporary change to avoid or
19 mitigate impacts that are not caused by the temporary
20 change. Neither the Department of Fish and Game, nor
21 any other state agency that comments on the proposed
22 temporary change, shall propose conditions to mitigate
23 effects on fish, wildlife, or other instream beneficial uses
24 caused by factors other than the proposed temporary
25 change. This subdivision does not limit the board, the
26 Department of Fish and Game, or any other state agency,
27 in proceedings pursuant to any provision of law other
28 than this article.

29 SEC. 12. Section 1732 of the Water Code is repealed.

30 SEC. 13. Section 1732 is added to the Water Code, to
31 read:

32 1732. The petitioner shall not initiate or increase the
33 use of groundwater to replace surface water transferred
34 pursuant to this article, except in compliance with this
35 article and Sections 1745.10 and 1745.11.

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