Susan France

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Subject: Draft consolidation of permanent and temporary transfer legislation for WPTF consideration

Attached is a first draft attempt to consolidate the water rights leasing bill and the changes in the permanent transfer legislation, both of which are being considered by the surface water transfers subcommittee of the WPTF. I prepared the attached because it seemed to me that, in most respects, the procedure and criteria for consideration and approval of both permanent and temporary transfers should be identical and should vary only when there were justifiable reasons for that variance. In reviewing the previous work of the subcommittee I also saw language in the leasing bill that in my opinion should be used to improve the current permanent transfer statutes and subcommittee proposed changes in the permanent transfer statutes that should be reflected in the leasing bill. In preparing the attached I tried to make use of what I thought were the best of both. As described and hopefully explained in more detail below, I also changed or left out some pieces of the subcommittee's work.

Decisions that I made and for which the reasons may not be obvious are as follows:

- First I determined that a definition section was not needed. The terms department and director do not need definition as long as the act is in the form of an amendment to the existing transfer statutes. I also chose not to define "surface water appropriations" but there is new language in 46-290 that describes what types of appropriations would and would not be transferrable.
- The last new paragraph in the amended section 46-291 is an attempt to capture the discussion at the last meeting of the EC about the need for a county to be able to provide comments on a proposed transfer, but to not become a party. Dave, I know you offered to write that language, but I took a shot at it as part of the consolidation effort. Feel free to modify as you think appropriate.
- The criteria for both permanent and temporary transfers are all in the amended 46-294; only subsections (1)(g) and (1)(h) are specific to one or the other.
- As a new criteria I added (1)(e); that is from our rules now, but in my opinion should be in the statute.
- I did not include in the list of criteria subsections (6) or (7) of the subcommittee's draft leasing bill. In my view, both (6) and (7) are covered by (1)(d) in the change to 46-294 (i.e. do not diminish the supply or harm appropriators). The right to divert more than the volume of water historically consumed should be transferrable as long as that transfer and diversion causes no harm. Also irrigators should not be able to transfer all the water necessary to irrigate the same number of acres elsewhere if, because of that change in location and the resulting change in location of return flow, there will be harm to some other user.
- I also did not include criteria (8) or (10) of the subcommittee's draft leasing bill. (8) tries to relate the criteria of the map transfer process to the leasing bill. First, I don't know what that section was intended to do. Second, it seems to me that if leases are allowed, they should be doable within an irrigation district and be subject to the process that follows a map transfer. If that needs to be recognized in statute, it should be in the map transfer legislation, not in this legislation. With regard to the subcommittee's criteria (10), i.e. that the lease address the reversion of the water right, I don't think that is necessary. If the law makes it clear that a water right shall be cancelled if not used in five years, it will be cancelled whether subject to a lease or not. If a lessee want to put in a clause that the lease will terminate because of non-use for something less than 5 years, that is fine, but we don't need to write the lease terms into law.
- I also did not include section 8 of the subcommittee's draft leasing bill. If the effect of leases on adjudications needs to be dealt with in statute, it should be by amendment to the adjudication statutes.
- Section 9 of the draft leasing bill was also left out as probably unnecessary. However, if others agree, such a provision could be added to this legislation or might even fit better as part of the "proactive" legislation.

- With respect to renewals and extensions of leases, I did not put in anything about when the application for approval had to be filed. Since all renewals are treated the same as new applications and no lease can be for a term longer than 30 years, there isn't any need for limitations on when the application has to be made.
- On the question of whether tax valuations should change when the transfer is temporary, the attached draft proposes that they would not change as long as the lease was for __ years or less. I left the decision on the number of years as a subject for discussion. If it were up to me I would probably place the cutoff at 10 years.
- I did not include section 14 of the subcommittee leasing bill draft though it could easily be added. I am not sure of the intended purpose of that section which deals with DNR notice to the county assessors.
- Because I was limiting my efforts on the attached draft to transfers, both permanent and temporary, I did not do anything with the proposed material on pages 5, 6 and 7 of the subcommittee's 7-21 draft. If the consolidated approach is used, section 14 on page 5 is not needed and section 15 and the other material on pages 6 and 7 would be accomplished by amendments to other statutes than those to be amended by the attached.
- Lastly, the concepts proposed in the subcommittee's proposed amendments to the current spreading language in 46-294 (bottom half of page 8 of the 7-21 draft) have been reworked and are found in the proposed revisions to that section in the attached. I attempted to distinguish between increases in acreage that would cause no harm and those that would. Harm as a result of spreading would be permissible only if the spread was on the same or an adjacent quarter section and involved no more than a 10% increase in acreage or 5 acres whichever was less. I felt it unnecessary to include the specific references to the point of diversion or the return flows because those would be covered by the "no harm" option and would be inconsistent with the proposed 5%/10acre/adjacent quarter option. If the subcommittee intent was to prevent even the 5%/10 acres/adjacent quarter option if there was harm because of a change in diversion point or in quantity or location of return flows, that option is not needed and the "no harm" option is all that is needed. However, I did not think that was the intent.

I know the subcommittee meets on Monday and that the members will not have enough time to review the attached before then. However, if possible I would like to get this memo and the attached to them before the meeting so we can at least discuss it in general terms. If it is appropriate to use the consolidated approach, and I strongly believe that it is, then I don't believe it is wise for the subcommittee to continue down two separate trails, one for the leasing bill and one for amendment of permanent transfers. As a result, I encourage Ann to forward this memo and the attached to the subcommittee no later than mid-morning Monday.

Jim Cook