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CHAPTER FIVE

Identifying Potential Projects and Developing a Plan

The process of acquiring water to dedicate to an environmental purpose may seem simple and straightforward at first glance, but it is actually a complex administrative and legal process that encounters an array of technical, political, and social issues. Therefore, this *Water Acquisition Handbook* will describe the steps involved in developing a comprehensive preliminary plan at the outset to help focus your efforts, to keep you on course, and to ensure that the water transfer project is legally sound.

Two of the most important preliminary steps you can take in the process of obtaining a water right are to (1) develop clear and defensible objectives for the proposed project, and (2) identify local stakeholders, community leaders, agency staff, and other individuals who may have an interest in the proposed project. You will want to develop good working relationships with stakeholders and community leaders early in the process since their knowledge, advice, and support can be invaluable over the long term. In fact, community support for—or opposition to—your plan can make or break your project.

Before doing any of this, you need to locate the potential project area (for example, a stream reach or wetland) where additional (environmental) water

may be needed to support a desired environmental condition and where you can achieve the most benefit for dollars spent.

IDENTIFYING A SUITABLE PROJECT



To identify impaired stream systems and wetlands in California that could benefit from additional water, there are numerous sources that can help you, such as environmental organizations and state and federal resource agencies and reports.¹ (See Appendix F, “Agency Contact Information.”) Also, DFG has been working on an assessment of streams and rivers statewide and has completed reports that highlight instream flow needs within several watersheds.

If the proposed acquisition aims to improve instream flows for threatened and endangered species, you should contact the regional DFG office² and the local or regional offices of the National Marine Fisheries Service (NMFS) and the FWS, all of whom have information about stream systems, fishery needs, and local environmental needs. These offices also may be able to provide you with information about local groups that have an interest in the water systems in question.



THE SWRCB'S DIVISION OF WATER RIGHTS

The SWRCB's Division of Water Rights collects and manages information regarding major stream systems and watersheds in California. The division has staff engineers or environmental specialists who are knowledgeable about water rights and public trust issues in particular areas. A telephone call or visit to the division's office may yield a wealth of information, and the agency staff will likely be able to point you in the direction of additional information. We encourage you to engage the SWRCB staff early in the development of your project; they can provide you with information and resources that will smooth the way for obtaining SWRCB approval to dedicate the water for environmental use.

FUNDING AN ENVIRONMENTAL WATER ACQUISITION



Completing an environmental water acquisition will require funding for a range of costs, including the payment to the seller, development of the water rights opinion and supporting information, completion of an appraisal, and the efforts of technical experts and lawyers that will assist you in navigating the SWRCB's administrative process.

Private foundation and public agency grants are logical sources of funding for water right acquisition projects. Because grant programs and funding sources can quickly change, we have not attempted to provide a comprehensive list of potential funding sources. However, the CALFED Bay-Delta Authority Web site³ has information regarding its Ecosystem Restoration Program—which manages a grants program—and there are links to state and federal resource agencies that manage other related programs where funding information can be obtained.

Grant programs focused on the restoration of habitat can vary widely. Some of these might allow for the acquisition of water as a means of improving habitat. Most grant programs target specific geographic locations and have explicit goals and objectives. Many programs solicit proposals from municipalities, counties, special districts, and nonprofit organizations. Often these grant programs require that one of the project proponents be a nonprofit or public entity.

Private charitable foundations can also provide funding. The Foundation Center Library in San Francisco (with other cooperating locations throughout California) provides information on a wide variety of foundations.⁴

If your organization is a 501(c)(3) nonprofit organization, the seller may be able to donate a part or all of the water and receive the fair market value as a tax deduction. In pursuing this option, the seller should consult with a tax advisor to determine the availability and the extent of any tax deduction.

OBTAINING LEGAL COUNSEL



As noted, you also will need the assistance of a water rights attorney. Specifically, an attorney will need to prepare the water right opinion that describes the water right in question (see Chapter 3, “Types of Water and Water Rights in California”). The SWRCB's Web site maintains a list of attorneys who have experience in dealing with water rights.⁵

The attorney you choose should be well versed in California's hybrid system of water rights, have experience in preparing water rights opinions, and have knowledge of water transfers. Additionally, the attorney should be familiar with the administrative, political, and legal issues related to the acquisition of water rights and the dedication of rights to environmental use. The attorney also should have experience working with the SWRCB (including informal contact with SWRCB staff) and experience with the formal administrative hearing process. An attorney, of course, can be quite costly, but some lawyers are willing to work at a reduced rate, for a flat fee, or on a pro bono basis (free of charge).





DEVELOPING CLEAR OBJECTIVES

The importance of articulating clear and defensible objectives at the outset of your project cannot be overstated. To begin, you should ask yourself questions such as these: Where and how much water do you want to acquire? How would it benefit the environment? How will it impact third parties? Why should a foundation or other funding source give you money to achieve this goal? The answers to these questions should help you build the basis for developing clear objectives for the project that will stand up to the critics you may face at some point in the process.

In most cases, your plan of action for a proposed transfer or acquisition of environmental water is likely to be driven by resource requirements already determined by a state or federal agency. In other words, you might launch a water transfer project for a region that has already been designated by an agency as needing environmental protection, and then you would want to follow the recommendations of that agency for how such a project should proceed. In fact, if an agency has designated such a project as necessary, the staff may already have done much of the work you would otherwise need to do.

A resource agency may have already designated an area for environmental restoration and thus can provide you with data and information.



GARNERING LOCAL SUPPORT

In addition to the support of agencies, it is important that you gain the support of local stakeholders and anyone else who may be affected by a water transfer. Stakeholders could include individuals or entities who hold rights to the water in question, watershed councils and other local groups, the local irrigation or water district organization that processes water in that region, environmental groups, or local and state decision makers. It is important that you explain a project's objectives to stakeholders, seek their input and guidance about the project, and work through any of their concerns that may arise through the development and implementation phases of the project.



FINDING COMMON OBJECTIVES

As a sample scenario, in a case that involves augmenting instream flows in a specific river to improve the rearing habitat for salmon, an agency may already have documented a clear and defensible objective to support such a project. The agency's biologists and ecologists may have completed the bulk of the data collection and hydrologic analysis. They may also have evaluated instream flow requirements for several different stream systems and set priorities about which stream system has the most urgent need.

You will want to be sensitive to the priorities that these agencies have developed, otherwise you will risk your project failing due to lack of funding or support. You do not want to alienate resource agency staff or SWRCB staff, all of whom can be critical to the success of your project.

In other cases, your project may not be driven by the goals of an agency but by an individual or a water district or other local group that enlists your services to assist them in obtaining a water transfer. In these cases, the interested parties may not have developed clear and defensible objectives before coming to you, and you will need to work with them to outline their objectives. You will also need to be sensitive to the needs and priorities of these parties who have engaged you to help them with their project.

Be aware, however, that a project that initially involves only a few interested parties could grow to involve a long list of individuals, organizations, and agencies as the project unfolds. It is a good idea to begin a dialogue with interested parties early in the process to make them aware of your plans and to remain flexible and willing to adapt to their needs throughout the duration of the project. If you haven't addressed the concerns of stakeholders before you file a change petition with the SWRCB, their opposition at this late stage could derail your project.

But local stakeholders and interested parties can lend support to your project and also provide you with valuable information and insight about the area's water rights, the history of water use, the availability of water, and detailed information regarding environmental water needs in the area. Work with local interests to develop a common understanding or agreement about the factual issues related to your project, the proposed water acquisition budget, the scientific assessment of environmental degradation, and possible restoration and enhancement activities.





ADDRESSING AND RESOLVING POLITICAL ISSUES

As author Mark Twain proclaimed, “Whiskey’s for drinking, and water’s for fighting over.” Times have not changed very much in terms of the politicization of water in California. Political issues—at state, regional, and local levels—can make or break your project. The acquisition of water rights, particularly for environmental purposes, is a very sensitive issue in most parts of the state. Thus, the potential impact that politics might have on a project should not be underestimated.

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Every environmental water acquisition, transfer, and dedication process has its own set of unique political issues that must be addressed. The acquisition of a small quantity of water on a relatively small tributary may not be as politically contentious as, for instance, a proposal to acquire instream flows in one hydrologic basin for use in another basin, or a proposal that seeks to transfer water through the San Francisco Bay–Delta. Political issues, small or large, should not be ignored. At the very least these issues or concerns can complicate a project and result in delays and increased costs or modifications to the project, such as a change in the quantity of water acquired or how the water will eventually be used. In a worst-case scenario, unresolved political issues and opposition can result in the environmental water acquisition and transfer being abandoned or terminated.

Local and regional political support may assist you in obtaining funding for a project. Conversely, unresolved political issues and political opposition could hamper your ability to obtain funding from private or public sources, as some public and private institutions shy away from highly controversial issues.

Although local politics do not factor into the SWRCB’s legal and factual standards used to approve or reject a petition to transfer water, local and regional political issues certainly can make the process more difficult. Therefore, developing a flexible strategy or plan for identifying and resolving political issues will help protect the project. This strategy should identify potential political issues associated with the project, identify local leaders and agency personnel who can assist in spotting and resolving political issues, and include a plan to meet with agency personnel, local leaders, and elected representatives to discuss the project, obtain their input, and seek their support.



EARLY DIALOGUE WITH INTERESTED PARTIES

You should make a good faith effort to identify, address, and resolve certain political issues. Generally, initiating a dialogue early in the process with agency staff, elected representatives, and local interests will be useful. Such local and regional agencies may include the local irrigation district, water agency, county planning department, and resource conservation district. You also should contact regional offices for state and federal resource agencies, including DFG, DWR, FWS, NMFS, BOR, and the U.S. Bureau of Land Management (BLM). Working closely with these organizations and individuals may help lay the groundwork for addressing political issues before they arise. In this way you may be able to avoid the harm and suspicion that can result from false rumors. Agency staff also may provide critical insight into the opinions of local elected representatives, such as members of the county board of supervisors.

Your investigation of local and regional politics should include inquiries into which elected representatives have a particular interest in water issues. Boards of supervisors or city council members usually have particular interests: more often than not, especially in rural areas, one or more of them will have a demonstrated interest and knowledge in water-related issues. It is also important to talk to the seller’s neighbors, the local Chamber of Commerce, the Farm Bureau, and other potentially affected water users. Listen carefully to their concerns and suggestions and be open to modifying a project to address concerns.

Even if you cannot satisfy all political concerns, going through the process of identifying the political issues and working with local, regional, state, and federal officials to discuss the issues will strengthen relationships with them and with stakeholders and thus will strengthen your project.

To identify local and regional political issues that may affect your project, search the Internet for recent news articles on water issues and contact local environmental and watershed groups, water users, and resource agency personnel to inquire about issues.

Although every environmental water acquisition and transfer has its own set of political issues, the following are some common ones that may affect your project:

1. *Third-party impacts.* Local leaders and elected officials will likely be concerned about any water acquisition that seeks to transfer water out of their area or converts the water use from agricultural irrigation to environmental restoration. Among other concerns, they will likely be worried about how the transfer will affect the local economy.



In general, the term “third-party impacts” refers to economic impacts on individual, community, or other interests that are not directly involved in the acquisition, as well as impacts on environmental resources. The Water Code does address impacts to fish, wildlife, and recreation, as well as to downstream water right holders,⁶ by requiring petitioners to show that a project will not have detrimental consequences for third parties.



IMPACT ON THIRD PARTIES

There are a number of factors that can determine whether a project will impact third parties. These include, but are not limited to, the source of the water, the length of the transfer, and the location of the transfer. Some examples of third-party impacts include reduction in farm-related employment as a result of land being taken out of production, and other associated economic effects; impacts on groundwater levels that result in changes to the cost of pumping groundwater as a substitute for surface water; impacts on fish and wildlife, including habitat; and impacts on recreation.

An environmental water acquisition may cause harm to the local economy when the purpose or place of use changes. For instance, transferring water that has been used historically for irrigation could result in the irrigation of fewer acres, which could result in a reduced need for labor, and reduced commerce with local businesses that sell seed and fertilizer, as well as others who are involved in the local and regional economy.

In evaluating an environmental water acquisition, it is critical to look at these third-party impacts, as they may spark opposition to the project from businesses, local agencies, or elected officials. Regardless of politics, you may choose not to proceed because the environmental good does not warrant the potential detriment to others. There is limited legal protection for third parties impacted by a water transfer. The Water Code requires that there be an evaluation of third-party economic impacts under only two circumstances.⁷ If a local or regional agency is seeking to transfer surplus water under the authority of the Water Code, the SWRCB must show that the transfer does not unreasonably affect the overall economy of the area from which the water is being transferred.⁸ Additionally, when an individual or public agency seeks to utilize the unused conveyance capacity of a public water agency, the individual or agency must, among other things, find that the transfer will not unreasonably affect the overall economy of the county from which the water is being transferred.⁹

Some water transfer opponents may attempt to argue that the SWRCB, in exercising discretionary approval over a project, should be required to prepare an environmental impact report under CEQA that addresses significant economic impacts. However, environmental review under CEQA is limited to an evaluation of the potentially significant *environmental* impacts.¹⁰ In only a few, narrow circumstances will economic impacts also create physical, environmental changes that would require the application of CEQA.

2. *Outside interests.* Another political issue lies with local officials and the public who may be suspicious of an environmental group or an individual coming into an area to acquire water rights. In many watersheds and basins there has not been any significant change to diversion points—or place and purpose of use—for decades, and an outsider’s attempt to change that sense of “historic balance” will foster concern over the potential impact on water rights and land uses.

3. *Impacts to local values and natural history.* Another key area to look for in evaluating the water acquisition is whether the water—or the land that the water has been used on—has some significance in terms of local values or natural history. For example, if the water is from a historical ranch, local officials may be concerned that any change in ownership of the water rights or land may have an impact on local values or the preservation of the historic ranch. If the purpose, or part of the purpose, for the acquisition is the preservation of the natural history, then let that objective be known early. Be ready to offer assurances that the natural history or local values will be preserved and protected. That should help diffuse public concern.

4. *Endangered and threatened species.* The use of water to create or enhance habitat for endangered and threatened species, whether instream or off-stream, may result in political opposition. This opposition could come from water users and landowners who are concerned about the consequences of attracting threatened and endangered species to restored or created habitat in their area. For instance, a project may seek to restore spawning habitat in the upper reaches of a small tributary that once provided a spawning habitat, but has not done so for several decades due to inadequate instream flows or obstacles such as culverts in the streams. Landowners and water users along the tributary may be concerned that the renewed presence of coho salmon in the stream will result in the ESA affecting their ability to divert water or use their land.

5. *Impacts on local tax revenues.* If the proposed acquisition involves the purchase of land as well as water rights, and the land or water will be transferred to a public agency, local officials may be concerned that the project will result in a reduction of property tax revenue for local agencies. In many rural counties, the removal of land from private ownership to public ownership raises



serious tax revenue concerns. Even small acquisitions can raise concerns if the county or city already has experienced a number of such transactions. Remember that significant portions of many rural counties form national parks, national forests, and state parks, and the counties generally do not receive any property tax revenue from publicly owned property. Thus, further reduction in private property affecting the tax base will be a political issue.

6. *Maintaining local control and management.* Management of the resource also may be a local control issue. If one of the project's objectives provides for the conveyance of the acquired water right or land to a third party—such as the U.S. Forest Service or FWS—local officials and the public may be concerned that they will lose local control or management over an important resource. Depending on the nature of the project, it may be possible to convey the water right or land to the local agency, thus preserving its control and management of the water rights and other resources.

7. *Perceived versus real impacts.* Perceived impacts of a proposed project—which may be very different from the project's actual impacts—often arise from a lack of information or the spreading of inaccurate information. Individuals and entities who are concerned about the perceived impacts of a water transfer may contact local officials to ask for assistance in opposing the acquisition without having all the information about the acquisition. This is why it is important to work with agency staff and local officials as early as possible to avoid misconceptions about the project. This potential pitfall also illustrates the importance of using sound science (see Chapter 6, “Supporting Science”) to justify your project, as well as having a strong outreach strategy. Once misconceptions about a project have been spread, it will become increasingly difficult to educate the public and local officials about the real facts and the project's potential impacts.

1. Visit the U.S. Environmental Protection Agency's "Surf Your Watershed" Web site at <http://www.epa.gov/surf/>. For the Sierra Nevada region, visit <http://ice.ucdavis.edu/aquadiv/sierra/snep.html>.
2. The Department of Fish and Game's Web site may be found at <http://www.dfg.ca.gov>.
3. The CALFED Bay-Delta Authority Web site may be found at <http://www.calfed.water.ca.gov>.
4. <http://www.fdncenter.org>.
5. <http://www.waterrights.ca.gov/wrinfo/contacts.htm>.
6. Cal. Water Code §§ 1702, 1736 (Deering 2003).
7. *Id.* §§ 386, 1810.
8. *Id.* §§ 382, 386.
9. *Id.* § 1810.
10. CAL. PUB. RES. CODE § 21060.5 (Deering 2003); CAL. CODE REGS. tit. 14, § 15360 (2003) (CEQA Guidelines), available at http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art20.html.

