

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**IN THE MATTER OF WATER RIGHT LICENSE 1289 (APPLICATION 4635)
OF CLIFTON COURT, LLC**

**PETITION FOR TEMPORARY CHANGE INVOLVING THE TRANSFER OF UP TO
1,539 ACRE-FEET OF WATER TO WESTLANDS WATER DISTRICT**

SOURCE: Old River and Western Canal

COUNTY: Contra Costa

ORDER DENYING TEMPORARY CHANGES

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 OVERVIEW

On May 5, 2021, Clifton Court, LLC¹ (Clifton Court or Petitioner) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), a petition for temporary change (Petition) involving the transfer of water under water right License 1289 (Application 4635), pursuant to Water Code section 1725 et seq. Under the proposed transfer, up to 1,539 acre-feet (af) of water will be transferred to Westlands Water District (Westlands). The temporary transfer period begins on July 1, 2021 and is effective through September 30, 2021.

2.0 TRANSFER TYPE

The Petitioner proposes to make water available for transfer by reducing consumptive use through idling of croplands in lieu of diverting surface water for irrigation under License 1289.

¹ The Petition was originally filed under the name Clifton Court, LP who was the previous owner of License 1289. As of May 13, 2021, the Division of Water Rights Electronic Water Rights Information Management System confirmed a change in ownership of License 1289 from Clifton Court, LP to Clifton Court, LLC.

Cropland idling includes the idling of land that would have been planted during the transfer period in the absence of the transfer. Cropland idling water transfers make water available by reducing the consumptive use of surface water applied for irrigation.

The Draft Technical Information for Preparing Water Transfer Proposals (Draft Technical Information), dated December 2019, prepared by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation) describes information that transfers proposed to them should contain to support claimed reductions in consumptive use of applied surface water upon which the transfer is based. Specifically, crop idling transfer proposals should support claimed reductions in consumptive use of applied surface water in order that State Water Project (SWP) and Central Valley Project (CVP) (hereinafter collectively referred to as Projects) water rights are not injured as a result of the transfer. Reclamation and DWR request that proposed crop idling transfers document historic cropping patterns, identify the crop types, provide records of historic diversions, show the land tracts irrigated and provide any other specific information needed to document the amount of water available for transfer resulting from crop idling. Crop idling transfers are subject to a petitioner obtaining DWR or Reclamation concurrence with the evaluation of quantities of water made available to transfer to ensure that the Projects are not injured by the transfer.

3.0 PETITION FOR TEMPORARY CHANGE INVOLVING TRANSFER

3.1 Description of the proposed temporary changes

In order to facilitate the transfer, Clifton Court proposes to temporarily add the following to License 1289:

- 1) CVP's Jones Pumping Plant as a point of diversion, located within NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of projected Section 29, T1S, R4E, MDB&M;
- 2) a portion of the service area of Westlands Water District (Westlands) as shown on the map accompanying the Petition.

The Petitioner proposes to fallow the entire Clifton Court Farm (977.1 acres within projected Sections 19, 20, 29, and 30, T1S, R4E, MDB&M, as shown on a map filed with the State Water Board under Application 4635) this year to effectuate the transfer. Petitioner estimates that three (3) acre-feet (af) per acre of water would have been consumptively used for irrigation on 513 acres this year. By Petitioner's estimation, this results in an overall potential consumptive use savings of 1,539 af, which is the quantity of water proposed for transfer to Westlands.

3.2 Summary of Clifton Court's License 1289

License 1289 authorizes the direct diversion of up to 6.25 cubic feet per second (cfs) from January 1st to December 31st of each year. The source of the water is Western Canal and Old River tributary to the San Joaquin River in Contra Costa County. License 1289 has a priority of June 15, 1925.

The existing points of diversion are located as follows:

- 1) On Western Canal, located within SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 25, T1S, R4E, MDB&M; and
- 2) Old River (on Delta Mendota Canal), located within NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 30, T1S, R4E, MDB&M.

The existing place of use is the Clifton Court Farm.

The authorized purpose of use is irrigation.

4.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On May 10, 2021, Governor Gavin Newsom declared a State of Emergency for the Klamath River, Sacramento-San Joaquin Delta, and Tulare Lake Watershed Counties due to drought. The signed proclamation modifies noticing requirements and notice duration for temporary transfers of water. As such, the Division noticed Clifton Court's Petition on May 24, 2021, to the Division's website and via the State Water Board's electronic subscription mailing list pursuant to modified Water Code section 1726(d).

The comment deadline was June 8, 2021. Timely comments on the Petition were received from Reclamation, DWR, Central Delta Water Agency (CDWA), and South Delta Water Agency (SDWA). Clifton Court subsequently provided responses to the comments of Reclamation, DWR, and CDWA. The comments and responses by Clifton Court are summarized below. The State Water Board discusses Reclamation and DWR comments in Section 7 of this Order.

4.1 Comments of Reclamation

By letter dated June 7, 2021, Reclamation provided comments as summarized below protesting Clifton Court's Petition for transfer based on potential injury to Reclamation's water rights².

² Specifically, Reclamation claims potential injury to Permits 11315, 11316, 11967,

1. Reclamation discussed Clifton Court's 2016 - 2019 Reports of Licensee for License 1289 and 2013 - 2019 Supplemental Statements of Diversion and Use for Statement 24638³. Reclamation noted that in both its Reports of Licensee and Supplemental Statements, Clifton Court claimed that diversion amounts reported for License 1289 and for Statement 24638 were duplicative and not additive so it is unclear whether the water that Clifton Court seeks to transfer is from a riparian right or from an appropriative right. However, Reclamation also notes that Clifton Court's 2020 Report of Licensee indicated that all water diverted and used for the Clifton Court place of use was done under Statement 24638. Reclamation also pointed out that in the Reports of Licensee, Clifton Court stated that License 1289 is supplemental to riparian and pre-1914 claims and other related water rights appurtenant to the subject lands.

Reclamation referenced Wells A. Hutchins' *The California Law of Water Rights* which asserts that riparian water rights cannot be transferred to non-riparian land. Reclamation claimed that allowing Clifton Court to transfer water previously diverted under a riparian right has the potential to injure Reclamation's water rights by allowing a use of water that is contrary to law, and by causing Reclamation to release water from reservoirs such as Shasta or Folsom to make up for water unlawfully transferred by Clifton Court.

2. Reclamation disputed Clifton Court's claim that water released from New Melones Reservoir by Reclamation to meet flow and water quality requirements can be considered abandoned downstream of Vernalis, and therefore available for appropriation by Clifton Court under License 1289. Reclamation claimed that it is releasing water from New Melones to meet Delta outflow⁴ and water quality requirements pursuant to State Water Board Decision 1641 (D-1641) and that released water has not been abandoned by Reclamation at the points of diversion

11968, 11969, 11971, 11973, 12364, 12721, 12722, 12723, 12727, 12860, 15149, 16597, 16600, and 20245 (Applications 13370, 13371, 5628, 15374, 15375, 16767, 17374, 17376, 5626, 9363, 9364, 9368, 15764, 21542, 14858A, 19304, and 14858B).

³ With Statement 24638, Clifton Court has claimed both riparian and pre-1914 water rights for a year-round diversion of up to 6.25 cfs for irrigation of the same 977 acres covered by License 1289. Clifton Court claims the pre-1914 diversion began in 1880.

⁴ Delta outflow objectives are intended to protect estuarine and migratory aquatic species and their habitat. Delta outflow objectives are listed in Table 3 of D-1641 and include year-round requirements that vary by month and water year type. On June 1, 2021, the State Water Board approved a TUCP filed by Reclamation and DWR requesting a reduction in minimum Delta outflow objectives from June 1 through August 15, 2021.

https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf

of License 1289, and the released water is not available for appropriation by Clifton Court. Reclamation also referenced *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 753-760 which determined that release of water from New Melones to meet water quality objectives in the Delta would not violate Water Code section 11460⁵ because the Delta is within the area of origin that includes the Stanislaus River watershed, and all beneficial uses within the area of origin are on equal footing under section 11460.

Reclamation claimed that diversion of water by Clifton Court that lawfully belongs to Reclamation may cause Reclamation to release water from reservoirs such as Shasta or Folsom to make up for the water unlawfully diverted by Clifton Court, and thus injure the rights of Reclamation.

3. Reclamation claimed that Clifton Court has not provided information to substantiate that following of Clifton Court Farm will result in 3 af per acre of water available for transfer. Reclamation believes that approval of the transfer without Clifton Court's submission of information on the types of crops that will be idled has the potential to injure Reclamation's water rights by allowing the transfer and use of water in excess of the amount actually made available by idling Clifton Court Farm's crops.

Reclamation requested that the State Water Board deny Clifton Court's proposed transfer since they believe that the water subject to transfer is diverted by Clifton Court under a riparian right, and/or lawfully belongs to Reclamation and cannot be diverted or transferred by Clifton Court. However, if the State Water Board decides to approve the Petition for transfer, Reclamation requested the Order approving the Petition be conditioned to require that Clifton Court's crop idling proposal is subject to evaluation and approval by Reclamation and DWR, consistent with the Draft Technical Information approval criteria as follows:

- 1) Only idled fields approved by DWR suitability and acceptability may be used for crop idling.
- 2) Clifton Court has not provided any information on the types of crops that will be idled to support their claim of 3 af per acre. Therefore, Clifton Court shall supply this information, and the amount of transferable water credited to Clifton Court's crop idling water transfer operation is subject to the determination of Reclamation and DWR.

⁵ Water Code section 11460: "In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

- 3) Baseline for estimating the amount of transferable water is subject to the determination of DWR and Reclamation.
- 4) Clifton Court shall submit historical cropping information for the past five years that can be used to accurately determine conditions that would exist absent the transfer.
- 5) Clifton Court shall provide a description of proposed crop idling/shifting activities.
- 6) Lands already idled for other purposes during the transfer year are not eligible for crop idling.
- 7) Crops listed in Table 2-2 of the Draft Technical Information are not eligible for crop idling/shifting.
- 8) Before commencing crop idling/shifting, petitioners shall submit a maintenance and monitoring proposal for idled acreage to DWR and Reclamation for evaluation and prior approval.
- 9) Transferrable water may be credited only during balanced conditions in the Sacramento-San Joaquin Delta.

Clifton Court response summary

Clifton Court responded by referencing their response to DWR regarding availability of appropriative water this summer on the San Joaquin River and Clifton Court's right to divert water. Clifton Court also provided a June 4, 2021, letter from Oakdale Irrigation District and South San Joaquin Irrigation District (Districts) to Reclamation regarding whether water released from New Melones Reservoir is abandoned. In the letter, the Districts claim that Reclamation can only legally provide water from New Melones to meet Delta water quality and fishery flows, specifically at Vernalis, and Reclamation cannot legally provide water from New Melones to provide Delta outflows. Therefore, the Districts believe that Reclamation water released from New Melones to meet water quality standards at Vernalis is considered abandoned downstream of Vernalis and available for appropriation in the Delta. Additionally, Clifton Court claimed that only the State Water Board has the authority to approve the Petition.

State Water Board response

The State Water Board's consideration and response to the issues raised by Reclamation are incorporated into Sections 7.1 and 7.2 of this Order.

4.2 Comments of DWR

By letter dated June 8, 2021, DWR provided comments indicating that Clifton Court's Petition for transfer should not be approved due to the following issues.

1. DWR believes that Clifton Court's Petition provides insufficient data and evidence of a savings of 1,539 af from fallowing its fields to support the transfer without injury to other users. Specifically, DWR claimed that Clifton Court did not provide adequate data regarding types of crops typically grown, the degree of land fallowing that typically takes place, and the crop rotation practices that typically occur to determine how much water could be transferred as a result of crop fallowing. DWR claimed that the Petition did not include data or information to support using 3 af per acre as the appropriate evapotranspiration of applied water (ETAW) and Clifton Court's Supplemental Statements of Diversion and Use for Statement 24638 have reported ETAW values well below 3 af per acre that are being claimed in the Petition. DWR also mentioned that the current place of use for License 1289 and Statement 24638 is in the Delta and there is a likelihood that groundwater is within five feet of the land surface, and in this situation remnant vegetation has access to seepage from adjacent waterways or shallow groundwater. DWR believes a measurement and monitoring program may be necessary to ensure the effective savings of the fallowing is not reduced. DWR believes it is impossible to determine what conditions would have occurred absent the transfer and therefore whether the transfer could injure other users.
2. DWR stated that based on Clifton Court's Reports of Licensee, it appears unlikely that absent the transfer any water would be diverted and used under License 1289. DWR indicated that it appears Clifton Court claims multiple rights for the place of use, including a riparian right, a pre-1914 water right, and License 1289. DWR also noted that Clifton Court claimed in 2020 that all diversion and use occurred under its riparian right, and Clifton Court's recent water rights reporting also indicated that diversion and use under License 1289 and Statement 24638 were duplicative and not additive. Therefore, DWR concluded that recent history diversions and use at Clifton Court's current place of use have been under the riparian right and not under License 1289. As such, DWR believes that absent the transfer there would be no diversion and use under License 1289, and it would be inappropriate to allow a transfer under a license that would not be relied on absent the transfer.

In conclusion, DWR indicated that Clifton Court needs to 1) provide more data to demonstrate that the proposed transfer will result in new or real water being made available and at what amount; and 2) demonstrate that water under License 1289 would actually be diverted and used absent the transfer. DWR stated that if the information is not provided, the proposed transfer will result in injury to others, including DWR, and be contrary to law. DWR believes the State Water Board should not approve the Petition

for transfer, however if the State Water Board decides to approve the Petition, DWR requests that the transfer be conditioned on DWR and Reclamation's evaluation and approval.

Clifton Court response summary

Clifton Court claimed that DWR implied that if a water right is not used to its maximum every year it is not a water right. Clifton Court indicated that there has been no abandonment or forfeiture of License 1289. Clifton Court also stated that water rights in the Delta such as License 1289 were applied for, permitted, and licensed based on upstream storage projects being built in the San Joaquin River basin. Clifton Court claimed that when water was stored and released for instream flows or was used and returned as agricultural discharge it was subject to appropriation. Clifton Court claimed License 1289 is superior to Reclamation's right to divert from the San Joaquin River at Jones Pumping Plant. Clifton Court believes that as long as Reclamation is diverting appropriative water at Jones Pumping Plant then there is water available to Clifton Court to divert under License 1289.

Clifton Court also stated that neither DWR nor Reclamation have approval of the proposed transfer and that authority rests solely with the State Water Board. Clifton Court also claimed that the Draft Technical Information is an underground regulation that has not been approved as a rule or regulation by either entity.

State Water Board response

The State Water Board's consideration and response to the issues raised by DWR are incorporated into Sections 7.1 and 7.2 of this Order.

4.3 Comments of CDWA

By letter dated June 8, 2021, CDWA provided comments indicating that no transfer of water for export from the Delta Watershed should be allowed unless D-1641 requirements, without temporary urgency changes, are and will be met. CDWA also stated that approval of such transfers should require adequate evaluation, monitoring and accounting of the a) the actual timing and amount diverted; and b) that such amount is truly surplus to the present and future needs within the Delta Watershed including the needs of fish and wildlife and the need to secure groundwater sustainability.

Clifton Court response summary

Clifton Court stated that it understood CDWA's concern regarding D-1641 and the issue raised by CDWA has been resolved by the State Water Board's approval of Reclamation and DWR's TUCP for 2021 operations.

State Water Board response

The June 1, 2021 TUCP approval Order applies only to Reclamation and DWR water rights and does not involve Clifton Court's License 1289. Further, Water Code section 1727 subdivision (e) indicates that when determining whether to approve a temporary change involving a transfer, "...the board shall not deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change." Reclamation and DWR filed the TUCP in response to the 2021 drought emergency. Reclamation and DWR did not file the TUCP to mitigate potential impacts from Clifton Court's proposed transfer, therefore the State Water Board cannot condition or deny Clifton Court's Petition for temporary changes based on Reclamation and DWR filing the TUCP to achieve compliance with D-1641.

4.4 Comments of SDWA

By email dated June 8, 2021, SDWA provided comments on Clifton Court's proposed transfer. SDWA indicated that it believes that there is always a supply of water in the Delta for riparian, pre-1914 and other appropriative rights due to the Delta's connection to the ocean and the Projects' obligation to keep that supply fresh (e.g. Water Code section 12200 et seq.). Therefore, SDWA does not oppose the transfer but wanted to provide comments on Clifton Court's Petition.

SDWA indicated that absent any flow in the Delta from the San Joaquin River, Sacramento River water would dominate and provide adequate supply. Absent any inflow from tributaries there would still always be water available for riparian diverters due to prior tributary flow still being present as well as water flowing in on the tides from the west. SDWA indicated that statutes require the Projects to keep the Delta water supply a certain quality and Water Code section 12200 et seq. has been interpreted to require the Projects to provide water quality and in-Delta water supply protection. SDWA acknowledged that the State Water Board has previously determined that the in-Delta water supply requires a contract with DWR and Reclamation which is not in place at this time.

SDWA also claimed that there is San Joaquin River and tributary water available for southern Delta diverters. SDWA mentioned that the Stanislaus River adjudication did not include downstream interests and the ruling doesn't impact riparian diverters or other users on San Joaquin River or the Delta. SDWA also commented that no adjudication has occurred on the Tuolumne, Merced or upper San Joaquin rivers; therefore, water from those sources would be available. Overall, SDWA believes there is water available for riparian claims and other appropriative water rights in the Delta, and it is not true that riparian water is absent in the southern Delta.

State Water Board response

SDWA stated they are not opposed to Clifton Court's proposed transfer but wanted to provide comments. SDWA's comments are noted.

5.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.)

6.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

The State Water Board shall approve a temporary change involving the transfer of water under Water Code section 1725 et seq., if it determines that a preponderance of the evidence shows both of the following:

- a. The proposed change would not injure any legal user of water, during any potential hydrologic condition that the State Water Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of water, or reduction in return flows.
- b. The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(Wat. Code, § 1727, subd. (b).)

In addition, the proposed change must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary change. (*Id.*, § 1726, subd.(e).) Each of these three factors must be met. If, based on the record before it, the State Water Board cannot make an affirmative finding on any one of these factors, it may deny the petition.

Temporary changes pursuant to Water Code section 1725 may be effective for a period of up to one year from the date of approval. (Wat. Code, § 1728.) "The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out." (*Ibid.*)

The State Water Board also has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The

State Water Board considers the evaluation of public trust resources as part of its evaluation of impacts to fish, wildlife, or other instream beneficial uses under Water Code section 1727, subdivision (b)(2).

7.0 REQUIRED FINDINGS OF FACT

7.1 Transfer Only Involves Water That Would Have Been Consumptively Used or Stored

Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Water Code section 1011. (Wat. Code, § 1725, § 1726.) Water Code section 1725 defines “consumptively used” to mean “the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.”

7.1.1 Consumptive use savings from fallowing crops

In the Petition, Clifton Court claimed fallowing 513 acres of Clifton Court Farm property this year would result in a savings of 3 af per acre of water for a potential total savings of 1,539 af of water that could be transferred. As discussed in Sections 4.1 and 4.2 above, both Reclamation and DWR questioned the lack of information provided in the Petition regarding historical crop use and farming operations at Clifton Court Farm to substantiate the purported historical 3 af per acre consumptive use that Clifton Court is asserting.

No other information was provided in the Petition by Clifton Court to demonstrate how much water would have been diverted and used pursuant to License 1289 absent the transfer. Additionally, as noted in Reclamation’s and DWR’s comments, no transfer proposal has been submitted to either agency with additional information pertaining to how water would have been consumptively used in the absence of the transfer.

By email to Clifton Court dated June 29, 2021, Division staff requested additional information regarding previous irrigation and use at Clifton Court Farm that would result in the reduction of consumptive use of surface water proposed by the transfer. Division staff requested Clifton Court to provide recent data regarding the crop types and acreage irrigated, how much of the applied water resulted in return flow, and whether any of the prior consumptive use was due to groundwater present in the root zone.

By email dated July 12, 2021, Clifton Court responded that over the last five years, the average quantity of water diverted for irrigation use on 569 acres of Clifton Court Farm was 1,728 af; average crop water used based on ET was 1,875 af; and therefore the average crop use beyond what was diverted was 146 af. Clifton Court also reported that since January 2021, the property has been fallowed or dry farmed, drain pumps on the property were still pumping existing sub-surface water, and there are no diversions of water occurring for flood irrigation of the property. Given that Clifton Court has stated that decisions were made by January 2021 regarding fallowing and dry farming of crops, it creates significant uncertainty as to whether the historical crop acreages would be planted and irrigated in the absence of the proposed transfer.

During the last five years, the crops grown at Clifton Court Farm have included alfalfa, safflower, sudan grass, tomatoes, and corn. Clifton Court also reported it did not have crop information prior to 2016. Based on information provided in its July 12 response, Clifton Court claims it has been consumptively using approximately 3 to 3.29 af of water per acre of crops planted. Estimated ETAW values in the Draft Technical Information for the crops Clifton Court has claimed to have previously planted include: safflower, 0.7 af per acre; sudan grass, 3.0 af per acre; both tomatoes and corn, 1.8 af per acre; and alfalfa, 1.7 af per acre, although the Draft Technical Information does not provide for transfers based on fallowing alfalfa in the Delta. Clifton Court did not provide historical information on cropping patterns or acreages of the different crops. Without knowing how many acres of each crop have historically been planted it is not possible to determine how much water might have been evapotranspired this year absent the decision to fallow the property this year. Further, Clifton Court indicated that they are currently pumping sub-surface water from beneath the fields.

As referenced in Sections 4.1 and 4.2 of this Order, Reclamation and DWR have established procedures for determining consumptive uses of crops which were developed to ensure proposed transfer will cause no injury to other legal users of water by use of CVP and SWP conveyance facilities, as required by Water Code section 1810, subdivision (d).⁶ The Draft Technical Information indicates that cropland idling on lands where groundwater is within five (5) feet of the land surface or where the crop root zone may extend into the groundwater table creates difficulty in determining the amount of water made available and uncertainty in what would have happened absent the transfer. This is demonstrated by the fact that Clifton Court's claimed ETAW of the crops was 146 acre-feet higher than the irrigated amounts, indicating that the crops are able to access water from sources other than irrigation. As discussed in Reclamation

⁶ Water Code section 1810, subsection (d): This use of a water conveyance facility is to be made without injuring any legal user of water and without unreasonably affecting fish, wildlife, or other instream beneficial uses and without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred.

and DWR's comments, in areas such as Clifton Court Farm, cropland idling transfers may only be considered by DWR and Reclamation if a measurement and monitoring program approved by Reclamation and DWR is implemented to determine the water savings and ensure the projected water savings are achieved.

Vegetation on the fields proposed for idling has the potential to consume water if that vegetation has access to seepage from adjacent canals or flooded fields, or shallow groundwater, and is actively growing during the transfer period, thus reducing the effective savings from the crop idling. Consequently, information from Clifton Court regarding remnant vegetation on the idled fields and the resultant impact to consumptive use savings is necessary to further establish the quantity of water that may be transferred. Also, Clifton Court has not provided information regarding historical diversion and distribution of irrigation water during the growing season. The quantity of water transferred based on crop idling is limited to the timing and quantity of historical diversion and irrigation of the crops idled.

Clifton Court has overall provided limited information regarding historical cropping and irrigation practices on the irrigated acreage such that it is not possible to accurately determine the quantity of consumptive water use that would occur in the absence of the transfer. Also, Clifton Court reported that in this critically dry water year their drain pumps are still pumping sub-surface water, which further calls into question how much consumptive use would occur during the transfer.

Based on the information available to the State Water Board and the above discussion, the State Water Board is unable to determine what quantity of water could be available for transfer as a result of fallowing fields at Clifton Court Farm, or if the acreage would have been planted to any specific crop, and thus whether water would be diverted under License 1289 in the absence of the transfer.

7.1.2 Clifton Court's Previously Reported Diversions Under License 1289

The State Water Board also evaluated Clifton Court's recent historical diversions under License 1289 to evaluate whether water would have been consumptively used by Clifton Court in the absence of the proposed transfer. Clifton Court claims multiple water rights provide water for irrigation to its place of use including License 1289 and Statement of Water Diversion and Use 24638 (Statement 24638). With Statement 24638, Clifton Court has claimed both riparian and pre-1914 water rights for a year-round diversion of up to 6.25 cfs for irrigation of the same 977 acres covered by License 1289. Information included in Clifton Court's Reports of Licensee and the Supplemental Statements of Diversion and Use call into question to what extent License 1289 has been exercised recently, and would be exercised in the absence of the transfer.

The table below includes Clifton Court's reported diversion quantities under License 1289 in its Reports of Licensee since 2013. The table also shows Clifton Court's reported diversion quantities under their Statement 24638.

	Diversions reported under License 1289 (af)	Diversions reported under Statement 24638 (af)
2020	1	2,678
2019	1,704.4	1,704.4
2018	889.9	889.9
2017	1,642.7	1,642.7
2016	1,087	1,087
2015	466	2,181
2014	1,267	3,138
2013	2,908	2,908

In 2020, Clifton Court reported a total diversion of one (1) af for License 1289 and indicated its Report of Licensee was completed in voluntary compliance with the "*Consensus Strategy for Avoiding Duplicative Reporting of Water Diversion and Use in the Delta*", whereby water diverted for beneficial use is accounted for and reported under the most senior available right/claim to its exhaustion, with successively available rights/claims supporting the report of diversions in excess of senior rights/claims, in order of priority. Therefore, in 2020, a diversion of 2,678 af was accounted for under Clifton Court's riparian rights and Clifton Court reported:

"...a nominal '1' acre-foot diverted under License 001289, which covers the combined places of use for the riparian rights listed below. This reporting methodology is adopted voluntarily in order to eliminate duplicative reporting, without committing to reporting under the Consensus Strategy in any future period, and without waiving the right to divert and use water within Clifton Court's place of use under any available right, including License 001289 issued by the State Water Resources Control Board. S024638."

Due to the issues described in this Order and due to the voluntary adoption of the Consensus Strategy, the State Water Board draws no conclusion in its evaluation of the Petition as to whether Clifton Court diverted water during 2020 under License 1289 or Statement 24638.

From 2016 through 2019, Clifton Court reported the same diversion quantity for both License 1289 and Statement 24638, and indicated that, "This license is supplemental to the Riparian Pre-1914 appropriative and other water related rights appurtenant to the

subject lands. The amounts reported on this License report are duplicative not additive, of the amounts reported for Statement 24638.” Clifton Court similarly indicated in the 2013 through 2019 Supplemental Statements of Diversion and Use for Statement 24638 that the diversion amounts reported were duplicative of diversion amounts under License 1289. Further, Clifton Court reported the same quantity of irrigated acreage under License 1289 and Statement 24638 each year from 2013 through 2019. Based on Clifton Court’s annual reports indicating a lack of recent diversions under License 1289, on May 6, 2021, Division staff requested that Clifton Court provide information showing that water would have been diverted under License 1289 in the absence of the proposed transfer. Clifton Court responded on May 10, 2021, stating that, “The water rights of Clifton Court are not duplicative.” Clifton Court also claimed that the current inflow to the Delta at Vernalis is stored water, and therefore all of the water in the San Joaquin River is not “riparian water”. Clifton Court claimed that since the water is not riparian water and is previously stored water, it is subject to appropriation by Clifton Court under License 1289. Clifton Court also claimed that the reason the Clifton Court property applied for and was given rights to appropriate water from the San Joaquin River was because the State Water Board recognized that eventually building upstream storage projects would result in most of the flow in below normal, dry and all flow in critical years being stored water.

Subsequently, on May 14, 2021, Division staff requested Clifton Court provide how much water was diverted each year from 2016 to 2020 under each of their following claimed rights: 1) License 1289; 2) pre-1914 diversions under Statement 24638; 3) and riparian diversions under Statement 24638.

Clifton Court’s May 18, 2021 response did not provide the requested information regarding diversion quantities under their water rights and instead indicated that they recently became owners of the property covered by License 1289 and Statement 24638 and they did not know the specific amount of water diverted under each right. Clifton Court also claimed that the Division’s question regarding diversion quantities, “...comes down to the issue of stacking and or reporting duplicative water use.” Clifton Court further claimed that the only water in the San Joaquin River, Old River, and at the diversion point this year is water subject to appropriation, and they have a license to appropriate the water and there has been no forfeiture of the right. Clifton Court stated that they are not transferring appropriative right water and then claiming the right to use pre-1914 or riparian water instead since the property will be followed. Clifton Court reiterated comments made in their May 10 response regarding the ability to divert previously upstream stored water under License 1289 and also claimed that prior to construction of the upstream reservoirs, appropriative right holders could take advantage of appropriative return flow to the San Joaquin River. Clifton Court believes that the stacking of rights is allowed and encouraged in California to promote the most beneficial use of water. These responses by Clifton Court do not address the specific requests for information from State Water Board staff.

Based on Clifton Court's own reporting of diversion and use under License 1289 and Statement 24638, it appears that since earlier than 2016, the majority if not all diversions for irrigation use on Clifton Court's property occurred under their riparian right pursuant to Statement 24638. Further, on May 18, 2021, Clifton Court responded to Division staff that due to a recent change in ownership of the Clifton Court property, the specific amount of water diverted under License 1289 and Statement 24638 was not known. However, the recent Reports of Licensee for License 1289 and Supplemental Statements of Diversion and Use for Statement 24638 were signed and certified by representatives of the previous owners of Clifton Court, and the current owners of Clifton Court have provided no information to dispute the accuracy of the statements in the annual reports.

Since at least 2016 until the recent change in ownership, Clifton Court reported that all the water for irrigation use on the property could be diverted under Statement 24638. Given that reporting, the prior owner's assertion that the same water was diverted under License 1289 does not provide clarity regarding Clifton Court's water use. Accordingly, the evidence available to the State Water Board does not support the finding required by Water Code section 1726, subdivision (e) that the water proposed for transfer would have been consumptively used pursuant to License 1289 in the absence of the proposed temporary change.

7.2 No Injury to Other Legal Users of the Water

Before approving a temporary change due to a transfer or exchange of water, the State Water Board must find that the transfer would not injure any legal user of the water during any potential hydrologic condition that the State Water Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows. (Wat. Code, § 1727, subd. (b)(1).)

Thus, the State Water Board must evaluate whether the change will injure any legal user of the water. The controlling consideration in the State Water Board's inquiry is the effect of the change on the rights of others. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 743, 805.) A person who claims injury from a proposed change "must show the change will interfere with his or her *right* to use the water, whatever the source of that right may be." (*Id.* at p. 805, italics in original.) It is not enough for a water user to show that it will receive less water as a result of the change. Instead, a water user claiming injury must demonstrate that it has a right to the greater amount of water claimed and that the proposed change will interfere with that right. (*Ibid.*)

7.2.1 Water Unavailability for License 1289

The State Water Board has developed a methodology to identify when supply and demand data indicate that water is unavailable for diversion by water right holders in the Sacramento-San Joaquin Watershed, referred to as the Water Unavailability Methodology for the Delta Watershed, or Methodology. This Methodology was most recently updated on July 23, 2021; a summary report describing the Methodology (titled "*Water Unavailability Methodology for the Delta Watershed*"), as well as the dataset used to implement the Methodology (titled "wua_spreadsheet_072321.xlsx"), are available at the following website:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/drought_to_ols_methods/delta_method.html.

Based on the available data and Methodology, the information available to the State Water Board by mid-June indicated that available supplies in the San Joaquin River watershed were insufficient to support diversion by any post-1914 water right, which includes License 1289. On June 15, 2021, the State Water Board mailed a *Notice of Unavailability of Water for Post-1914 Water Right Holders and Warning of Impending Water Unavailability for Pre-1914 and Riparian Claimants in the Sacramento-San Joaquin Delta Watershed* (Notice of Unavailability) to water users, including Clifton Court, to notify them that the best information available to the State Water Board as evaluated through application of the Methodology at that time indicated that there was insufficient water for the priority of License 1289. Since the June 15 Notice of Unavailability, drought conditions have intensified throughout the Delta watershed and the July 23 update to the Methodology continues to indicate that water is not available to the priority of License 1289.

Transferable water is limited to the extent of the surface water direct diversion rights available at the time of the transfer. It is unlikely, based on the severity of the drought and the analysis supported by the Methodology, that water could be lawfully diverted and consumptively used under License 1289 in the absence of the transfer.

On June 17, 2021, Division staff notified Clifton Court via email that based on the information available to the State Water Board, the Division was unable to make the findings required by Water Code section 1727 subdivision (b)(1), that the proposed change would not injure any legal user of water and offered Clifton Court an opportunity to provide additional information. On June 25, 2021, Clifton Court requested an extension of time to provide additional information regarding the availability of post-1914 water at Clifton Court and available for diversion under License 1289. Division staff responded on June 29, 2021, allowing Clifton Court an extension of time, and requested Clifton Court's information address the water supply and demand data and evaluation Methodology.

On July 12, 2021, Clifton Court provided additional information regarding water availability for the San Joaquin River watershed in 2021. A summary of Clifton Court's

response follows.

1. Clifton Court claimed that all water arriving at Vernalis after August 1, 2021, will be previously stored water and is subject to appropriation. Clifton Court pointed out that the Methodology does not consider previously stored water in determining water unavailability.

Clifton Court believes that previously stored water from New Melones Reservoir, New Don Pedro Reservoir, and New Exchequer (aka Lake McClure) is subject to appropriation. Clifton Court also noted that the Methodology summary report shows that the San Joaquin River will experience return flows of 68,000 af in August and 54,000 af in September. Clifton Court claimed the sources of that return flow include 1) flow from the eastside of the San Joaquin River from confluence of the Merced River to Vernalis originates from previously stored water from Eastside Irrigation Districts, and 2) flow from the westside of the San Joaquin River from the confluence of the Merced River to Vernalis is previously used groundwater, stored water, and/or foreign water. Clifton Court stated that if natural flow were available in the San Joaquin River basin above Vernalis in August and September that water is being diverted upstream.

2. Clifton Court believes that all water that reaches Vernalis is abandoned water subject to appropriation.

Clifton Court claimed the following are abandoned water supplies: 1) Merced instream flow releases; 2) Tuolumne instream flow releases; 3) New Melones releases for instream flow for OCAP-BO RPAs, and dissolved oxygen and TDS at Vernalis; and 4) return flows. Clifton Court referenced the Methodology summary report which states that instream flows required to meet salinity requirements are not considered abandoned; however, they indicated the Methodology summary report also states that some instream flows that only apply to a certain reach of a stream can be considered abandoned past that reach. Clifton Court appears to claim that Reclamation's requirement to meet TDS standards at Vernalis is the downstream terminus of its instream flow obligations. Therefore, any releases downstream of Vernalis would be considered abandoned. Clifton Court did not consider releases from New Melones as for the purpose of meeting Delta outflow requirements.

3. Clifton Court disputed the assertion in the Methodology summary report that water released from New Melones Reservoir is not abandoned.

Clifton Court noted that the Methodology summary report recognizes no flow from the Stanislaus River as abandoned flows. Clifton Court stated this is not correct as the Methodology summary report shows that all of the releases from New Melones meet requirements in either the Stanislaus River or in the case of TDS,

downstream at Vernalis. Clifton Court claimed that Reclamation is specifically prevented from rediverting that water under its permits but diverts that water in the Delta under the CVP-SWP Coordinated Operations Agreement as abandoned water. However, no data was provided to support this statement. Clifton Court disputed whether instream flows that are required to meet Delta outflows are not considered abandoned. Clifton Court stated that there is no rule, regulation, law or order by the State of California or the State Water Board cited in the Methodology summary report to support the assertion of non-abandonment. Clifton Court noted that the Methodology summary report states that releases from New Melones are protected to meet Delta outflow, but Clifton Court believes this approach allows the junior rights of the CVP to use all of the other water at Vernalis to contribute to Delta outflow and as a result senior water rights are foreclosed from using water that is available to them so that that the junior rights of the CVP can operate.

Clifton Court also claimed the Methodology summary report is incorrect in assuming all of the water released from New Melones Reservoir is for Delta outflow. Clifton Court also mentioned that Reclamation is releasing additional water for Delta outflow, but the water released to meet instream flow, dissolved oxygen, and TDS is not for outflow and is abandoned at Vernalis. Clifton Court also disputed whether Reclamation is required to release water from New Melones.

Overall, Clifton Court believes that approximately 400 cfs of water will be available at Vernalis for appropriation from August 1 through September 30, 2021. Clifton Court believes it can divert up to 6.25 cfs of this water pursuant to its License 1289 with its 1925 priority. Clifton Court's response did not address the extent of appropriate demands senior to License 1289 relative to the approximately 400 cfs believed to be available based on the above assertions, including the extent of pre-1914 appropriative water rights between Vernalis and the point of diversion for License 1289.

Clifton Court disagrees with aspects of the Methodology, including Sections 2, and specifically Subsections 2.1.2 and 2.1.6 of the summary report describing the Methodology. However, Clifton Court did not provide an alternate method for comparing available supplies to existing demands in the San Joaquin watershed, nor does Clifton Court provide data to support an alternative method. Clifton Court's response assumes that License 1289 is the most senior appropriative water right in the watershed without regard to more senior demands reliant on the same source as License 1289. Absent an alternative methodology for comparing water availability analysis results, the State Water Board is unable to address the contentions raised by Clifton Court or rely on an alternative method for concluding water is available to License 1289 during the period of the transfer. Therefore, the State Water Board is unable to make the findings required by Water Code section 1727, subdivision (b)(1), that this transfer will not injure any legal user of water.

8.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to the Deputy Director for Water Rights the authority to act on petitions for temporary change if the State Water Board does not hold a hearing. This Order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2012-0029.

9.0 CONCLUSION

The following reasons each independently preclude the State Water Board from making the findings necessary to approve a temporary transfer:

1. As described in Section 7.1.1, Clifton Court has not provided sufficient data on the crop types or acreages that would have been planted and consumptively using water diverted pursuant to License 1289 in the absence of the transfer, nor sufficient data to evaluate historical consumptive use of water in the place of use of License 1289. This lack of data prevents the State Water Board from making the determinations pursuant to Water Code section 1725 and section 1726, subdivision (e), that absent the transfer, water would have been consumptively used under License 1289 during the transfer period.
2. As described in Section 7.1.2, the duplication of diversion data reported pursuant to License 1289 and Statement 24638, and the inability to disaggregate the reported data between different bases of right, prevents the State Water Board from making the determinations pursuant to Water Code section 1725 and section 1726 subdivision (e), that absent the transfer, that water would have been consumptively used under License 1289 during the transfer period.
3. As described in Section 7.1, Clifton Court's statements that the place of use of License 1289 is currently fallowed or being dry-farmed prevents the State Water Board from making the determinations pursuant to Water Code section 1725 and section 1726, subdivision (e), that absent the transfer, water would have been consumptively used under License 1289 during the transfer period.
4. Given the information available to the State Water Board as described in Section 7.2 and Clifton Court's inability to present an alternate methodology for comparing available supplies to existing demands senior to License 1289, the State Water Board cannot make the determination that the transfer will not injure any other legal user of water. Therefore, the State Water Board cannot make the findings required by Water Code section 1727, subdivision (b)(1), that this transfer would not injure any legal user of water, during any potential hydrologic condition that the

State Water Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of water, or reduction in return flows.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Petition filed for temporary change for the transfer of up to 1,539 acre-feet of water under Clifton Court LLC License 1289 (Application 4635) is denied.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:
DIANE RIDDLE, FOR

*Erik Ekdahl, Deputy Director
Division of Water Rights*

Dated: JUL 30 2021