

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

DIVISION OF WATER RIGHTS

IN THE MATTER OF LICENSES 6000 AND 9407 (APPLICATIONS 2221 AND 1389)
OF WALKER RIVER IRRIGATION DISTRICT

PETITIONS FOR TEMPORARY CHANGE INVOLVING THE TRANSFER AND INSTREAM
FLOW DEDICATION OF 25,000 ACRE-FEET OF WATER

ORDER APPROVING TEMPORARY CHANGES

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 BACKGROUND

On February 28, 2013, the Walker River Irrigation District (District) filed petitions for temporary change involving the transfer of water and instream flow dedication under Licenses 6000 and 9407 with the California State Water Resources Control Board (State Water Board or Board), Division of Water Rights (Division), pursuant to Water Code section 1725 et seq. and section 1707. The petitions involve the waters of the interstate Walker River stream system. The District holds License 6000 for Topaz Reservoir, which is located on the West Walker River, and License 9407 for Bridgeport Reservoir, which is located on the East Walker River. The West Walker River and East Walker River arise in the Sierra Nevada of California and flow into Nevada where they join to create the main stem of the Walker River, which then flows to Walker Lake, a natural desert terminal lake in Nevada.

The purpose of the proposed temporary changes is to assist in implementation of the Walker Basin Restoration Program (Restoration Program), which is administered by the National Fish and Wildlife Foundation (NFWF). The Restoration Program was established in 2009 by Public Law 111-85 and related authorities for the primary purpose of restoring and maintaining Walker Lake, which is critical to recovery of the threatened Lahontan Cutthroat Trout and is an important stopover for migratory waterfowl. Due to insufficient freshwater inflows, Walker Lake's elevation has been declining since the early 1900s and increased salinity levels threaten its ecology. The Restoration Program seeks to increase instream flows to Walker Lake through various basin-wide initiatives.

The Restoration Program includes a three-year water leasing demonstration program to be administered and managed by the District pursuant to an agreement with NFWF. In 2012 the District entered into an amended grant agreement with NFWF to administer and manage a Stored Water Program (SWP) in the Walker River Basin.¹ Under the SWP, surface water will be released from Topaz and Bridgeport Reservoirs for instream dedication to and including Walker Lake. Through the SWP, individual farmers within the District may voluntarily dedicate a portion of their stored water supply to the SWP for at least one year. The District filed the petitions for temporary change in order to implement the SWP and thereby increase inflows to Walker Lake.

¹ First Amendment to [NFWF] Grant Agreement (Nov. 2012) for Project 2010-0059-101 (Water Leasing Demonstration Program in the Walker River Basin).

2.0 PETITIONS FOR TEMPORARY CHANGE INVOLVING TRANSFER

2.1 The Walker River Action and Related Proceedings

The proposed changes involve waters of the Walker River that have been adjudicated by the United States District Court for the District of Nevada in *United States of America v. Walker River Irrigation District, et al.*, Case In Equity No. C-125. The federal District Court issued Decree C-125 (the Walker River Decree) on April 14, 1936, and subsequently amended the decree on April 24, 1940. The U.S. Board of Water Commissioners (USBWC) and the Chief Deputy Water Commissioner (known as the Water Master) are charged with apportioning and distributing the waters of the Walker River and its tributaries under the Walker River Decree. In administering the Walker River Decree, the Water Master operates under the *Rules and Regulations for the Distribution of Water on the Walker River Stream System under the Provisions of Paragraph 15 of Decree in Equity, No. C-125*, which were approved by the federal District Court on September 3, 1953 (1953 Rules).

Pursuant to the federal District Court's order, the State Water Board is responsible for reviewing proposed changes in the point of diversion, place of use, or purpose of use, in the exercise of federally adjudicated rights in California that have been established by the Walker River Decree. Thus, in addition to applicable California law, the State Water Board has processed the petitions in accordance with the Administrative Rules and Regulations adopted by the federal District Court in Case No. C-125, as amended through June 3, 1996² (Administrative Rules) and will continue to comply with those rules in this proceeding.³

By Resolution dated January 6, 2012, the District adopted Regulation No. 14, "Temporary Changes to Stored Water Rights for Beneficial use at Walker Lake" to implement the SWP. In addition to the approval of change petitions filed with the State Water Board, Regulation No. 14 requires the Nevada State Engineer's approval of temporary change applications filed by individual participants in the SWP. Any approval by the State Water Board will not take effect until the federal District Court enters an order modifying the Walker River Decree accordingly and also has approved at least one of the temporary change applications approved by the Nevada State Engineer.

2.2 Description of the Proposed Transfer

The District filed separate petitions under Licenses 6000 and 9407 with similar proposed changes. Through its petitions, the District seeks to 1) temporarily add to the existing place of use covered under License 6000 by including the West Walker River from the outlet of Topaz Reservoir to the confluence of the Walker River, thence the Walker River to and encompassing Walker Lake, 2) temporarily add to the existing place of use covered under License 9407 by including the East Walker River from Bridgeport Reservoir to the confluence of the Walker River, thence the Walker River to and encompassing Walker Lake; and 3)

² *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and Its Tributaries and Regarding Compliance with California Fish and Game Code Section 5937 and Other Provisions of California Law* (as amended through June 3, 1996).

³ "Change applications" under the Administrative Rules (and Nevada law) and "change petitions" under California law are essentially the same mechanism. The Administrative Rules defines "change applications," as applications to change the point of use, purpose of use, and place of use of water rights under the Walker River Decree. (Administrative Rules, § 1.1(b).) In California, such requests for change are made through a petition process and referred to as "change petitions." (See, e.g., Wat. Code, § 1726, subd. (a)(1) [a person proposing a temporary change shall submit a petition to the State Water Board].)

temporarily add Fish and Wildlife Preservation and Enhancement to both licenses as an additional purpose of use for release of up to a total of 25,000 acre-feet (af) for instream dedication to Walker Lake. The water involved is surface water that was previously stored or would have otherwise been held in storage absent the transfer at Topaz Reservoir or Bridgeport Reservoir, some or all of which would otherwise have been released for irrigation purposes within the District. The proposed releases by the District would occur during a period of up to one year following approval of the petitions.

The quantities of water proposed to be released by the District are variable and depend upon hydrologic conditions and participation in the SWP by individual growers within the District. The District indicates that the estimated maximum quantity of water that may be transferred from Topaz or Bridgeport Reservoir over a 30-day period is up to a total of 25,000 af. The average flow rate associated with this quantity is approximately 420 cubic feet per second (cfs) over a 30-day period. The instantaneous releases from Topaz Reservoir and Bridgeport Reservoir may be up to approximately 750 cfs and 550 cfs, respectively. Following evaluation of participation by growers in the SWP, the District will develop and operate to a schedule of releases for the proposed temporary changes that will be coordinated with the Water Master and other entities, including NFWF.

2.3 Summary of Water Right Licenses 6000 and 9407

License 6000 – Topaz Reservoir

The District holds water right License 6000 (Application 2221), with a priority date of February 21, 1921, for collection to storage in Topaz Reservoir. License 6000 authorizes the diversion of up to 57,580 acre-feet per annum (afa) of water to off-stream storage in Topaz Reservoir from the West Walker River tributary to Walker River in Mono County. The season of diversion is from about October 1 of each year through about July 15 of the succeeding year. The rate of diversion to off-stream storage is limited to 1,000 cfs. The water can be used for domestic and irrigation purposes on a net area of 79,174 acres within a gross area of 132,573 acres within the boundaries of the District.

License 9407 – Bridgeport Reservoir

The District holds water right License 9407 (Application 1389), with a priority date of August 8, 1919, for storage in Bridgeport Reservoir. License 9407 allows the diversion of up to 39,700 afa of water to storage in Bridgeport Reservoir from the East Walker River tributary to Walker River in Mono County. The season of diversion to storage is from about September 1 of each year to about July 20 of the succeeding year. The maximum amount of water that can be held in the reservoir at any time cannot exceed 42,500 af and the maximum withdrawal in any one year cannot exceed 36,000 af. The water can be used for irrigation and recreational purposes. Irrigation is allowed on 52,062 acres net within the gross area of the District. Storage rights under License 9407 in combination with the District's other rights confirmed by Federal Decree C-125 cannot exceed 57,000 afa.

3.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

Water Code section 1707 authorizes the use of the temporary transfer provisions of Water Code section 1725 et seq. for a change for the purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water. Pursuant to Water Code sections 1707 and 1725, the District has applied for a temporary change involving a transfer for the purpose of preserving and enhancing fish and wildlife resources. 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 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).)

Moreover, before approving the District's petitions, the State Water Board must make the following findings under Water Code section 1707:

- a. The proposed change will not increase the amount of water the District is entitled to use.
- b. The proposed change will not unreasonably affect any legal user of water.
- c. The proposed change otherwise meets the requirements of division 2 (commencing with section 1000) of the Water Code.

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).

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The District filed the petitions for a temporary transfer and change under Water Code sections 1707 and 1725 et seq. Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of CEQA (Pub. Resources Code, § 21000 et seq.). The State Water Board will file a Notice of Exemption.

5.0 PUBLIC NOTICE OF THE PETITIONS

On March 13, 2013, public notice of the petitions for temporary change was provided by first class mail to interested persons identified in the Administrative Rules and by posting on the Division's website. On March 14, 2013, downstream water right holders were provided public notice of the proposed transfer by first class mail. On the same date, the State Water Board provided notice via the Board's electronic notification service to the following electronic

subscription mailing lists: Walker River Water Right Change Petition, Water Rights Transfers, and Water Rights Petitions. Public notice of the petitions was also published in the following newspapers: the Gardnerville Record-Courier, the Mason Valley News, the Mammoth & Eastern Sierra Times, and the Mineral County Independent-News.

6.0 COMMENTS ON THE PETITIONS

Comments on the petitions were received from: (1) Antelope Valley Mutual Water Company (AVMWC); (2) Six N Ranch, Inc.(SNR); (3) Peter A. Fenili; (4) NFWF; (5) Gary Garms; (6) California Department of Fish and Wildlife, Region VI (DFW); (7) Mono County Board of Supervisors (Mono County); (8) Walker River Paiute Tribe (Tribe); and (9) the USBWC. The District and the State Water Board subsequently agreed to schedules by which the District would respond to the comments and the board would issue its decision. By letter dated November 22, 2013, the District responded to the comments. Mono County submitted a letter regarding the District's responses on January 7, 2014. A summary of the major comments and the District's responses follows.

6.1 Common Issues of Concern

Some commenters raised similar issues of concern. The issues raised by more than one commenter and the District's responses are summarized below. The summary below does not necessarily correlate with the grouping or responses of comments made by the District in its responses.

a. Impacts on return flows, delivery efficiencies, and Walker River flows

AVMWC, Peter Fenili, Gary Garms, the USBWC, SNR and the Tribe expressed concern about impacts related to changed operations under the temporary change petitions. The more specific comments addressed the potential loss of irrigation return flows and decreased water delivery efficiencies. In general, the commenters are concerned that lower volumes of stored water released for irrigation could result in less total flow in the system and reduced return flows. In addition, the commenters note that diminished return flows would result in water users having to provide additional water to meet downstream senior water rights.

Commenters also expressed concern that diminished flows, whether from a reduction in return flows or a change in the timing of water releases from the reservoirs to the end of, or after, the irrigation season, would decrease water delivery efficiency in the Walker River and ditches. Releases from the reservoirs normally occur during the irrigation season, when the shared loss in the system makes the delivery of the decreed water more efficient. If the timing of releases is changed to outside of the irrigation season, the commenters believe that more stress could be placed on the decreed users, who would have to absorb more of the delivery losses, thereby potentially altering the priority on the river system.

The Tribe suggests that curtailments on the volume of allowable storage water transferred are necessary during dry year conditions, depending on the severity of the year, to address the potential reduction in return flows and river flow loss under those conditions. According to the Tribe, segments of the Walker River tend to lose flow at a higher percentage by volume under progressively lower flow regimes. Thus, less flow in the river during the irrigation season (including less return flow) could negatively affect downstream delivery of the Tribe's decreed water rights in drought years. In dry years, the Tribe suggests requiring the timing of stored water releases

to be consistent with historic practices to avoid impacts to downstream senior rights that depend, in part, "on drain return flows generated from up-stream use of storage water during the irrigation season, and would additionally experience incrementally higher percentages of river flow loss under progressively lower flow conditions during the irrigation season." (Tribe's Comments contained in letter from Dwight Smith, Interflow Hydrology, to Kate Gaffney, State Water Board (Apr. 22, 2013) (Tribe's Comments, p. 3, ¶ 13.)

The Tribe also seeks clarification whether the lands that will participate in the SWP have actively been using the stored water or whether "the storage right was not exercised on the land and has been effectively dormant over a sustained period of time." (Tribe's Comments, p. 2, ¶ 8.) If dormant, the Tribe suggests that the transfer of stored rights should be subject to additional management criteria to avoid creating an added draw on the river over current conditions that could reduce the intended benefit from the proposed changes.

The USBWC also comments that if stored water is not used for irrigation purposes during the irrigation season, then the return flows would not be available for the Water Master to use in computing the total available water to serve vested decreed rights as required by the 1953 Rules.

District Response:

The District responds that the water that is the subject of the temporary change petitions is previously stored water to which downstream users are not entitled and cannot rely. According to the District, the storage rights "did not exist when the natural flow rights in the Walker River Decree were established under either state or federal law." (Letter from Gordon H. DePaoli, District, to Kate Gaffney, State Water Board (Nov. 22, 2013) (District Response), p. 8.) The natural flow rights under the Walker River Decree were established before the District's storage rights. Thus, there is no return flow from the District's stored rights on which the holders of prior natural flow rights in the Walker River Decree could have relied. Further, the District states that because owners of stored water rights are allowed to call for their stored water when they need it (subject to any applicable limitations), there is no assured pattern of use on which others may have relied for purposes of return flow or for delivery efficiencies in the Walker River or in ditches.

In sum, the District's position is that the requested changes will not injure another legal user of water because the water involved is not water to which the downstream users have a right. "A downstream water right is not entitled to benefit from water previously lawfully stored under another's right. The only rights that such a downstream appropriator has are those which he would have had under the natural conditions existing before the dam was erected. [Citations.]" (*ibid.*)

With respect to the dormant lands issue raised by the Tribe, the District responds that because the proposed temporary changes involve previously stored water, no new burden will be created on the system. Moreover, the District asserts that Water Code section 1727, subdivision (e) prohibits the State Water Board from imposing the Tribe's proposed condition because it is intended to mitigate impacts that are not caused by the proposed changes.

b. Loss of carryover storage

This issue was raised by Peter Fenili, Gary Garms, SNR, and the USBWC. The commenters asserted that if water is released from storage after the end of the irrigation season (October 31) for transfer to Walker Lake, it will result in a loss of carryover storage in Bridgeport and Topaz Reservoirs. The commenters believe that the water remaining in storage after the irrigation season belongs to all of the water users for the next season. Therefore, any depletion of water in storage after the irrigation season could negatively impact the amount of water available to the stored water users the following year.

District Response:

The District responds that "owners of stored water have an absolute right to call on their stored water for beneficial use during the irrigation season" and they are not "required to leave any water in storage at the end of an irrigation season to benefit the common pool for the subsequent year." (*Id.*, p. 9.) "An appropriator is not required to refrain from using stored water in order to make more water available to others. [Citations.]" A change in use that allows a water right owner to make greater beneficial use of stored water does not result in legal injury.

c. The period of transfer

Peter Fenili, Gary Garms, SNR, and the USBWC commented on the period of transfer, which is not limited to the irrigation season. Certain commenters believe that the proposed transfer season conflicts with the District's present policies because the District has adopted a regulation that limits the use of stored water for irrigation purposes from April 1 through October 31 of each year. For the transfers, the District proposes to release water from storage from October 1 through July 15 of the following year. (The comments and responses regarding the impacts of releasing water from storage outside the irrigation season are summarized above in section 6.1.a.)

District Response:

Pursuant to Nevada law, which allows an irrigation district to adopt regulations for the use of water within the district, the District has adopted a regulation that limits the use of stored water for irrigation purposes to the period April 1 to October 31. That period does not completely coincide with the irrigation season under the Walker River Decree, which establishes an irrigation season of March 1 to October 31 in the area. The District notes that the Walker River Decree and California law allow for changes in use and that because the proposed use will not be an irrigation use, the period of use for irrigation does not apply. According to the District, it is likely, however, that releases will take place during the period April 1 to October 31, or immediately after October 31.

d. The maximum combined amount of water proposed to be transferred

This issue was raised by NFWF and DFW. DFW seeks clarification on how much water is proposed to be transferred because, it states, the petitions could be read to suggest that a maximum amount of 50,000 af could be transferred, but the public notice indicated that 25,000 af would be transferred.

NFWF expresses concern that the maximum quantity of water sought to be transferred under the Petitions may not be consistent with the annual Stored Water Program goal of at least 25 percent of the annual storage water allocation during the first program year. NFWF requests that the 25,000 af limit be applied to each reservoir individually, with a combined maximum of 50,000 af to "ensure consistency with the 2012 funding agreement as well as flexibility in future years." (Letter from Don Springmeyer, Wolf, Rifkin, Shappiro, Schulman & Rabkin LLP to Kate Gaffney, State Water Board (April 19, 2013), p. 3.)

District Response:

The petitions are limited to a combined total of 25,000 af. Therefore, the 25,000 af combined total proposed for transfer will meet the SWP goal of 25 percent of the maximum annual storage water allocation that is allowed under the District's licenses.⁴

e. Protection of public resources and values in California

DFW and Mono County question whether the temporary change petitions would unreasonably affect fish, wildlife, or other instream beneficial uses, contending that the temporary change petitions do not contain enough information for the State Water Board to evaluate the effects of the petitions and make the required findings. The commenters seek additional information about potential changes resulting from the proposed transfers that could affect fish and wildlife, recreation, aesthetic, and other public values both at Bridgeport and Topaz Reservoirs and downstream. These potential changes include changes in the timing of releases of stored water on resources and public values at the reservoirs, changes to bypass flows in the West Walker River below the Topaz Canal Diversion, and changes in streamflow, timing, and rates of change downstream of the reservoirs. Further, they request the District develop a schedule of reservoir releases, in coordination with DFW, Mono County and other interested parties in California.

District Response:

The District responds that the petitions do not request any changes regarding diversion to storage under either license. Thus, there will be no impact to the West Walker River bypass flow that applies to diversions to storage in Topaz Reservoir. Further, releases from Topaz Reservoir storage will not impact any part of the West Walker River in California because the Topaz outlet is in Nevada. Topaz Reservoir, which is located partly in California and partly in Nevada, has a dead pool of approximately 65,000 af which will not be affected by the transfer.

Bridgeport Reservoir will continue to be operated in accordance with the Bridgeport Reservoir Operations Manual. Minimum pool, ramping requirements and minimum release requirements will be followed.

According to the District, farmers currently can call for stored water at any time for irrigation purposes during the period April 1 to October 31. Consequently, there is no set pattern of releases from the reservoirs, and nothing prevents the early drawdown

⁴ The State Water Board notes that License 6000 authorizes the diversion of up to 57,580 afa of water to storage. License 9407 allows the diversion of up to 39,700 afa of water to storage, but the maximum withdrawal in any one year cannot exceed 36,000 af. Thus, the maximum that can be withdrawn from storage in any year under Licenses 6000 and 9407 is 93,580 af (57,580 af plus 36,000 af).

of reservoirs or fluctuating releases during the irrigation season. To the extent that there is a problem with a changing pattern of releases during the irrigation season, it is not caused by the petitions.

The District states that it is possible, if not probable, that the water sought to be transferred under the petitions will be released from storage near the end of, or immediately after, the irrigation season. This will likely improve, and will not harm, summer recreation on Bridgeport and Topaz Reservoirs. To the extent that releases occur after October 31, the District states that it will work with DFW to avoid unseasonal additions, abnormal quantities, or rapid fluctuations in the streams.

f. CEQA compliance is required for the transfers

This issue was raised by DFW and Mono County. The commenters acknowledge that Water Code section 1729 exempts temporary transfers of one year or less from compliance with CEQA. They assert, however, that the SWP is in reality a three-year water leasing program that is not exempt from CEQA under Water Code section 1729. Mono County further suggests that the application of Water Code section 1729 to the change petitions will result in piecemealing that is prohibited under CEQA.

District Response:

The District responds that although the lease demonstration program is authorized for three years, there is nothing which requires the program to be carried out for three years or that the program be operated in consecutive years. Moreover, there is no certainty the one-year program will be carried out, much less that a three-year program will be carried out.

The District further notes that the California Legislature in Water Code § 1729 has expressly provided that changes made under Water Code § 1725 are exempt from CEQA. It asserts that the State Water Board cannot disregard that exemption simply because another similar or perhaps longer change might be sought in the future. Moreover, any temporary changes authorized pursuant to the current petitions will not authorize a change for longer than one year. Anything after that will require additional filings.

g. Beneficial use of water past the Wabuska gage

This issue was raised by the Tribe and the USBWC. The USBWC questions how the District will ensure that the transferred water will be put to the proposed beneficial use since the District cannot manage the conveyance of water from Wabuska gage to Walker Lake. The Tribe also requests that the terms of the State Water Board's approval reference the conveyance agreement, which was then being executed between the Tribe, the Bureau of Indian Affairs (BIA), and NFWF for all NFWF Program water conveyance and accounting for flows through the reservation to Walker Lake.

District Response:

The District indicates that management of releases past the Wabuska gage is an issue for the Walker River Court that does not need to be addressed by the State Water Board. Also, in connection with NFWF's Application 80700 before the Nevada State Engineer, the District notes that NFWF and the Tribe have reached an

agreement related to administration of the transferred water from the Wabuska Gage and through the Reservation and provides a copy of the agreement and the Lower Walker River Conveyance Protocols (Sept. 18, 2013) as Exhibit A to its responses.

h. Potential loss of groundwater recharge

Groundwater recharge issues were raised by SNR and the Tribe. SNR believes that the instream flow dedication would be detrimental to groundwater recharge that would otherwise occur through irrigation. The Tribe is interested in whether, over time, the lack of deep percolation of applied water would diminish the underground return flows to the Walker River or adversely affect supplemental groundwater pumping.

District Response:

The District responds that neither the State Water Board nor the District can require a farmer to irrigate for purposes of groundwater recharge. According to the District, the Nevada State Engineer has recognized this fact in several rulings, and found that impacts to groundwater recharge are not a valid basis for denying a change to a surface water right.

6.2 AVMWC

The AVMWC supports the District's participation in the Restoration Program, but expressed concerns about potential impacts to AVMWC that are summarized in section 6.1.a.

6.3 SNR

Comment:

SNR opposes the change petitions and the dedication of water to Walker Lake. Certain SNR comments and the District's responses are summarized in sections 6.1.a, 6.1.b, 6.1.c, and 5.1.h. In addition to those comments, SNR notes that, historically, water transfers have not been allowed outside of the District boundaries. SNR also believes that the proposed transfer amount of 25,000 af would not accomplish the intended purpose of increasing inflow to Walker Lake given river losses, and that efforts would be better directed at clearing the river channel below Wabuska to Walker Lake or installing a pipeline. Further, SNR expresses concern that the proposed temporary changes may be made permanent.

District Response:

The District responds that the proposed temporary changes are authorized under District Regulation No. 14, which expires in 2017.⁵ There has been no decision to allow permanent use of District stored water outside the boundaries of the District and the temporary changes proposed with these petitions will not permit such permanent use. The District states that this issue is internal to the District, and is not a State Water Board issue.

6.4 Peter A. Fenili

Peter Fenili's comments and the District's responses are summarized in sections 6.1.a, 6.1.b and 6.1.c.

⁵ By Resolution dated January 6, 2012, the District adopted Regulation No. 14, "Temporary Changes to Stored Water Rights for Beneficial use at Walker Lake."

6.5 NFWF

Comment:

NFWF supports the overall intent of the Petitions, which it stated are consistent with the November 2012 funding agreement with the District and are necessary to implement the Stored Water Program. Certain comments by NFWF regarding the amount of water proposed to be transferred and the District's responses are summarized in section 5.1.d. In addition, even if the State Water Board approves the temporary change petitions, NFWF notes that additional approvals will be required to implement the proposed changes, including approvals from the Nevada State Engineer and the federal District Court. Accordingly, NFWF requests that the State Water Board condition its approval to allow the one-year period to begin once all necessary approvals, and not just the Board's, are obtained.

District Response:

The District agrees that the one-year temporary transfer period should not begin to run until the last of the required approvals by the Nevada State Engineer and federal District Court have been obtained.

6.6 Gary Garms

Comment:

Gary Garms's comments are addressed in sections 6.1.a, 6.1.b and 6.1.c.

6.7 DFW

Comment:

DFW supports the change petitions, but notes that the project should be conducted in a manner to minimize and avoid potential impairment to other water bodies in the Walker Lake basin. DFW identifies specific information that it believes must be developed before the effects of the proposed temporary changes can be evaluated. DFW's comments and the District's responses are summarized in sections 6.1.e and 6.1.f.

6.8 Mono County

Mono County generally supports proposals to lease water within the Walker River Basin in order to provide additional inflow to Walker Lake, provided that appropriate protections are in place and the program does not result in environmental or economic harm. It strongly believes that the State Water Board requires additional information before evaluating the temporary change petitions. Mono County's comments and the District's responses are summarized in sections 6.1.e and 6.1.f.⁶

⁶ In a subsequent letter dated January 7, 2014, Mono County criticizes the District's response dated November 22, 2013, as being insufficient and reiterates its request for additional information and analysis regarding the effects of the proposed changes.

6.9 Tribe

Comment:

The Tribe generally supports conveyance of additional water to Walker Lake for fisheries recovery and environmental restoration efforts, but believes that precautions and accurate flow accounting are necessary to prevent detrimental impacts to the Tribe's irrigation rights and irrigation practices. Several of the Tribe's comments and the District's responses are summarized in sections 6.1.a, 6.1.g and 6.1.h.

The Tribe identifies a number of concerns relating to the administration of, and accounting for, transferred water past the Wabuska gage, suggesting that accounting methods, hydrologic data and accounting of storage, releases, and conveyance to the Wabuska gage must be approved by the BIA and the Tribe. To avoid harm to the Tribe's rights or to natural flow that has been historically available to the Tribe, the Tribe states that an accurate and publicly available accounting system is needed that identifies specific information, including amounts and volumes of water attributable to the transfer of water. (Tribe's Comments, pp. 2-3, ¶¶ 6, 7, 9, 10, 16.)

In addition, the Tribe notes that the temporary change petitions cannot be approved if they will harm the water rights held by the United States in trust for the Tribe with an 1859 priority date.

The Tribe also commented that portions of the temporarily added place of use will be within the Tribe's Reservation. The Tribe notes that any State Water Board approval of this proposed place of use should not be construed as permitting entry onto the Reservation by any party, including the District, the State of California, or the Water Master, unless specifically authorized by the Tribe.

District Response

In responding to the Tribe's comment regarding potential impacts to water right holders, the District noted that the Water Master makes certain that the Tribe's 1859 right is satisfied prior to water being stored for the District under their junior right. Thus, the water is stored during a period of non-injury.

6.10 USBWC

Comment:

Certain of the USBWC's comments and the District's responses are summarized above in sections 6.1a, 6.1.b, 6.1.c, and 6.1.g. In addition, the USBWC notes that, pursuant to the Walker River Decree, the change petitions cannot deprive parties to the Decree of stock water or water for domestic purposes, citing to paragraph VIII of the Walker River Decree, which provides that "water shall not be stored in said [Topaz Reservoir and Bridgeport Reservoir] so as to deprive the parties hereto including the plaintiff and its assigns of stock water or water for domestic purposes."

The USBWC raises several issues that it believes the federal District Court may need to decide. First, it raises the issue of whether the Walker River Decree can be construed to prohibit the transfer of water to Walker Lake. Paragraph XIV of the Decree states that, with one exception not applicable here, "no water shall be sold or delivered outside of the basin of the Walker River." The USBWC suggests that, because there was no beneficial use of water

at Walker Lake when the Decree was entered, the lake may not be considered part of the Walker Basin. Second, the USBWC notes that there is a question as to whether a decree holder "can own water rights but not own any land or the place of use for which the water is to be placed to beneficial use." (Letter from Karen A. Peterson, USBWC, to Kate Gaffney, State Water Board (May 9, 2013), p. 4.)

Further, the USBWC suggests that the Administrative Rules would allow the State Water Board to withhold "for good cause shown" any pending decision on the change petitions until pending litigation over waters of the Walker River has concluded. The USBWC, however, states that it "takes no position" as to whether the State Water Board should hold action on the pending petitions.

District Response:

The District responds that the change petitions will not affect, and have no relationship to, the delivery of stock water. It states that the stored water either would have been used during the irrigation season or held in storage after the irrigation season; it has never contributed to the delivery of stockwater.

The District also responds that whether the change petitions propose a place of use outside of the Walker River Basin is an issue for the federal District Court. In an interim ruling on NFWF's Application No. 80700, the District notes, the Nevada State Engineer has concluded that Walker Lake is within the Walker River Basin. The District also asserts that there is no requirement under California or Nevada law for a decree holder to own the place of use to exercise a water right. If it is an issue, the District states, it is one for the federal District Court.

With respect to the possibility of the State Water Board withholding its decision pending the outcome of litigation, the District notes that the one-year temporary changes cannot affect any outcome of the pending litigation, which is years, if not decades, away from being decided.

7.0 STATE WATER BOARD FINDINGS

In considering changes sought to California water rights adjudicated in the Walker River Decree, the State Water Board proceeds under California law. The Administrative Rules require that proceedings before a state agency must be in accordance with the practice and procedure of that agency, but establish additional requirements specific to administration of the Walker River Decree. (Administrative Rules, § 5.1.)

7.1 Availability of Water for Transfer

Before approving a temporary change involving the transfer of water, the State Water Board must determine that the proposed 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. (Wat. Code, §§ 1725, 1726, subd. (e).) Section 1725 defines "consumptively used" to mean the amount of water that 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. In addition, before approving a change under section 1707, the State Water Board must find that the proposed change will not increase the amount of water the person is entitled to use. (*Id.*, § 1707, subd. (b)(1).)

In the change petitions, the District states that the water that is the subject of the petitions is previously stored water or water that would have otherwise been held in storage at Topaz or Bridgeport Reservoirs absent the proposed transfer, "some or all of which would have been released for irrigation purposes within the District." (Petition for License 6000, Att. No. 1, p. 1; Petition for License 9407, Att. No. 1, p. 1.) The water would have been stored either during the non-irrigation season or during the irrigation season when all other decreed rights to natural flow are satisfied. (District Response, p. 5.)

The State Water Board conducted an independent evaluation of its records. The combined use under Licenses 6000 and 9407 ranged from 71,310 af to 76,060 af annually during the period 2010 to 2012.⁷ These data indicate that the District has put the amount proposed to be transferred to recent beneficial use and would, absent the proposed changes, have released water from Topaz and Bridgeport Reservoirs to the landowners within the District for irrigation purposes or would have retained the volume of water in storage pursuant to its water rights. The State Water Board finds that, in accordance with Water Code section 1726, subdivision (e), the water proposed for transfer pursuant to this order would be consumptively used or stored in the absence of the proposed temporary change. This Order includes a term to ensure that District landowners who participate in the SWP do not receive additional water to offset the water transferred.

Moreover, the District's petitions do not request any changes in the diversion of water to storage; instead they only request changes in the place and purpose of use upon release from storage. Thus, the State Water Board finds that, in accordance with Water Code section 1707, subdivision (b)(1), the proposed change will not increase the amount of water that the District is entitled to use.

7.2 No Injury To Other Legal Users Of Water

Before approving a temporary change involving the transfer of water, the State Water Board must find that a preponderance of the evidence shows that the proposed temporary change would not injure any legal user of water during any potential hydrologic condition that the 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).) Water Code section 1707, subdivision (b)(2) also requires the State Water Board to determine that a change proposed for purposes of instream flow dedication will not unreasonably affect any legal user of water before approving the change.

Thus, with respect to the "no injury" inquiry under both Water Code sections 1727 and 1707, the State Water Board must evaluate whether the change will injure any legal user of the water involved in the change. 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.*; see also (State Water Board Decision 1651 (2012) (D-1651), p. 22).⁸

⁷ 2012 is the most recent year of record on file with the State Water Board.

⁸ D-1651 can be viewed at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1650_d1699/wrd1651.pdf (as of Feb. 4, 2014).

Based on the information in the record, the District has met its burden of establishing that the proposed change will not injure any legal user of water. (Wat. Code, § 1727, subd. (b)(1), (c).) The burden of proof then shifts to any commenter to show that the proposed temporary change would result in injury. (*ibid.*) A person claiming injury must show (1) that he or she has a right to the water and (2) the proposed change would interfere with that right. (*State Water Resources Control Bd. Cases, supra*, at p. 805.) The commenters have not met this burden.

The District holds water rights to storage at Topaz and Bridgeport Reservoirs under Licenses 6000 and 9407. The water subject to the proposed temporary changes will continue to be diverted to storage under the terms and conditions of the two licenses and in accordance with water right priority. The proposed temporary changes only involve the release of water that that was diverted to storage after senior rights had been met. Thus, senior rights cannot be injured by changes in stored water once that water has been stored. Further, a downstream appropriator cannot require the owner of an upstream reservoir to release previously appropriated water. (*State Water Resources Control Bd. Cases, supra*, at p. 743.) “[I]f previously stored water is not available to a water right holder, the water right holder cannot be injured if the water does not arrive at the water right holder’s point of diversion due to a change in the use of the stored water.” (D-1651, at p. 24.) Previously stored water is only available for use by the District and is not available for other users downstream.

None of the commenters have demonstrated any right, under contract or otherwise, to the stored water that will be injured by the proposed temporary change. Landowners in the District will continue to be allocated their portion of the stored water unless they voluntarily participate in the SWP. No landowner will be required to participate involuntarily in the program.

Several commenters expressed concern that changes in reservoir operations could affect return flows or irrigation efficiencies, which in turn would affect the availability of water for their water right priority. But the issue of water availability is distinct from the issue of legal injury. Water being used under an existing right is not available for appropriation. (Wat. Code, § 1202; Cal. Code Regs., tit. 23, § 695.)

Moreover, there is no legal right to return flows from stored water that has not been abandoned. Releases of stored waters are foreign in time—in other words, they would not be present in the stream under natural conditions—and “have no relationship to or conflict with priorities of right to use the flows of another time or season.” (State Water Board Decision 192 (1928),⁹ at pp. 23-24; see *Stevens v. Oakdale Irrigation Dist.* (1939) 13 Cal.2d 343, 350-352 [downstream user has no right to continued releases of artificial flow]; *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 457 [downstream riparian user has no right to discharge of stored water]; State Water Board Decision 1602 (1984),¹⁰ at p. 4 [citing *Stevens v. Oakdale Irrigation Dist.*, *supra*, as indicating that “noncontractual rights to the use of foreign water are not a valid basis for claiming injury as a legal user of water”].)

⁹ The State Water Board's predecessor at the time was the Division of Water Rights in the Department of Public Works. Decision 192 can be viewed at <http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d0150_d0199/wrd192.pdf> (as of Feb. 8, 2014).

¹⁰ Decision 1602 can be viewed at <http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1602.pdf> (as of Feb. 8, 2014).

The Tribe expresses concern that the proposed temporary changes will affect its senior rights or claim to senior rights. Again, however, the water under Licenses 6000 and 9407 will be diverted to storage with water right priority on the stream system. Senior rights cannot be injured by the release of water stored under a junior water right.

In sum, the commenters have not demonstrated a right to water previously stored under either License 6000 or 9407, and thus, the commenters cannot be injured by a change in the previously stored water. Once the water is diverted to storage in a manner consistent with water right priorities, water stored in Topaz and Bridgeport Reservoirs is previously stored water to which the commenters have not demonstrated any legal interest.

To avoid potential injury and to ensure that other water users can identify the waters subject to the temporary changes, the State Water Board will require the District to develop and operate to a schedule of releases for the proposed temporary transfer and instream flow dedication in consultation with the Water Master, the Tribe, and NFWF. The District has already proposed similar coordination and this Order makes consultation a requirement of the approved changes. Further, under the District's grant agreement with NFWF, the District must develop an Annual Monitoring Plan that will monitor the release and delivery of SWP water and maintain daily records to account for the releases and deliveries of the water. The information must be made publically available. This Order also makes the development of such a plan and public accounting a requirement of the approved changes. Moreover, the District landowners participating in the transfer authorized under this Order to implement the SWP shall not receive a supplemental or replacement water supply to offset, in any manner, the transferred water. In addition, after the transfer period ends, an accounting of the volume of water transferred must be submitted to the Deputy Director for Water Rights.

The State Water Board finds that, in accordance with Water Code section 1727, subdivision (b)(1) and Water Code section 1707, subdivision (b)(2), the proposed temporary changes 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, or otherwise unreasonably affect a legal user of water.

7.3 No Unreasonable Effect Upon Fish, Wildlife, or Other Instream Beneficial Uses

Before approving a temporary change due to a transfer of water, the State Water Board must find that the proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).)

The District states that the increased flows resulting from releases from Topaz and Bridgeport Reservoirs will result in increased flows and water quality benefits downstream in Walker River to and including Walker Lake as part of the Restoration Program. Because the petitions do not request any changes regarding diversion to storage under either license, there will be no impacts to bypass flows or changes to other requirements governing diversions to storage. The District proposes to develop and operate to a schedule of releases for the proposed temporary transfer and instream flow dedication that will be coordinated with the Chief Deputy Water Commissioner under the Walker River Decree and other entities, including NFWF and DFW.

Certain commenters criticized the change petitions for providing insufficient detail to evaluate the environmental effects of the project, including effects related to changes in reservoir levels and downstream flows. Without more specific information provided by the District

about how the proposed temporary changes will be implemented, they claim that they cannot evaluate the project's effects.

The SWP involves a demonstration water leasing program to increase inflows to Walker Lake. In this first year of the demonstration program, the District does not know which individual landowners will participate in the program or what the exact schedule of releases will be. Any subsequent years' water releases will be informed by monitoring and evaluation of this first year's efforts. Thus, recognizing the limitations associated with the first year of a demonstration program, the State Water Board did not reject the District's change petitions for providing insufficient detail.

Moreover, to the extent that water is released during the irrigation season, the releases will be made in accordance with historic pattern of releases. Although the pattern of releases for irrigation may vary within a season, there is no evidence that water transferred for instream flow purposes during the irrigation season will have an unreasonable effect on fish and wildlife. To the extent that releases occur after October 31, the District states that it will work with DFW to avoid unseasonal additions, abnormal quantities, or rapid fluctuations in the streams.

To avoid unreasonably affecting fish, wildlife, or other instream beneficial uses, this Order will require the District to limit releases of stored water during the irrigation season, which are made pursuant to the temporary changes approved by this Order, to the historic range of reservoir releases during the irrigation season. The District may release stored water in amounts exceeding the historic range of releases during the irrigation season, or after the irrigation season ends, if the District first consults with DFW and Mono County to avoid harm to fish and wildlife and downstream habitat. Such consultation shall include the establishment of a flow ramping schedule to avoid harm through rapid fluctuations in instream levels.

The State Water Board finds that, as conditioned, in accordance with Water Code section 1727, subdivision (b)(2), the proposed changes will not unreasonably affect fish, wildlife, or other instream beneficial uses.

8.0 OTHER ISSUES RAISED BY THE COMMENTERS

Certain commenters raise issues concerning the proposed temporary changes that go beyond the questions of injury and environmental effects addressed above.¹¹

8.1 Applicability of CEQA Exemption to the Proposed Temporary Changes

Mono County and DFW argue that the proposed temporary changes are not exempt from CEQA under Water Code section 1729 because they are sought for the first year of a three-year program. Mono County further argues that treating the one-year temporary change petitions as exempt from CEQA when the SWP is a three-year water leasing demonstration program is improper piecemealing that violates CEQA.

¹¹ The State Water Board is not required to respond to comments regarding temporary changes. Nonetheless, either the District in its petitions and responses to comments or this Order address the major comments received. To the extent that a comment is not expressly addressed by this Order, it is either impliedly addressed by the determinations in this Order or is not relevant to the determinations required for State Water Board approval. It does not necessarily mean that the State Water Board endorses the District's responses.

Water Code sections 1725-1732 provide for the expedited review of temporary transfers. Water Code section 1729 exempts these temporary transfers from the requirements of CEQA, stating in full: "A proposed temporary change under this article shall be exempt from the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code." The words of this statute are clear and unambiguous, and thus the plain meaning of the provision should be followed. (*Security Pacific Nat. Bank v. Wozab* (1990) 51 Cal.3d 991, 998; see also, *id.*, § 15061, subd. (b)(1) [a project is exempt from CEQA if the project is exempt by statute].) Moreover, there are no exceptions to this statutory exemption. (Compare Water Code section 1729 with Cal. Code Regs., tit. 14, §§ 15061, subd. (b)(2), [application of a categorical exemption may be barred by exception], 15300.2 [exceptions to categorical exemptions].) Nor do Water Code sections 1725 through 1732 prohibit the approval of a series of similar temporary changes in successive years. Thus, as long as the proposed change qualifies as a temporary change involving a transfer pursuant to Water Code section 1725, it is exempt from CEQA.¹²

Here, the District seeks approval of a one-year temporary transfer of water pursuant to Water Code sections 1725 et seq. Thus, the CEQA exemption under section 1729 applies. It merits noting, however, that approval of the petitions addressed in this order does not commit the State Water Board to any particular action on future petitions associated with the SWP.

8.2 No Cause to Withhold Decision

The USBWC notes, but does not take a position on the issue, that the Administrative Rules allow an agency to withhold a pending decision on a change petition when an action has been filed in court that may affect the allocation and distribution of the waters of the Walker River until the court action is concluded. (Administrative Rules, § 6.1.) Given the decades-long duration and scope of the pending litigation, the State Water Board does not anticipate a conclusion to the court action in the near future that will affect, or be affected by, the Board's action on the temporary transfer petition. The State Water Board does not find cause to withhold its decision.

8.3 Walker Lake is Part of the Walker Basin

The USBWC notes that the provision of the Walker River Decree that prohibits the sale or delivery of water outside the Walker River basin (with certain exceptions not applicable here) has not been construed by the federal District Court, and suggest that Walker Lake may not be part of the basin for purposes of the decree. The USBWC's suggestion appears to be based on comments made by attorneys at the time litigation was pending in the 1930s that there was no beneficial use of water that went to Walker Lake.

Even if the attorneys' comments about beneficial use were consistent with the concept of beneficial use as it was commonly understood at the time, they do not support an interpretation that the Walker River Decree prohibits water from being put to beneficial use at Walker Lake. At the time the decree was entered, the court expressly prohibited the sale or delivery of water outside the Walker River basin. A watercourse is commonly understood to include the entire stream system, including any lake.¹³ There is no basis to conclude that the

¹² Mono County suggests that the District is a public agency within the meaning of CEQA, even though the District is organized under Nevada law, because the District is carrying out a project within the State of California. Even if the District is a public agency under CEQA, however, it would not alter the applicability of the exemption from CEQA for temporary transfers under Water Code section 1729.

¹³ For example, in considering the character of a stream from which water may be appropriated, the California Supreme Court concluded that a lake in which a stream terminates is part of a watercourse. "It is sufficient if there is a flowing stream; and the fact that it ends either in a swamp, in a sandy wash in which the water disappears, or

court's prohibition impliedly excluded Walker Lake from the basin particularly when the lake is part of the same drainage basin.

More importantly, paragraph X of the Walker River Decree allows parties to change the purpose of use and place of use of decreed rights.¹⁴ (See Wat. Code, § 1243 [recognizing that the use of water for protection of fish and wildlife is a beneficial use].) Thus, as long as a change is for a use that is recognized as beneficial and does not cause injury to a legal user of water, it is a permissible change and it does not matter what the parties' understanding of beneficial use was at the time the decree was entered.

8.4 Beneficial Use of Water past Wabuska Gage

The Tribe and the USBWC commented on the management of transferred water past Wabuska Gage. The USBWC notes that it is unclear how the District will ensure that the transferred water will be used for fish and wildlife enhancement because the District cannot manage the conveyance of water from the Wabuska Gage to Walker Lake. The Tribe requests that the State Water Board's approval reference the Lower Walker River Conveyance Protocols (Conveyance Protocols), which NFWF, the BIA, and the Tribe have entered into as part of a stipulation to resolve the BIA's and the Tribe's protests against NFWF's Application 80700 before the Nevada State Engineer. The Conveyance Protocols govern the conveyance of Restoration Program water in the Lower Walker River through the Tribe's Reservation to Walker Lake.

The District is not a party to the stipulation in which the Tribe, the BIA, and NFWF agreed to the Conveyance Protocols. Nonetheless, I acknowledge the Conveyance Protocols as reflecting a common understanding as to how Restoration Program water will be accounted for and conveyed in the Lower Walker River.

8.5 Appropriative Rights Do Not Depend on Land Ownership

Under California law, an appropriative right does not depend on the ownership of land, including the land where the water is placed to beneficial use. (*Crandall v. Woods* (1857) 8 Cal. 136, 142; *Santa Paula Waterworks v. Peralta* (1896) 113 Cal. 38, 43 ["title, or the right to acquire title, in the place of intended use, has never been a necessary element in the ownership of appropriated water"].) As an example, California's major water projects—the federal Central Valley Project and the State Water Project—involve appropriative water rights used on lands not held by the water right holder. (See, *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 98-100, 106-107 [describing the water projects and water rights].)

9.0 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. The Resolution also delegates authority to the

in a lake in which it is accumulated upon the surface of the ground, will not defeat the right to make the statutory appropriation therefrom, and we can see no reason why the appropriation, in such a case, may not be made from the lake in which the stream terminates, and which therefore constitutes a part of it, as well as from any other part of the water course." (*Duckworth v. Watsonville Water & Light Co.* (1907) 150 Cal. 520, 529.)

¹⁴ Paragraph X of the Walker River Decree provides that "parties shall be entitled to change the manner, means, place or purpose of use or the point of diversion of the [waters of the Walker River] or any thereof in the manner provided by law, so far as they may do so without injury to the rights of other parties hereto"

Deputy Director to perform duties related to processing change petitions in the Walker River action. This Order is adopted pursuant to the delegation of authority in sections 4.4.2 and 4.7.3 of Resolution 2012-0029.

10.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the determinations required by Water Code sections 1707 and 1725 et seq.

The State Water Board concludes that, based on the available information:

1. The proposed transfers involve only an amount of water that would have been consumptively used or stored in the absence of the temporary change.
2. The proposed temporary changes will neither injure, nor unreasonably affect, any legal user of water, including during any potential hydrologic condition that the 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 return flows.
3. The proposed temporary changes will not unreasonably affect fish, wildlife, or other instream beneficial uses.
4. The proposed temporary changes will not increase the amount of water the District is entitled to use.
5. The proposed temporary changes will otherwise meet the requirements of Division 2 of the Water Code.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT the District's petitions for temporary transfer and dedication of water for instream purposes of 25,000 acre-feet pursuant to Water Code sections 1707 and 1725 et seq. are approved for a period of one year, which will commence on the date of final approval, as defined below.

All existing terms and conditions of Licenses 6000 and 9407 remain in effect, except as temporarily amended by the following provisions:

1. The temporary change is limited to a one-year period commencing on the date of final approval. Final approval means that all related approvals by the federal District Court have been obtained, including modification of the Walker River Decree by the federal District Court to recognize (i) the State Water Board's approval of the changes under this Order and (ii) approval by the Nevada State Engineer of a change application submitted by an individual within the District to implement the SWP. Within 30 days after receiving the final approval, the District shall notify, and provide copies to, the Deputy Director for Water Rights of the approval. The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out.
2. In addition to all other purposes of use authorized by Licenses 6000 and 9407, the purpose of use of the licenses is temporarily amended to include preservation and enhancement of fish and wildlife within the following reaches: 1) for License 6000, the West Walker River from Topaz Reservoir to the confluence of the Walker River, thence

the Walker River to and encompassing Walker Lake; and 2) for License 9407, the East Walker River from Bridgeport Reservoir to the confluence of the Walker River, thence the Walker River to and encompassing Walker Lake.

3. The place of use under License 6000 is temporarily expanded to include preservation and enhancement of fish and wildlife within the reach between West Walker River from Topaz Reservoir to the confluence of the Walker River, thence the Walker River to and encompassing Walker Lake, within the following boundaries: Upstream Limit – Topaz Reservoir being within the SE ¼ of SE ¼ of Section 12, T9N, R22E, MDB&M; Downstream Limit – The terminus of Walker River into and including Walker Lake within T9 to 11N, R29 to 30E, MDB&M, as shown on map filed with the State Water Board for License 6000 and maps prepared by NFWF submitted with the petitions as Attachment A.
4. The place of use under License 9407 is temporarily expanded to include preservation and enhancement of fish and wildlife within the reach between East Walker River from Bridgeport Reservoir to the confluence of the Walker River, thence the Walker River to and encompassing Walker Lake, within the following boundaries: Upstream Limit – Bridgeport Reservoir being within the SE ¼ of the NE ¼ of Section 34, T36N, R25E, MDB&M; Downstream Limit – The terminus of Walker River into and including Walker Lake within T9-11N, R29-30E, MDB&M, as shown on map filed with the State Water Board for License 9407 and maps prepared by NFWF submitted with the petitions as Attachment A.
5. Water transferred pursuant to this Order shall be limited to a combined maximum of 25,000 af to be released from either Topaz Reservoir or Bridgeport Reservoir, or both.
6. The District shall develop and operate to a schedule of releases for the transfer in consultation with the Water Master, NFWF, and the Tribe. The District shall promptly inform these parties of any changes to the release schedule.
7. During the transfer period, the District landowners participating in the transfer authorized by this Order to implement the SWP shall not receive a supplemental or replacement water supply to offset, in any manner, the transferred water.
8. During the transfer period, the District shall comply with the section F, Annual Monitoring Plan, of Attachment A to First Amendment to [NFWF] Grant Agreement [November 2012] Regarding [District] Lease of Water Demonstration Program, Stored Water Program, and Water Measurement and Control Phase, and the public reporting provisions of section J.3 of that Attachment A. If section F or section J.3 of Attachment A are amended prior to, or during, the transfer period, the District shall promptly inform the Deputy Director for Water Rights.
9. During the transfer period, the District shall schedule reservoir releases to be made during the irrigation season (April 1 through October 31) to be within the historic range of releases during the irrigation season. The District may release stored water either (i) during the irrigation season in amounts exceeding the historic range of releases during the irrigation season, or (ii) after the irrigation season ends, if the District first consults with DFW and Mono County to avoid harm to fish and wildlife and downstream habitat. Such consultation shall include the establishment of a flow ramping schedule to avoid harm through rapid fluctuations in instream levels.

10. Within 90 days of completion of the transfer period, the District shall provide a report to the Deputy Director for Water Rights describing the transfer authorized by this Order. The report shall include the following information:
- a. The daily, monthly, and total volumes of water transferred for instream flow dedication from 1) Topaz Reservoir and from 2) Bridgeport Reservoir pursuant to this Order.
 - b. Documentation that the water transferred did not result in an increase in water diverted to storage in both Topaz Reservoir and Bridgeport Reservoir from the source waters of the District's licenses beyond the quantities that would otherwise have been diverted absent the transfer.
 - c. Documentation of compliance with all other conditions of this order.
11. No water shall be diverted or used pursuant to this Order, and no construction related to such diversion shall commence, unless petitioner has obtained and is in compliance with all necessary permits or other approvals required by other agencies.
12. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this temporary change Order, including method of use and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with the law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.
13. This order does not authorize any act that results in the taking of an endangered, threatened or candidate species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, § 2050 et seq.) or the federal Endangered Species Act (16 U.S.C.A. § 1531 et seq.). If a "take" will result from any act authorized under this transfer, the petitioner shall obtain authorization for an incidental take permit prior to construction or operation. Petitioner shall be responsible for meeting all requirements of the applicable Endangered Species Acts for the temporary change authorized under this Order.
- (0000014)
14. I reserve jurisdiction to supervise the transfer, exchange, and use of water under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD



*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated: FEB 21 2014