

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:

This Order conditionally approves the Walker River Irrigation District's (District) petitions for temporary change involving the transfer of water and instream flow dedication under water right Licenses 6000 and 9407 (Applications 2221 and 1389), pursuant to Water Code sections 1725 et seq. and 1707. This Order includes substantially similar terms and conditions, revised as appropriate, as those included in the California State Water Resources Control Board's (State Water Board or Board) 2014 and 2020 approvals of similar petitions filed by the District.

1.0 BACKGROUND

1.1 Overview

On November 10, 2021, the District filed the two petitions for temporary change with the State Water Board's Division of Water Rights (Division).

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 originate 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). The Restoration Program was established by Congress in 2009 by Public Law 111-85 for the primary purpose of restoring and maintaining Walker Lake, which is critical to the 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 Walker Basin Conservancy (WBC) currently administers the Restoration Program. The Restoration Program includes a three-year water leasing demonstration program (Stored Water Program) that is administered and managed by the District pursuant to a grant agreement with the National Fish and Wildlife Foundation (NFWF), the predecessor to the WBC. Under the Stored Water Program, surface water is released from Topaz and Bridgeport Reservoirs for the purpose of increasing inflows to Walker Lake and to obtain information regarding the establishment, budget, and scope of a longer-term leasing program. Through the Stored Water Program, individual farmers within the District may voluntarily dedicate a portion of their stored water supply to the Stored Water Program for at least one year. Although the Stored Water Program is authorized for three years, it is not required to be implemented three times or in three consecutive years.

1.2 The District's Previous Transfers Under the Stored Water Program

In February 2013, the District filed the first set of petitions for temporary changes involving the transfer of water and instream flow dedication under water right Licenses 6000 and 9407 to assist in the initial implementation of the Restoration Program. The State Water Board approved the petitions in February 2014,¹ but the transfer of water did not occur until August 2019 for various reasons, including the need for additional approvals and resulting litigation.

The Ninth Circuit Court of Appeals ultimately affirmed the State Water Board's approval in *United States v. United States Board of Water Commissioners* (9th Cir. 2018) 893 F.3d 578 (*US v. USBWC*). The court upheld the State Water Board's determination that the proposed changes involved water that would otherwise be stored and thus would not injure any legal user of the water as being consistent with the Walker River Decree and in accord with California law. (*Id.* at p. 604.) The court also concluded that Walker Lake is part of the Walker River Basin and that "dedicating water from the Walker River to Walker Lake does not violate the Decree's prohibition on delivering water 'outside of the basin of the Walker River.'" (*Id.* at p. 606.) It further clarified that state law applies to state agencies' consideration of the changes: "[t]he Decree presupposes state law in its entirety as to both substance and procedure." (*Id.* at p. 595.) The court remanded with

¹ The Division conditionally approved the change petitions by order dated February 21, 2014, and the State Water Board denied various parties' request for reconsideration and amended the Division's order by Order WR 2014-0020-Exec (May 16, 2014).

instructions to grant the District's petition to modify the Walker River Decree consistent with the State Water Board's report.

The temporary changes ultimately were authorized through July 16, 2020. The District initiated the transfers in 2019 and released approximately 17,664 acre-feet (af) of stored water to the Walker River system and Walker Lake in August through October 2019.

In January 2020 the District filed a similar set of petitions for temporary changes involving the transfer of water and instream flow dedication under water right Licenses 6000 and 9407 to enable the second year of the Stored Water Program. The Division approved the petitions by order dated April 17, 2020. The District released approximately 703 af of stored water to the Walker River system and Walker Lake in August 2021 for the second year of the Stored Water Program.

With the current change petitions, WRID seeks to implement the third and final demonstration year of the Stored Water Program.

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 for the Walker River (USBWC) and the Water Master/Chief Deputy Water Commissioner for the Walker River (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

² *Administrative Rules and Regulations Regarding Change of Point of Diversion*,

rules in this proceeding.³ 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.

2.2 Description of the Current Proposed Transfer

The District filed two separate petitions under Licenses 6000 and 9407 with similar proposed changes that seek to transfer up to a total of 25,000 af for instream flow dedication to Walker Lake. Through its petitions, the District seeks to temporarily 1) 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) 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) add Fish and Wildlife Preservation and Enhancement to both licenses as an additional purpose of use for instream dedication to Walker Lake. The water involved is surface water that was previously stored or would have otherwise been held in storage at Topaz Reservoir or Bridgeport Reservoir absent the transfer, 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 final approval by the State Water Board, the federal District Court, and the Nevada State Engineer.

The quantities of water proposed to be released by the District are variable and depend upon hydrologic conditions and participation in the Stored Water Program 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. The District proposes to release water

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 involve similar actions. The Administrative Rules defines “change applications,” as applications to change the point of diversion, manner of use, or place of use of water rights under the Walker River Decree. (Administrative Rules, § 1.1(c).) 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].)

from April 1 through October 31, which is generally the irrigation season. Following evaluation of participation by growers in the Stored Water Program, 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 the WBC/NFWF, and the Walker River Paiute Tribe (Tribe).

The District anticipates that the State Water Board's approval will include similar terms and conditions to those included in the Board's 2014 and 2020 approvals.

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 November 22, 2021, the State Water Board issued public notice of the petitions for temporary change, posting the notice on the Division's website and providing the 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. On the same date, the public notice was provided by first class mail to interested persons identified in the Administrative Rules and to downstream water right holders. The November 22, 2021 public notice of the petitions was also published in the following newspapers: the Gardnerville Record-Courier, the Lyon County Leader, and the Mineral County Independent-News. On January 22, 2022, public notice of the petitions was also published in the Mammoth Times.

6.0 COMMENTS ON THE PETITIONS

The State Water Board received comments on the petitions from 1) the WBC; 2) Mr. Mark Mahan; 3) the USBWC and the Water Master; and 4) the California Department of Fish and Wildlife (CDFW), California's trustee agency for fish and wildlife resources. On January 6, 2022, the District responded to the comments. This section summarizes the comments and the District's responses and, as appropriate, the State Water Board's consideration of the issues raised.

6.1 WBC Comments

The WBC indicated that it is fully supportive of the District's petitions, which it stated are consistent with the NFWF funding agreement, as well as necessary to implement the Stored Water Program. The WBC noted the importance of monitoring and evaluating the effects of the timing of transferred water releases on river health and other ecological needs as part of the Stored Water Program and that such efforts "can provide important feedback that informs adaptive management and joint learning in support of future operations and longer-term efforts." (WBC Comment Letter (Dec. 7, 2021), p. 2.)

6.2 Mark Mahan

Comments:

Mark Mahan of Santa Margarita Ranch objected to the timing of the release of waters under the District's proposed transfer. Mr. Mahan stated that he works along the East Fork Walker River corridor that runs through the ranch. Citing to low reservoir pools and low allotments the past two years, Mr. Mahan explained that the transfers should not occur during critical low water years. Instead, water should be transferred in years when there are excess flows through the reservoirs. Mr. Mahan stated that the transfer of water and changes should be based on availability of excess water after the water user group has been supplied water pursuant to their water rights or the change of use should have a new priority date set at the time of the change so that water users can still get their water. He further noted that taking water from the two ranches up the canyon has a negative effect on riparian vegetation and increases invasive species.

District Response:

The District stated that availability of stored water to water users within the District is unchanged. The District allocates available stored water to landowners who are entitled to the stored water, and in turn individual landowners within the District may voluntarily dedicate a portion of the allocated stored water supply to the Stored Water Program. Landowners' participation in the Stored Water Program will not change the amount of stored water available to other parties who have an entitlement to the District's stored water. Further, the stored water that is voluntarily dedicated to the Stored Water Program is not excess water and has no impact on the availability of water to other users under their water rights or entitlements.

The District further explained that the situation involving the two ranches upstream from the Santa Margarita Ranch is not related to the Stored Water Program. The ranches previously sold their land and natural flow water rights to the WBC, and the ranches have become part of the Nevada State Park system. The WBC has not applied to the Nevada State Engineer to change those natural flow rights for use at Walker Lake. The WBC and Nevada State Parks are the parties who currently decide whether to irrigate those ranches.

As discussed below, the State Water Board finds that, based on information in the record, the District has met its burden of establishing that the proposed change will not injure any legal user of water. Moreover, the issues related to the two upstream ranches are not related to the proposed changes involving the transfer of water.

6.3 USBWC and Water Master Comments

Comments:

The USBWC and the Water Master (referred to collectively in this subsection as USBWC) requested that the District be required to provide the USBWC with a copy of the release plan and the summary report or information submitted to the Division pursuant to any condition of approval similar to Condition 10 of the Division's 2014 Order. Condition 10 of the Division's 2014 Order requires the District to submit certain information, including documentation of compliance with all other conditions of the Order, to the Division within 90 days of completion of the transfer period. A similar condition is included in this order as Condition 11.

The USBWC referenced the District's statement in the petitions that the District will rely on existing water measurement gages in the Walker River Basin for monitoring flows and accounting for actual releases. The USBWC believes that, for purposes of monitoring flows and accounting for actual releases by the District for the Stored Water Program, it is critical that the existing water measurement gages in the Walker River Basin, at a minimum, be maintained, including but not limited to the Miller Lane gage. The USBWC stated that it is not clear whether the Miller Lane gage will be maintained during the 2022 agricultural season.

The USBWC commented that there is no information provided in the petitions regarding the management and accounting for stored water transferred under the Stored Water Program past the Wabuska Gage and that the District did not ask that the Lower Walker River Conveyance Protocols⁴ govern the conveyance of stored water. The USBWC assumes that the protocols will be in place if the petitions are approved by the State Water Board.

District Response:

The District stated that it will provide the USBWC a copy of the release plan and summary report or other information submitted to the Division pursuant to any condition of approval of the current petitions that is similar to Condition 10 of the Division's previous orders. The District also indicated it will provide the USBWC a copy of any temporary change applications filed with the Nevada State Engineer and copies of any

⁴ The protocols establish accounting procedures for the conveyance of NFWF's Restoration Program water from Wabuska Gage through the Tribe's Reservation to Walker Lake and are the result of a stipulation between NFWF, the Tribe, and the Bureau of Indian Affairs to resolve protests over NFWF's Nevada Application 80700 to change the manner of use and place of use of decreed water rights to increase inflows to Walker Lake.

monthly reports submitted to the Nevada State Engineer.

The District stated that it is currently coordinating with the U.S. Geological Survey to ensure that the Miller Lane gaging station will be maintained during the 2022 season.⁵

The District also stated that the Lower Walker River Conveyance Protocols will govern the conveyance of the released water under the Stored Water Program in the Lower Walker River including the reach from the Wabuska Gage through the Walker River Indian Reservation and to Walker Lake.

The State Water Board finds that it is reasonable for parties that must be consulted on the release plan, the Water Master, the WBC/NFWF, and the Tribe, also to have an opportunity to review information related to the completion of the transfer. Condition 11 will require the District to provide notice of availability of the report to these parties and, on request, make the report available either by posting it on a website or other means. In addition, the USBWC requested that the District be required to provide the USBWC with copies of any temporary change applications and monthly reports submitted to the Nevada State Engineer as required by any temporary permits issued by the Nevada State Engineer, but does not explain how this information is required under California water right law or otherwise relates to the State Water Board's consideration of the petitions. Approvals by the Nevada State Engineer that fall within the definition of final approval in Condition 1 must be provided to the Deputy Director for Water Rights. As explained below, there is sufficient information in the record to support the State Water Board's approval of the transfer petitions. The USBWC will receive notice of the District's compliance with conditions of this Order pursuant to Condition 11.

6.4 CDFW Comments

Comments:

CDFW stated that it is not opposed to the "concept of water transfers if the transfer is structured and timed such that beneficial uses for fish and wildlife resources are not

⁵ Pursuant to a 2019 stipulation between NFWF and the USBWC, the Miller Lane gage is being operated for a trial period of three irrigation seasons for the Water Master's administrative flows under Nevada Permit 80700 within Nevada. At the end of the trial period, the Water Master and NFWF will conduct a technical analysis of the stream flow data to inform the utility of the Miller Lane gage and/or the Yerington Weir gage in the future. At this time, the WBC is awaiting finalized data from the Miller Lane gage for the 2021 irrigation season in order to complete the analysis necessary to determine the effectiveness of the gage to administer instream flows. The State Water Board's conditional approval of the petitions is not dependent on the operation of the Miller Lane gage.

impacted or impaired.” (CDFW Comment Letter (Dec. 22, 2021), p. 2.) CDFW is concerned that the District’s proposed transfer period may occur when high flows may be detrimental to fisheries and recommends that flows in East Walker River should be limited to 20 to 50 cfs from December through February to avoid adverse impacts to overwintering trout and fulfill the requirements of Fish and Game Code section 5937. CDFW also recommended that the District’s transfer releases should be timed to avoid flow increases or decreases in excess of 15 percent per day between January and May to avoid impacts to spawning rainbow and Lahontan cutthroat trout, as well as protecting spawning native mountain sucker and mountain whitefish. CDFW requested that any approval of the petitions include a monitoring and reporting requirement, at least monthly, that provides information detailing the location, timing, and amount of flow releases to ensure compliance with CDFW’s proposed flow conditions.

District Response:

The District stated that the Stored Water Program will only be releasing water during irrigation season, consequently no water will be released during the months of December through February. The season of use for stored water is generally from April through October 31, and releases for the Program will be scheduled to be made within the historic range of releases during that period. The District stated that it is highly unlikely that any releases for the Program will be made during April, however those releases would be made within the range of releases for that month.

The District stated that the State Water Board’s previous approvals of the Stored Water Program required the District to provide a monitoring report to the Board within 90 days of completion of the transfer. The District has only been required to submit monthly reports to the Board if the District released stored water in either amounts exceeding the historic range of releases during the irrigation season or following October 31. The District indicated it does not intend to do either, however it will comply with requirements for monthly reporting with respect to any such releases.

The District indicated that it performs monitoring on a daily basis and that information is provided on the District’s website⁶.

To ensure that the proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses, the State Water Board will require the District to ensure that transfer releases do not contribute to flow increases⁷ in the Walker River system in

⁶ Daily monitoring data for WRID’s Stored Water Program is located on the following webpage: <http://www.wrid.us/WRID/SWLP>

⁷ In CDFW’s comments, it recommended that the District’s transfer releases should avoid “flow increases *or decreases* in excess of 15% per day between January and May.” (CDFW Comment Letter (Dec. 22, 2021), italics added.) On January 14, 2022, CDFW staff confirmed with Division staff the term ‘decreases’ was inadvertently

excess of 15 percent per day in April or May. If, however, after consultation with CDFW, CDFW agrees in writing that flow increases in excess of 15 percent per day in April or May will not unreasonably affect fish, wildlife, and other instream beneficial uses, the District may make larger releases consistent with the terms of this order. If the District releases stored water in April or May, the District will be required to provide monthly reports to the State Water Board and CDFW documenting compliance with this requirement. The District will also be required to notify CDFW of availability of the summary report as detailed in Condition 11 of this Order.

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 and agency practice and procedure. (*US v. USBWC, supra*, 893 F.3d at p. 595; 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).) 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).)

The change petitions involve the transfer of stored water. 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. 2; Petition for License 9407, Att. No. 1, p. 2.) 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 fully satisfied. (Petition for License 6000, Att. No. 1, p. 5; Petition for License 9407, Att. No. 1, p. 5.)

The State Water Board conducted an independent evaluation of its records. The combined annual use under Licenses 6000 and 9407 was 28,930 af, 72,260 af, 68,680 af, and 57,921 af during 2017, 2018, 2019, and 2020, respectively. 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

included in CDFW’s flow recommendation.

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 Stored Water Program 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 before approving a change for purposes of instream flow dedication that the change will not unreasonably affect any legal user of water.

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

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,

⁸ D-1651 can be viewed at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1650_d1699/wrd1651.pdf (as of February 15, 2022).

subds. (b)(1), (c).) 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.) Water previously stored water by the District is only available for use by the District and is not available for other users downstream. (*US v. USBWC, supra*, 893 F.3d at p. 604.)

The Stored Water Program may result in changes in reservoir operations that have the potential to affect return flows or irrigation efficiencies, which in turn could affect the availability of water for junior priority water right holders. 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 February 15, 2022).

¹⁰ Decision 1602 can be viewed at <http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1602.pdf> (as of February 15, 2022).

Senior water right diverters downstream of Topaz and Bridgeport Reservoirs will not be affected by the transfer. The water under Licenses 6000 and 9407 will be diverted to storage in accordance with water right priority on the stream system. Senior rights cannot be injured by the release of water stored under a junior water right.

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 set forth in a release plan for the proposed temporary transfer and instream flow dedication, in consultation with the Water Master, the Tribe, and the WBC/NFWF. In part, the release plan will describe the proposed schedule and volume of releases to be made from each reservoir during the period of April 1 through October 31. 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 Stored Water Program water and maintain daily records to account for the releases and deliveries of the water.¹¹ The information must be made publicly available. This Order also makes the development of such a plan and public accounting a requirement of the approved changes. Moreover, as noted above, the District landowners participating in the transfer authorized under this Order to implement the Stored Water Program shall not receive a supplemental or replacement water supply to offset, in any manner, the transferred water. 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).)

¹¹ NFWF and the District have executed several amendments to the original grant agreement. The most recent amendment, the fourth amendment to the grant agreement, extends the period of performance but does not alter the terms of the first amendment to the NFWF grant agreement regarding the Annual Monitoring Plan or applicable reporting requirements that are required by this Order.

The District anticipates that the increased flows resulting from releases from Topaz or Bridgeport Reservoirs will result in beneficial effects on fish, wildlife, other instream beneficial uses and water quality downstream to and including Walker Lake. If the District determines that stored water releases will occur in amounts exceeding the historical range of releases, the District proposes to consult with the CDFW and Mono County to identify potentially unreasonable impacts to fish and wildlife and instream beneficial uses, and to develop measures to avoid or mitigate any such impacts.

The purpose of the petitions is to assist with increasing flows into Walker Lake for environmental restoration in the Walker River Basin as provided under federal law and the Restoration Program. The change petitions do not propose any physical changes in the District's diversion and conveyance system. Nor do the petitions propose any change in the diversions to storage in Topaz or Bridgeport Reservoirs or existing bypass or minimum pool requirements. Thus, the record supports the conclusion that the proposed temporary changes, as conditioned, will not unreasonably affect fish, wildlife, or other instream beneficial uses.

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 period of April 1 through October 31, which are made pursuant to the temporary changes approved by this Order, to the total historic range of reservoir releases during the irrigation season. The historic range of reservoir releases are those releases that have taken place under existing license conditions, including any requirements for reservoir surface water elevation, minimum pool, bypass flows, or ramping schedules. The District may release stored water in amounts exceeding the historic range of releases during the irrigation season if the District first consults with CDFW and Mono County to identify potentially unreasonable impacts to fish and wildlife and instream beneficial uses, and to develop measures to avoid or mitigate any such impacts. Such consultation shall include the establishment of a flow ramping schedule to avoid harm through rapid fluctuations in instream levels.

CDFW recommended that the District's transfer releases be timed to avoid flow increases in excess of 15 percent per day in April and May to avoid impacts to spawning rainbow and Lahontan cutthroat trout, as well as protecting spawning native mountain sucker and mountain whitefish. This Order requires that the District's transfer releases do not contribute to flow increases in the Walker River system in excess of 15 percent per day in April or May absent written concurrence by CDFW.

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 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 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.

9.0 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 Stored Water Program. 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 located at California Coordinate System, NAD 83, Zone 3, North 2,419,385 feet and East 6,845,209 feet, being within SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 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 the District and NFWF submitted with the petitions as Exhibit C.
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 located at California Coordinate System, NAD 83, Zone 3, North 2,307,798 feet and East 6,931,075 feet, being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 34, T6N, 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 the District and NFWF submitted with the petitions as Exhibit C.

5. Water transferred pursuant to this Order shall be limited to a combined maximum amount of 25,000 af to be released from either Topaz Reservoir or Bridgeport Reservoir, or both, from April 1 through October 31.
6. The District shall develop and operate to a schedule of releases (release plan) for the transfers that describes the proposed schedule and volume of releases to be made from either Topaz Reservoir or Bridgeport Reservoir, or both, during the period of April 1 through October 31.
 - a. The release plan shall be developed in consultation with the Water Master, the WBC/NFWF, and the Tribe. Within 30 days after consultation, the District shall provide verification to the Division of Water Rights that such consultation has occurred and information regarding any actions taken or that will be taken as the result of the consultation. The District shall promptly inform the Water Master, the WBC/NFWF, the Tribe, and the Division of Water Rights of any changes to the release schedule.

If any dispute arises during consultation regarding potential injury to legal users of water, the Deputy Director for Water Rights shall decide the matter. Consultation is required only when necessary to carry out this transfer; unless otherwise required by law, consultation is not required for releases of stored water for purposes unrelated to the transfer, such as irrigation, flood control, and dam safety. The District shall promptly inform these parties of any changes to the release schedule.

- b. Unless otherwise provided herein, the total release must be within the historic range of releases for each reservoir during the period of April 1 through October 31. The historic range of releases are those releases that have taken place under existing license conditions, including any requirements for reservoir surface water elevation, minimum pool, bypass flows or ramping schedules. The historical range of releases must be based on average daily releases in years with similar hydrology to the period in which the transfer will occur or be based on a comparable method that reflects the relevant hydrology and is approved in advance by the Deputy Director for Water Rights. The release plan must identify the historic range of releases during the irrigation season and evaluate whether water to be transferred during the irrigation season is within the historic range of releases.
 - c. At least one month prior to the period of releases for the transfer, the District will provide the release plan to the Deputy Director for Water Rights and make the plan publicly available.
7. In order for the District to release stored water in amounts exceeding the historic range of releases during the period of April 1 through October 31, the District first

shall consult with CDFW and Mono County to identify potentially unreasonable impacts to fish and wildlife and instream beneficial uses and to develop measures to avoid or mitigate any such impacts. Such consultation shall include (a) development of a schedule of releases for each reservoir; (b) establishment of flow ramping rates; (c) establishment of stream flow release limitations, if necessary; and (d) development of a monitoring plan for implementation to ensure that release of stored water exceeding the historic range of releases does not result in unreasonable impacts to fish, wildlife, or instream beneficial uses. The monitoring plan shall focus on specific fisheries concerns during the periods of release exceeding the historic range of releases. A monthly monitoring report shall be submitted to CDFW, Mono County, and the Deputy Director for Water Rights and a final report of the results of the monitoring submitted no later than 90 days after the transfer period ends.

Within 30 days after consultation, the District shall provide verification to the Division of Water Rights that such consultation has occurred and information regarding any actions taken or that will be taken as the result of the consultation. If any dispute arises during consultation regarding unreasonable impacts to fish, wildlife, and other instream beneficial uses, or measures to avoid or mitigate such impacts, the Deputy Director for Water Rights shall decide the matter. Consultation is required only when necessary to carry out this transfer; unless otherwise required by law, consultation is not required for releases of stored water for purposes unrelated to the transfer, such as irrigation, flood control, and dam safety.

8. If the District releases stored water for transfer in April or May, the releases shall not contribute to flow increases in the Walker River system in excess of 15 percent per day. If, after consultation with CDFW, CDFW agrees in writing that flow increases in excess of 15 percent per day in April or May will not unreasonably affect fish, wildlife, and other instream beneficial uses, the District may make larger releases consistent with the terms of this Order. When releasing stored water in April or May, the District shall provide monthly reports to the State Water Board and CDFW documenting compliance with this condition. The monthly reports shall be submitted to the State Water Board and CDFW within 15 days following the month(s) the releases occurred.
9. During the transfer period, the District landowners participating in the transfer authorized by this Order to implement the Stored Water Program shall not receive a supplemental or replacement water supply to offset, in any manner, the transferred water.
10. 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 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 substantively amended prior to, or during, the transfer period, the District shall promptly inform the Deputy Director for Water Rights.

11. 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 District will also provide notice of availability of the report to the Water Master, the WBC/NFWF, CDFW, and the Tribe, and, on request, make the report available either by posting it on a public website or by other means. 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.
12. 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.
13. 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.
14. 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.

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15. 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

ORIGINAL SIGNED BY

Erik Ekdahl, Deputy Director
Division of Water Rights

Dated: FEB 23 2022