

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

**DIVISION OF WATER RIGHTS**

**WR ORDER 2007-0021-DWR**

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**IN THE MATTER OF LICENSE 11395 (APPLICATION 16186)  
MERCED IRRIGATION DISTRICT  
ORDER APPROVING TEMPORARY URGENCY CHANGE  
IN PLACE AND PURPOSE OF USE AND 1707 PETITION FOR  
DEDICATION OF WATER FOR INSTREAM USE**

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SOURCE: Merced River  
COUNTY: Mariposa and Merced

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ORDER APPROVING TEMPORARY URGENCY CHANGE IN PLACE AND PURPOSE OF USE AND 1707 PETITION FOR THE DEDICATION OF WATER FOR INSTREAM USE BY THE CHIEF OF THE DIVISION OF WATER RIGHTS

**1.0 SUBSTANCE OF PETITION**

On June 8, 2007,

Merced Irrigation District  
c/o Marc Van Camp  
MBK Engineers  
2450 Alhambra Blvd. 2<sup>nd</sup> Floor  
Sacramento, CA 95817

filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a Petition for Temporary Urgency Change pursuant to Water Code Sections 1435 and 1707 Petition for dedication of water for instream use. If approved, the Merced Irrigation District (District) would temporarily increase their licensed place of use to include Merced River from New Exchequer to the confluence with the San Joaquin River, the San Joaquin River from the confluence of the Merced River to the San Joaquin River at Vernalis, and the San Joaquin River from Vernalis through the San Francisco-San Joaquin Bay Delta (Delta). The purposes of use requested are water quality use and fish and wildlife enhancement. Temporary urgency changes under Water Code section 1435 may be effective for a period of up to 180 days.

**1.1 Description of the Project:** The District proposes to temporarily change the place of use of License 11395 (Application 16186) to allow 15,000 acre-feet (af), at a rate of 850 cubic feet per second (cfs), of previously stored water to be released downstream to: a) assist in meeting the salinity objectives for protection of agricultural beneficial uses contained in State Water Board Decision 1641 (Decision 1641); b) help maintain the combined net

positive flow target for Old and Middle Rivers to protect Delta smelt, as recommended by the Delta Smelt Working Group; and c) enhance the U.S. Bureau of Reclamation's (Reclamation) action to protect Delta smelt in the central Delta while Reclamation diverts a minimum amount of water at the CW "Bill" Jones Pumping Plant (also known as the Tracy Pumping Plant) to meet health and safety needs. The intent is to release water from New Exchequer Reservoir to assist in meeting instream flow and water quality objectives at Vernalis on the San Joaquin River, the combined flow target for Old and Middle Rivers, and fish protection actions for Delta smelt. The release of this water will be used to offset the water being pumped at the Jones Pumping Plant by Reclamation.

## **1.2 Place of Use Under the Temporary Urgency Change and 1707 Petitions:**

Merced River from New Exchequer to the confluence with the San Joaquin River, the San Joaquin River from the confluence of the Merced River to the San Joaquin River at Vernalis, and the San Joaquin River from Vernalis through the Delta.

## **2.0 BACKGROUND**

**2.1 Substance of the District's License:** MID holds License 11395 which authorizes the diversion to storage of up to 605,000 af of water per annum from the Merced River between October 1 and July 1. The maximum withdrawal from Lake McClure and Lake McSwain under License 11395, as well as Licenses 2684, 2685, and 11396 (Applications 1222, 1224, and 16187) is 516,110 af per annum. The points of diversion for License 11395 are located at the New Exchequer Dam and the McSwain Dam. The water is used for irrigation, domestic, recreational, fish culture, and wildlife enhancement purposes within the authorized place of use identified by the "Official map of MID-1973" on file with the State Water Board.

In Decision 1641, the State Water Board added the reach of river between the District's point of diversion at McClure Dam to Vernalis as an authorized place of use and fish and wildlife enhancement as an authorized purpose of use through the year 2011.

## **3.0 PUBLIC NOTICE**

The State Water Board may issue a temporary change order in advance of public notice. (Wat.Code § 1438.) The State Water Board will comply with the noticing requirements as soon as practicable.

## **4.0 REQUIRED FINDINGS OF FACT**

**4.1 The Licensee Has an Urgent Need to Make the Proposed Change:** On May 31, 2007, Reclamation announced, in coordination with the U.S. Fish and Wildlife Service (USFWS), a plan for the immediate protection of the Delta smelt at the two major export pumps in the South Delta. The Delta smelt are identified as threatened under the California Endangered Species Act and the Federal Endangered Species Act. Reclamation has reduced pumping at Jones Pumping Plant to 850 cfs, which is the minimum pumping rate possible absent the complete shut down of the pump. Reclamation must pump at this minimum rate to provide water for public health and safety to its contractor, the City of Tracy. In order to continue diverting water for the health and safety of the City of Tracy, Reclamation arranged with the District for delivery of 15,000 af, at a rate of 850 cfs, to mitigate for the diversions at the Jones Pumping Plant. Reclamation will continue to divert water at Jones Pumping Plant pursuant to its water rights.

The contribution by Merced will facilitate Reclamation's ability: a) to meet downstream commitments including instream flows and water quality at Vernalis, as required by Decision 1641; b) help to maintain the combined net positive flow requirement of Old and Middle Rivers to protect Delta smelt, as recommended by the Delta Smelt Working Group; and c) enhance Reclamation's protective action for the benefit of Delta smelt in the central Delta. Reclamation has informed the District that the need for this water is urgent as the other available surface water supplies, such as may be available from New Melones Reservoir are limited due to project water supply commitments and forthcoming summer/fall State Water Board instream flow and water quality standards per Decision 1641. Reclamation believes water releases from the District need to occur as soon as possible due to the travel time of water released from the District's New Exchequer Reservoir to the Delta, approximately three days.

This proposed District release of water is critical for helping Reclamation meet water quality and flow objectives for the San Joaquin River at Vernalis and enhancing Reclamation's protective action to benefit Delta smelt in the central Delta. Based on the Department of Water Resources Bulletin 120 publication for May 1, 2007, *Water Supply Conditions in California*, Water Year 2007 is classified as a critical year according to the San Joaquin Valley Water Year Type Index (60-20-20).

**4.2 No Injury to Other Legal Users of Water and No Increase in Amount the District is Entitled to Use:** Approval of the petition will include conditions to ensure that no legal user of water is injured during future refill of Lake McClure resulting from this temporary urgency change and dedication of instream flows. In light of the above, I find in accordance with Water Code sections 1435(b)(2) and 1707(b)(2) that the proposed temporary urgency change and 1707 petition would not injure any legal user of the water.

The District will be limited solely to utilizing water released from storage for the dedication of instream flows. This Order will require that only water already placed in storage pursuant to License 11395 be used. The District would utilize this water within its previously authorized place of use, if the urgency change and dedication of instream flows were not approved. Thus, I find in accordance with Water Code section 1707(b)(1) that the change will not increase the amount of water the District is entitled to use.

**4.3 No Unreasonable Effect on Fish, Wildlife, or Other Instream Beneficial Uses:** In accordance with Water Code section 1435, the State Water Board must consider potential impacts on fish, wildlife, and other instream beneficial uses.

The petitions seek authorization to dedicate water to instream flows. This will increase flows in the stream reaches identified above, beyond the flows that would otherwise occur. Additionally, the District has retained sufficient water in storage to release water required by Decision 1641 for the Vernalis Adaptive Management Plan in fall, 2007. In light of the above, I find in accordance with Water Code section 1435(b)(3) that the proposed temporary urgency change and dedication of instream flows would have no unreasonable effects on fish, wildlife or other instream beneficial uses.

## **5.0 ENVIRONMENTAL CONSIDERATION**

Pursuant to the provisions of the California Environmental Quality Act (CEQA), on June 7, 2007, the District adopted a Resolution of Exemption for the project identified in this Order. The District Board adopted a finding that the project is categorically exempt from CEQA, as the project is for the use of existing facilities with negligible or no expansion of existing use

for the purpose of maintaining fish and wildlife habitat areas, maintaining stream flows, and protecting fish and wildlife resources. (14 Cal. Code Regs. § 15301(i).).

The State Water Board has reviewed the District's notice of exemption and information contained in the petitions, and is prepared to issue a Notice of Exemption under Class 1, pursuant to CCR, title 14, section 15301, based on the following:

1. The project consists of operation, repair, maintenance or minor alteration of an existing reservoir that involves no expansion of use beyond that existing at the present time.
2. This project will not cause significant adverse impacts on any sensitive environment and will not result in significant cumulative impacts.
3. There are no objections.
4. The project dedicates additional flow, beyond that which would otherwise be available, for instream purposes. The Department of Fish and Game did not identify any concerns regarding protection of instream beneficial uses.

## **6.0 STATE WATER BOARD DELEGATION OF AUTHORITY**

On May 16, 2002, the State Water Board adopted Resolution 2002-0106, granting the authority to act on petitions for temporary urgency change to the Chief of the Division of Water Rights where no objections are outstanding and also to act on petitions to dedicate water for instream use. This order is adopted pursuant to the delegation of authority in Resolution 2002-0106.

## **7.0 CONCLUSIONS**

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1435; and therefore I find as follows:

1. The Licensee has an urgent need to make the proposed temporary change and instream flow dedication.
2. The proposed temporary change will not operate to the injury of any other lawful user of water.
3. The proposed temporary change will not unreasonably affect fish, wildlife, or other instream beneficial uses.
4. The petitioned changes are in the public interest.

## **ORDER**

**NOW, THEREFORE, IT IS ORDERED** that the petitions filed for temporary urgency change in the place and purpose of use and instream flow dedication under the District's License 11395 (Application 16186) to dedicate 15,000 af, at a rate of 850 cfs, of water to instream purposes including water quality use and fish and wildlife enhancement are approved subject to the provisions of this Order.

All existing terms and conditions of License 11395 remain in effect, except as temporarily amended by the following conditions. These conditions remain effective for 180 days from the date of this Order.

1. License 11395 shall be amended to include the following place and purpose of use: Merced River from New Exchequer to the confluence with the San Joaquin River, the San Joaquin River from the confluence of the Merced River to the San Joaquin River at Vernalis, and the San Joaquin River from Vernalis through the Delta for the purposes of water quality use and fish and wildlife enhancement.
2. Only water stored in New Exchequer Reservoir may be used for purposes of this Order.
3. Prior to initiating the temporary urgency change, the District and Reclamation shall enter into a Refill Agreement. The Refill Agreement shall govern the conditions under which refill of the water released pursuant to this Order occurs, except that "Daily Refill Impact", as defined in the Refill Agreement between the District and Reclamation, is not allowed to accrue whenever Water Right Terms 91 or 93 (as modified below) are in effect. The District shall be responsible for knowing when these terms are in effect.

*Water Right Term 91:*

No refill of storage resulting from this change order is authorized by this license when satisfaction of inbasin entitlements requires release of supplemental project water by the Central Valley Project or the State Water Project.

Inbasin entitlements are defined as all rights to divert water from streams tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses, and flows required by the State Water Board for maintenance of water quality and fish and wildlife. Export diversions and project carriage water are specifically excluded from the definition of inbasin entitlements.

Supplemental project water is defined as that water imported to the basin by the projects plus water released from project storage which is in excess of export diversions, roject carriage water, and project inbasin deliveries.

*Water Right Term 93:*

No refill of storage resulting from this change order is authorized by this license under the following conditions:

When in order to maintain water quality in the San Joaquin River at Vernalis as set forth in Table 2 of Decision 1641, the Bureau of Reclamation is releasing stored water from New Melones Reservoir or is curtailing the collection of water to storage, or

During any time of low flows when salinity levels at Vernalis exceed those set forth in Table 2 of Decision 1641.

4. Not later than December 15, 2007, the Licensee shall provide to the Chief of the Division a report describing the amount of water actually provided for instream use pursuant to the conditions of this Order. The report should include the following information:
  - a. The monthly amounts of water released from New Exchequer Reservoir for (i) existing requirements pursuant to License 11395 and (ii) dedication to water

quality and fish and wildlife enhancement pursuant to this Order. These quantities shall be separately tabulated.

- b. An additional report documenting compliance with the reservoir refill criteria shall be submitted on June 1, 2008. If reservoir refill is not completed by June 1, 2008, subsequent reports shall be submitted by June 1 of each year until the reservoir refill is complete.
5. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change Order, including method of diversion, method of use, and quantity of water diverted are subject to the continuing authority of the State Water Board in accordance with law and in the interest of 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. The continuing authority of the State Water Board also may be exercised by imposing specific requirements over and above those contained in the Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.
6. This Order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this temporary transfer, the Licensee shall obtain authorization for any incidental take prior to commencing transfer of water. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.
7. I reserve jurisdiction to supervise the temporary urgency change 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*

*Victoria A. Whitney, Chief  
Division of Water Rights*

Dated: June 8, 2007