

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

**DIVISION OF WATER RIGHTS**

**ORDER WR 2007-0026-DWR**

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**IN THE MATTER OF LICENSE 2637 (APPLICATION 5155)  
PETITION FOR TEMPORARY CHANGE  
INVOLVING THE TRANSFER OF 885.22 ACRE-FEET OF WATER  
FROM ISLAND RECLAMATION DISTRICT 2062  
TO LLOYD PHELPS AND GARY PHELPS**

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ORDER AUTHORIZING TEMPORARY CHANGE IN PLACE OF USE  
AND POINTS OF DIVERSION  
BY THE CHIEF OF THE DIVISION OF WATER RIGHTS:

**1.0 SUBSTANCE OF PETITION**

On May 7, 2007,

Island Reclamation District 2062  
c/o Susan Dell'Osso, President  
73 West Stewart Road  
Lathrop, CA 95330

filed with the State Water Resources Control Board (State Water Board), a Petition for Temporary Change under Water Code section 1725, et seq. Island Reclamation District 2062's (District) petition requests a temporary change to facilitate the transfer of up to 885.22 acre-feet (af) of water under License 2637 (Application 5155) to two private Southern Delta farming interests. The proposed temporary change would be effective from the date of approval through September 30, 2007.

**1.1 Description of the Transfer** Lloyd Phelps and Gary Phelps (hereinafter referred to as the Phelps) own approximately 551 acres in Upper Roberts Island (located within the Southern Delta) and irrigate these lands under water right Licenses 7609, 13274, and 13444. Licenses 13274 and 13444 (which serve 389 of the 551 acres) include Standard License Term 91 (Term 91), which requires the curtailment of diversions during periods of time when the Department of Water Resources' State Water Project and the United States Bureau of Reclamation's Central Valley Project are making upstream reservoir releases to meet Delta water quality objectives (typically July, August and September). Though wet conditions over the past two years have delayed the initiation of Term 91 diversion curtailment through most of the summer, this year, Term 91 diversion curtailments are currently in effect.

The District holds License 2637 (Application 5155) authorizing the direct diversion of up to 49.24 cubic feet per second (cfs) from the San Joaquin River, Old River, Dredger Cut in Paradise Cut, and Old River (formerly called Salmon Slough) for irrigation of 3939.4 acres on Stewart Tract (just south of Upper Roberts Island). The District has until recently irrigated the entire 3939.4 acres within its place of use; however, this year the District intends to fallow approximately 900 acres. The District proposes to allow the Phelps to divert up to 885.22 af of water from the San Joaquin River for use on the 389 acres served by Licenses 13274 and 13444. The proposed temporary change would be effective from the date of approval of this

petition through September 30, 2007. The maximum rate of diversion by Phelps pursuant to the subject petition would be 4.59 cfs. The proposed temporary change would be effective from the date of approval through September 30, 2007.

**1.2 Place of Use and Points of Diversion Under the Proposed Transfer** The proposed temporary change would temporarily add the points of diversion and place of use under Phelps' Licenses 13274 and 13444 to License 2637. The points of diversion to be temporarily added to License 2637 are located as follows:

North 2,500 feet and East 1,050 feet from the SW Corner of projected Section 16, T1S, R6E, MDB&M, being within the NW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of said Section 16

South 285 feet and East 4,182 feet from N $\frac{1}{4}$  corner of projected Section 17, T1S, R6E, MDB&M, being within the NE  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of projected Section 16, T1S, R6E, MDB&M

The place of use to be temporarily added to License 2637 is located as follows:

157 acres located within projected Section 18  
232 acres located within projected Sections 8 and 17

389 acres total, all within T1S, R6E, MDB&M

The above-listed points of diversion and places of use are shown on maps on file under Applications 20957 and 21162.

**1.3 Other Agency Consultation** Prior to submitting the subject petition for temporary change, the District contacted the Department of Fish and Game (DFG) to solicit comments regarding the proposed temporary change. Initially, DFG did not oppose the proposed temporary change. However, during the comment period for this temporary change, Term 91 curtailment notices were sent out by the State Water Board. Since this temporary change could not be approved until the close of comments on June 1, 2007, the petitioner requested that DFG comment on a potential petition for temporary urgency change to allow the changes requested under the proposed temporary change to be effective immediately. On June 4, 2007, DFG stated that due to the extreme concern regarding delta smelt, it opposed the potential temporary urgency change. A petition for temporary urgency change was not filed with the State Water Board. Since DFG's comments also addressed the proposed temporary change, those portions of DFG's comments are summarized in Section 3.0 of this Order, below.

Additionally, the District contacted the Central Valley Regional Water Quality Control Board regarding the proposed temporary transfer. Central Valley Regional Water Quality Control Board staff concluded that the proposed temporary change would not have a measurable impact on water quality in the area of the transfer.

## **2.0 BACKGROUND**

**2.1 Substance of the District's License** License 2637 authorizes the District to directly divert up to 49.24 cfs from January 1 through December 31 of each year from eight points of diversion located on the San Joaquin River, Old River, Dredger Cut in Paradise Cut, and Old River (formerly called Salmon Slough). The authorized purpose of use under License 2637 is irrigation of 3939.4 acres within the District, which is located on Stewart Tract.

### **3.0 PUBLIC NOTICE AND COMMENT ON THE PROPOSED TRANSFER**

Public notice of the petition for temporary change (dated May 25, 2007) was provided via regular mail to interested parties and by publication in the Lodi News-Sentinel on May 30, 2007. DFG and the San Joaquin River Group (SJRG) submitted timely comments regarding the proposed temporary change. These comments and the State Water Board's responses are summarized below.

**3.1 Comments of the Department of Fish and Game** DFG notes that due to extreme concern regarding delta smelt (at the time the comments were submitted), it has requested that diverters within the southern Delta voluntarily cease diversions. Due to these concerns, DFG also opposes the proposed temporary change. DFG states that once local water temperatures are above 25 °C, delta smelt are likely to migrate away from the proposed diversion location, and it would no longer be opposed to the proposed temporary change.

State Water Board Response: State Water Board staff contacted DFG staff regarding its comments to determine the location of water temperature measurements which could be used to indicate when DFG could withdraw its opposition to the proposed temporary change. Upon consultation with DFG staff, it was determined that both water temperature and fish salvage data from the State and federal export pumps would be required to determine when DFG could withdraw its opposition. Staff remained in regular contact until July 6, 2007, when DFG indicated that based on water temperature and fish salvage data, it appeared that delta smelt were no longer in the vicinity of the diversion locations for the proposed temporary change. DFG withdrew its opposition to the proposed temporary change based on its opinion that the proposed temporary change would not unreasonably impact fish, wildlife, or other instream beneficial uses.

**3.2 Comments of the San Joaquin River Group** The SJRG comments that the proposed temporary change should be denied on the basis that the petitioner has failed to meet its burden of establishing that it will not injure other legal users of water or unreasonably affect fish, wildlife and other beneficial uses. The SJRG asserts that the District must show that water will be available for its appropriation and consumptive use, based on water right priorities. The SJRG notes that USBR has stated that flow in the San Joaquin River at Vernalis is projected to be between 1,250 and 1,000 cfs. SJRG lists the face value of several water rights with points of diversion located between Vernalis and Old River that are senior to the District. SJRG subtracted the sum of these face values (including the 49.24 cfs authorized for diversion under License 2637) from 1,250 cfs and determined that there would be only 34 cfs left for diversion below Old River. SJRG also notes that riparian water users within the Delta are senior to the District and have been estimated to require up to about 1,400 cfs per month during the summer. Additionally, DWR and USBR are required to maintain net Delta outflow between 3,000 and 4,000 cfs during the period of the proposed transfer, which will require some inflow from the San Joaquin River. SJRG concludes that the petitioner has not established that water will be available for appropriation pursuant to License 2637 during the period of the proposed temporary change, and that it will also have unreasonable impacts on fish, wildlife and other instream beneficial uses.

State Water Board Response: The SJRG's analysis of the water available for diversion by the petitioner omits several factors. The SJRG analysis does not consider return flows from the parties senior to the petitioner with diversion points between Vernalis and Old River or that these parties might not continually divert the full face value of their water rights over the proposed transfer period. Additionally, the SJRG analysis does not account for the influence on flow at the petitioner's (and transferee's) points of diversion of the State and federal export pumps, as well as tidal impacts. Significant reverse flows develop in the San Joaquin River, as well as Old and Middle Rivers, during the period of the proposed temporary change. Thus, the analysis presented by the SJRG indicating that [if 1,250 cfs is present within the San Joaquin River at Vernalis] only 34 cfs would remain within the San Joaquin River downstream of the petitioner's point of diversion is not valid. Additionally, in order for the State Water Board to determine that water is not present for appropriation under a water right license, all water right holders on the affected stream system must be given notice of such an action and the opportunity for hearing. This order includes a term which prohibits diversion pursuant to the proposed temporary change if the State Water Board determines that water is not available for appropriation by the petitioner.

A review of previous "Reports of Licensee" submitted for License 2637 shows that from the years 1968 to 1999 the petitioner has reported irrigation of the total acreage authorized under License 2637 (3939.4 acres). Division staff also contacted the petitioner to confirm this information. This information provides the basis for determining that water would be available for diversion by the petitioner during the period of the proposed temporary change. Given that the petitioner is fallowing 900 acres of this land for this irrigation season, water is then available for transfer to the Phelps. Parties who believe that this temporary change will injure their water rights should file a complaint with the Division of Water Rights. Such a complaint must contain specifics about the party claiming injury, their basis in right, as well as information regarding the cause of the injury. Similarly, if either DWR or USBR believes that the proposed temporary change will impact their ability to meet the Delta outflow requirements during the period of the temporary change, they also may file a complaint with the State Water Board.

#### **4.0 REQUIRED FINDINGS OF FACT**

##### **Availability of Water for Transfer**

Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Section 1011. (Wat. Code, § 1725 and § 1726.) The District has shown that since 1968 it has diverted water to irrigate the entire 3939.4 acres authorized pursuant to License 2637. This year the district is fallowing approximately 900 acres. The District is proposing to transfer a portion of the water saved due to its reduction in irrigated acreage.

In light of the above, I find in accordance with Water Code section 1726(e) that the water proposed for transfer pursuant to this order will be conserved pursuant to Water Code section 1011.

##### **No Injury to Other Legal Users of Water**

Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would not injure any legal user of the 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).) The proposed points of diversion under this temporary change are within the general vicinity of the District's points of diversion. Additionally, the flow patterns and water levels within the vicinity of both the District's point of diversion and the proposed temporary points of diversion are determined by a combination of flow in the San Joaquin River at Vernalis, tidal influences, and State and federal export pumping. This order includes a term that prohibits diversion pursuant to the proposed temporary change if the State Water Board determines that water is not available for appropriation by the petitioner. Finally, Central Valley Regional Water Quality Control Board staff have concluded that the proposed temporary change would not have a measurable impact on water quality in the area of the transfer.

In light of the above, I find in accordance with Water Code section 1727(b)(1) that the proposed transfer will not injure any legal user of the water.

##### **No Unreasonable Effect on Fish, Wildlife, or Other Instream Beneficial Uses**

Water Code section 1729 exempts temporary changes involving the transfer of water from the requirements of the California Environmental Quality Act (CEQA). (Public Resources Code section 21000, et seq.) However, the State Water Board may approve a temporary change due to a transfer of water only if it determines that the proposed temporary change would not unreasonably affect fish, wildlife or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) State Water Board staff have maintained close contact with DFG regarding the proposed temporary change. As of July 6, 2007, DFG withdrew its



## ORDER

**NOW, THEREFORE, IT IS ORDERED** that the petition filed for temporary change in the place of use and points of diversion under Island Reclamation District 2062's (District) License 2637 (Application 5155) to facilitate the transfer of up to 885.22 acre-feet of water is approved subject to the provisions of this order.

All existing terms and conditions of License 2637 remain in effect, except as temporarily amended by the following provisions:

1. The transfer/exchange of water is limited to the period from the date of this Order through September 30, 2007.
2. The place of use of License 2637 is temporarily changed to include the following areas:  
  
157 acres located within projected Section 18  
232 acres located within projected Sections 8 and 17  
  
389 acres total, all within T1S, R6E, MDB&M  
  
as shown on maps on file with the State Water Board under Applications 20957 and 21162.
3. The points of diversion under License 2637 are temporarily changed to include the following two locations:  
  
(1) North 2,500 feet and East 1,050 feet from the SW Corner of projected Section 16, T1S, R6E, MDB&M, being within the NW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of said Section 16  
  
(2) South 285 feet and East 4,182 feet from N $\frac{1}{4}$  corner of projected Section 17, T1S, R6E, MDB&M, being within the NE  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of projected Section 16, T1S, R6E, MDB&M
4. The maximum daily average diversion rate for water diverted pursuant to this temporary change is 4.59 cubic feet per second (cfs). While water is being diverted pursuant to this temporary change, the maximum daily average diversion rate for existing authorized uses under License 2637 is 44.65 cfs.
5. If at any time during this temporary change the State Water Board or the Division of Water Rights makes the determination that water is unavailable for appropriation pursuant to License 2637, this temporary change shall be ceased until the State Water Board or the Division of Water Rights determines that unappropriated water is available.
6. By June 1, 2008, the District shall provide to the Chief of the Division of Water Rights a report describing the diversion and use of the water transferred pursuant to this Order, as well as the conservation measure or measures utilized to make water available for transfer. The report shall include the following information:
  - a. The daily average rate of diversion, 30-day average rate of diversion, and monthly volume of water diverted by the Phelps pursuant to this temporary change;
  - b. The amount of acreage served by water diverted by the Phelps pursuant to this temporary change;
  - c. The daily average rate of diversion and 30-day average rate of diversion of water pursuant to existing authorized uses under License 2637; and

- d. The amount of acreage served pursuant to existing authorized uses under License 2637.
7. 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 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.

The continuing authority of the State Water Board also may be exercised by imposing specific requirements over and above those contained in this Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.

8. This Order does not authorize any act that 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 permittee shall obtain authorization for an incidental take prior to commencing transfer of water. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this order.
9. 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 JAMES W. KASSEL for*

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

Dated: July 25, 2007