

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

DIVISION OF WATER RIGHTS

ORDER WR 2007-0036-DWR

**IN THE MATTER OF LICENSE 11395 (APPLICATION 16186)
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 25,000 ACRE-FEET OF WATER
FROM MERCED IRRIGATION DISTRICT
TO THE ENVIRONMENTAL WATER ACCOUNT**

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

1.0 SUBSTANCE OF PETITION

On June 28, 2007,

Merced Irrigation District
c/o Marc Van Camp
MBK Engineers
2450 Alhambra Boulevard, 2nd Floor
Sacramento, CA 95817-1125

filed with the State Water Resources Control Board (State Water Board), a Petition for Temporary Change under Water Code section 1725, et seq. Merced Irrigation District's (MID) petition requests a temporary change to facilitate the transfer of up to 25,000 acre-feet (af) of water under License 11395 (Application 16186) to the Environmental Water Account (EWA). The United States Bureau of Reclamation (USBR) and the United States Fish and Wildlife Service (USFWS) are the CALFED agencies administering this transfer. Transferred water would be available for rediversion at the State and federal export pumps for use within the service areas of the Central Valley Project (CVP) and the State Water Project (SWP). Additionally, in accordance with Water Code section 1707, the water would be used for the purpose of preservation and enhancement of fish and wildlife resources within the San Joaquin River downstream of Vernalis¹ to the San Francisco Bay/Sacramento – San Joaquin Delta Estuary (Delta). The proposed temporary change would be effective from the date of this order through December 31, 2007.

1.1 Previous Petition for Temporary Urgency Change Recent declines in the populations of Delta pelagic (open water) fish, identified as the Pelagic Organism Decline or POD², have resulted in numerous actions by the USBR, the USFWS, the National Marine Fisheries Service (NOAA – Fisheries), the Department of Water Resources (DWR), and the Department of Fish and Game (DFG). These actions

¹ State Water Board Revised Decision 1641 added the reach of river between MID's point of diversion (New Exchequer Dam) and the San Joaquin River at Vernalis as an authorized place of use under License 11395 for the purpose of Fish and Wildlife enhancement through December 31, 2011, or termination of the San Joaquin River Agreement, whichever comes first.

² Further information regarding the POD is contained at the following website:
http://science.calwater.ca.gov/pod/pod_index.shtml

have included reductions in CVP and SWP exports from the Delta, as well as upstream acquisitions of water to release to the Delta. On June 8, 2007, the State Water Board received (from MID) and approved a petition for temporary urgency change to provide flow in the lower San Joaquin River to a) assist in meeting the salinity objectives for protection of agricultural beneficial uses contained in State Water Board Decision 1641 (D-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 USBR's action to protect Delta smelt in the central Delta while it 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 petition authorized MID to release up to 15,000 af of water stored in New Exchequer Reservoir at a rate of 850 cubic feet per second (cfs) to the Merced River thence the San Joaquin River and the Delta between June 10 and June 18, 2007.

The subject petition is intended to provide flows for similar purposes: to augment streamflow in the San Joaquin River and Delta Outflow, to provide fishery benefits during critical fish lifestages, and to replace project water supply interrupted by fishery-related export reductions taken earlier this year. USBR and USFWS are administering this water transfer for EWA.

1.2 Description of the Transfer MID proposes to transfer up to 25,000 af of water under License 11395 (Application 16186) to EWA for use within the Delta and the CVP and SWP service areas. Water will be released from Lake McClure into the Merced River to augment streamflows in the Merced River and the San Joaquin River. Flow reaching the Delta may provide for protection of the fish of the Delta or the water may be pumped by either the CVP or the SWP to replace project water supplies interrupted by fishery related changes to CVP/SWP project operations. Transferred water will be released from Lake McClure from the date of this order through December 31, 2007, with the majority of releases planned for the month of October. The release schedule has yet to be finalized and will be developed by USBR and MID in consultation with USFWS and the other EWA fisheries agencies. The current target for flow at Vernalis in October (including this transfer) is 3,000 to 3,500 cfs, thus the maximum release rate for this transfer will be about 2,000 cfs.

1.3 Groundwater Substitution MID has proposed to make water available for this transfer by pumping additional groundwater to replace the transferred surface water (groundwater substitution). The groundwater wells intended for additional pumping are located within MID's service area. Local interests have adopted a basin-wide Groundwater Management Plan and MID has adopted its own Groundwater Management Plan. Both of these documents are available for viewing with the copy of this notice posted online at www.waterrights.ca.gov, Water Transfer Program, Notices of Transfers and Temporary Urgency Actions. The basin-wide Groundwater Management Plan includes methods to identify the extent of groundwater overdraft in the area and methods to reduce this overdraft. MID's Groundwater management Plan states that MID intends to perform both direct and in-lieu recharge methods to reduce groundwater overdraft.

MID initiated the additional pumping of 25,000 af of groundwater on July 28, 2007 and is scheduled to complete the additional pumping on October 31, 2007. The additional groundwater will be pumped from 120 wells located within MID's service area. MID has submitted a hydrogeologic analysis of the proposed groundwater substitution, prepared by Geomatrix. The hydrologic analysis states that between 1970 and 1992, MID pumped an average of approximately 65,000 af per year and that between 1993 and 2004, MID pumped an average of 13,000 af per year. The hydrogeologic analysis states that this reduction in pumping is a result of modernization automation and upgrades in the surface water distribution system and fewer dry years during the 1993 through 2004 period. The hydrogeologic analysis concludes that the additional pumping of 25,000 af of groundwater is unlikely to have a significant (greater than five feet of average groundwater decline) or irreversible impact on Merced subbasin aquifer system. Additionally, the hydrogeologic analysis states that it is unlikely that the proposed groundwater substitution program will result in reduced stream flow or stream water levels. The hydrogeologic analysis is available for viewing with the copy of this notice posted online at www.waterrights.ca.gov, Water Transfer Program, Notices of Transfers and Temporary Urgency Actions.

In the absence of the transfer, MID would release the subject 25,000 af of water from Lake McClure for use by its customers and MID would not perform the additional groundwater pumping associated with its groundwater substitution plan.

1.4 Place of Use and Points of Diversion Under the Proposed Transfer The proposed temporary change would temporarily add the Banks and Jones Pumping Plants as additional points of re-diversion and municipal, industrial, salinity control, stockwatering, and water quality control as additional purposes of use under License 11395. The service areas of the SWP (as shown on maps 1878-1, 2, 3, & 4 on file with Application 5629) and CVP (as shown on map 214-208-12581 on file with Application 5626) would be temporarily added to the place of use of License 11395. In addition, the Delta channels from the San Joaquin River near Vernalis to the Banks and Jones Pumping Plants would be added to the place of use of License 11395 for the purpose of preservation and enhancement of fish and wildlife resources in accordance with Water Code section 1707. The San Joaquin River at Vernalis is identified as point C10 on the State Water Board's *Bay-Delta Estuary Monitoring Stations* map contained in the 2006 Water Quality Control Plan for the Delta. The 2006 Water Quality Control Plan for the Delta is available for viewing at www.waterrights.ca.gov, Bay-Delta Program, 2006 Water Quality Control Plan.

2.0 BACKGROUND

2.1 Substance of the District's License License 11395 (Application 16186) authorizes the diversion to storage of up to 605,000 af of water from the Merced River between October 1 and July 1. 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 SWRCB.

3.0 PUBLIC NOTICE AND COMMENT ON THE PROPOSED TRANSFER

Public notice of the petition for temporary change (dated August 8, 2007) was provided via regular mail to interested parties and by publication in the Merced Sun-Star on August 10, 2007. The South Delta Water Agency (SDWA) submitted timely comments regarding the proposed temporary change.

3.1 Comments of the South Delta Water Agency SDWA opposed the proposed temporary change based on several concerns. These concerns and the State Water Board's responses are summarized below:

1. SDWA states that Water Code section 1725 specifies that a temporary transfer may occur if the water transferred only involves the amount of water that would have been consumptively used or stored in the absence of the change. SDWA asserts that MID is increasing its net use of water by pumping groundwater to replace the water transferred to EWA pursuant to the proposed temporary change. SDWA asserts that Water Code section 1725 should be interpreted to mean that temporary changes which result in a net increase in consumptive use should not be approved by the State Water Board.

State Water Board Response: Water Code sections 1726 (e) and 1727 (c) delineate the requirements which must be met for the State Water Board to approve a petition for temporary change. These requirements are as follows:

- a) The water proposed for transfer would have been consumptively used or stored in the absence of the transfer or conserved pursuant to Water Code section 1011;
- b) The proposed transfer would not injure any legal user of water during any potential hydrologic condition that the SWRCB determines is likely to occur during the proposed change, through significant changes in water quantity, timing of diversion or use, consumptive use of water, or reduction in return flows; and

- c) The proposed transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses.

These conditions do not require the petitioner to maintain a constant level of consumptive use if the petitioner provides evidence which supports the necessary findings.

- 2. SDWA asserts that MID has a long history of transfers and has 'finally gone beyond any conceivable savings due to "conservation."

State Water Board Response: MID is proposing to make water available for this transfer through an increase in groundwater pumping (groundwater substitution). Water Code section 1732 requires that any increase in groundwater pumping to replace surface water be in accordance with the requirements of Water Code sections 1745.10 and 1745.11. The pertinent requirement is contained in Water Code 1745.10 (a), which provides that in areas where a groundwater management plan has been adopted, groundwater substitution be performed in accordance with this plan. Local interests have adopted a basin-wide Groundwater Management Plan and MID has adopted its own Groundwater Management Plan for the Merced Groundwater Basin. The basin-wide Groundwater Management Plan includes methods to identify the extent of groundwater overdraft in the area and methods to reduce this overdraft. MID's Groundwater management Plan states that MID intends to perform both direct and in-lieu recharge methods to reduce groundwater overdraft. MID has submitted a hydrogeologic analysis of the proposed groundwater substitution, prepared by Geomatrix. The hydrologic analysis states that between 1970 and 1992, MID pumped an average of approximately 65,000 af per year and that between 1993 and 2004, MID pumped an average of 13,000 af per year. The hydrogeologic analysis concludes that the additional pumping of 25,000 af of groundwater is unlikely to have a significant (greater than five feet of average groundwater decline) or irreversible impact on Merced subbasin aquifer system. Additionally, the hydrogeologic analysis states that that it is unlikely that the proposed groundwater substitution program will result in reduced stream flow or stream water levels. Based on this information, we have determined that the proposed groundwater substitution program is in accordance with the local groundwater management plans, and thus in accordance with Water Code section 1745.10 (a).

- 3. SDWA asserts that the proposed temporary change will allow MID to store more water than it would have absent the transfer. SDWA further asserts that the ability of MID to store additional water will injure downstream parties with riparian and senior appropriative water rights.

Since MID is making water available for transfer by pumping additional groundwater prior to the transfer, MID will have 25,000 af more water in storage than it would absent the proposed transfer and accompanying groundwater substitution program. After the proposed release of 25,000 af of water, MID will have the same amount of water in storage as it would have absent the transfer. Thus, the proposed temporary change will not allow MID to store additional water and potentially injure downstream parties. .

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 water proposed for transfer consists of previously-stored water made available through an increase in groundwater pumping. In the absence of the transfer, MID would not have pumped additional groundwater and would have used the water proposed for transfer within its service area.

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 would have been consumptively used absent the proposed temporary change.

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).) As stated above, the water proposed for transfer consists of previously-stored water made available through an increase in groundwater pumping (groundwater substitution). Water Code sections 1732 and 1745.10 require that in areas where a groundwater management plan has been adopted, groundwater substitution be performed in accordance with this plan. Local interests have adopted a basin-wide Groundwater Management Plan and MID has adopted its own Groundwater Management Plan for the Merced Groundwater Basin. The basin-wide Groundwater Management Plan includes methods to identify the extent of groundwater overdraft in the area and methods to reduce this overdraft. MID's Groundwater management Plan states that MID intends to perform both direct and in-lieu recharge methods to reduce groundwater overdraft. MID has submitted a hydrogeologic analysis of the proposed groundwater substitution, prepared by Geomatrix. The hydrologic analysis states that between 1970 and 1992, MID pumped an average of approximately 65,000 af per year and that between 1993 and 2004, MID pumped an average of 13,000 af per year. The hydrogeologic analysis concludes that the additional pumping of 25,000 af of groundwater is unlikely to have a significant (greater than five feet of average groundwater decline) or irreversible impact on Merced subbasin aquifer system. Additionally, the hydrogeologic analysis states that it is unlikely that the proposed groundwater substitution program will result in reduced stream flow or stream water levels.

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).) The subject petition is intended to provide flows for similar purposes; to augment streamflow in the San Joaquin River and Delta Outflow, to provide fishery benefits during critical fish lifestages, and to replace project water supply interrupted by fishery-related export reductions taken earlier this year. USBR and USFWS are administering this water transfer for EWA and the release schedule will be developed by USBR and MID in consultation with USFWS and the other EWA fisheries agencies. Additionally, this order conditions rediversion of water for transfer at the Banks and Jones Pumping Plants in accordance with the requirements of the CVP and SWP permits as amended by State Water Board Decision 1641 and Biological Opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act.

In light of the above, I find in accordance with Water Code section 1727(b)(2) that the proposed transfer will have no unreasonable effects on fish, wildlife or other instream beneficial uses.

5.0 STATE WATER RESOURCES CONTROL BOARD DELEGATION OF AUTHORITY

On September 18, 2007, the State Water Board adopted Resolution 2007-0057, granting the authority to act on petitions for temporary change to the Chief of the Division of Water Rights, except where the State Water Board holds a hearing.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change in the place of use and points of diversion under Merced Irrigation District's Licensed Application 16186 to facilitate the transfer of up to 25,000 acre-feet of water is 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 provisions:

1. The transfer/exchange of water is limited to the period from the date of this Order through December 31, 2007.
2. For the purpose of transferring up to 25,000 af of water, the place of use under License 11395 is temporarily changed as follows:

MID's Licensed Application 16186 -- The authorized place of use is expanded to include the service areas of the SWP (as shown on maps 1878-1, 2, 3, & 4 on file with Application 5629) and CVP (as shown on map 214-208-12581 on file with Application 5626). In addition, the Delta channels from the San Joaquin River near Vernalis to the Banks and Jones Pumping Plants would be added to the place of use of License 11395 for the purpose of preservation and enhancement of fish and wildlife resources in accordance with Water Code section 1707. The San Joaquin River at Vernalis is identified as point C10 on the State Water Board's *Bay-Delta Estuary Monitoring Stations* map contained in the 2006 Water Quality Control Plan for the Delta.
3. Municipal, industrial, salinity control, stockwatering, and water quality control are temporarily added as additional purposes of use under License 11395.
4. The Banks Pumping Plant and the Jones Pumping Plant are temporarily added as points of rediversion under License 11395. Rediversion of water at the Clifton Court Forebay and the Tracy Pumping Plant pursuant to this Order is subject to compliance by the operators with the objectives currently required of the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR) set forth in Tables 1, 2, and 3 on pages 181 to 187 of State Water Board Revised Decision 1641 (D-1641), including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by DWR and USBR. Rediversion of water at the Banks Pumping Plant and the Jones Pumping Plant pursuant to this Order is also subject to compliance by the operators with the Delta Smelt Biological Opinion and other applicable biological opinions.
5. Additional groundwater pumping shall be performed in accordance with the hydrogeologic analysis of the proposed transfer titled *Evaluation of Potential Impacts of Transfer of up to 25,000 Acre-Feet of Surface Water to the Environmental Water Account*.
6. By December 15, 2007, the Licensee shall submit to the Chief of the Division of Water Rights a report indicating whether the groundwater substitution program for this transfer has been completed. Licensee shall include in this report the locations of the wells used for groundwater substitution and the approximate volume of groundwater pumped as a result of this Order.
7. Within 60 days of the completion of the transfer/exchange, but no later than March 1, 2008, the Licensee shall provide the Chief of the Division of Water Rights a report describing the use of the water transferred pursuant to this Order. The report shall include a summary showing the monthly amounts of water actually transferred under this Order.

The report should include the following information:

- a. The average daily release rate for transferred water released from Lake McClure;

- b. The average daily rate of diversion for water rediverted at either Banks Pumping Plant or Jones Pumping Plant pursuant to the transfer;
 - c. The monthly amounts of water released from Lake McClure;
 - d. The monthly amounts of water rediverted at either Banks Pumping Plant or Jones Pumping Plant;
 - e. The locations of the groundwater wells used for groundwater substitution as a result of this transfer and the monthly amounts of water pumped from each well; and
 - f. The beginning- and end-of-season groundwater elevations in each of the wells specified in e., above.
8. 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 may also 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.
9. 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.
10. 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



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

Dated: OCT 19 2007