

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2017-0011-EXEC

In the Matter of Petition for Reconsideration of

SAN JOAQUIN TRIBUTARIES AUTHORITY

Regarding Order Approving Temporary Change Involving the Temporary
Transfer of up to 56,758 Acre-Feet of Water from the
U.S. Bureau of Reclamation to Friant Water Contractors
License 1986 AND Permits 11885, 11886, and 11887

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

On February 2, 2017, the U.S. Bureau of Reclamation (Reclamation) submitted four petitions under Water Code sections 1707 and 1725 et seq. (Change Petitions), to the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) for temporary change to transfer dedicated instream flows (Restoration Flows) previously stored in Millerton Reservoir and/or taken under control at Friant Dam pursuant to direct diversion rights. Restoration Flows would be rediverted through Patterson Irrigation District (PID) and Banta-Carbona Irrigation District (BCID) facilities to the Delta-Mendota Canal (DMC) for reuse by Central Valley Project (CVP) contractors through direct delivery, exchange, and/or transfer. The change would assist Reclamation in meeting the two primary goals of the San Joaquin River Restoration Settlement Act (Pub. Law No. 111-11, Title X, § 10001 et seq. (Mar. 30, 2009), 123 Stat. 991, 1349–1414) to: (1) restore and maintain fish populations, including salmon, in good condition in the mainstem of the San Joaquin River below Friant Dam; and (2) reduce or avoid adverse water supply impacts on all of the Friant Contractors that may result from Restoration Flows.

¹ State Water Board Resolution No. 2012 - 0061 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of a Division order issuing a permit falls within the scope of the authority delegated under Resolution No. 2012 - 0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

To facilitate implementation of the San Joaquin River Restoration Program (SJRRP), Reclamation petitioned the State Water Board under section 1707 of the Water Code for approval of changes in the long-term instream flow dedication and the diversion of those flows at specified locations, and the State Water Board approved those changes. (See Order Approving Change and Instream Flow Dedication (October 21, 2013) http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_orders/docs/usbr_friant_order102113.pdf [hereinafter referred to as "2013 Order"].) The Change Petitions at issue in this petition relate to the new points of diversion not previously authorized in 2013. Approval of the Change Petitions would provide a means to supply water to the Friant Division CVP contractors at times when there is limited or no capacity at the Jones Pumping Plant and Banks Pumping Plant (Delta Pumps) in the Delta. The transfer would be subject to existing provisions in the 2013 Order, Reclamation's License 1986 and Permits 11885, 11886, and 11887, and Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) under the federal Endangered Species Act (ESA).

On April 3, 2017, after making the requisite findings, the Deputy Director approved the Change Petitions (2017 Order). The San Joaquin Tributaries Authority (SJTA or Petitioner) timely filed a petition for reconsideration, arguing that the Change Petitions cannot be approved under Water Code section 1725 because they do not involve a "transfer or exchange of water or water rights" and that the proposed changes do not involve water that would have been consumptively used or stored. Petitioner also incorporates by reference arguments previously made in 2016 challenging the Deputy Director's findings that the temporary changes will not injure other legal users of water or unreasonably affect fish, wildlife, and other instream beneficial uses. Upon review, I find that the Deputy Director's 2017 Order was appropriate and proper.

2.0 GROUND FOR RECONSIDERATION

Any person interested may petition the State Water Board for reconsideration of a water right decision or order within 30 days on any of the following grounds: (a) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was

- (a) prevented from having a fair hearing;
- (b) the decision or order is not supported by substantial evidence;

- (c) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced; or
- (d) error in law.

(Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 DISCUSSION

Pursuant to Water Code section 1725, a permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would involve only 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, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1725.)

Pursuant to Water Code section 1707, a permittee or licensee may petition the board for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water. (Wat. Code, § 1707, subd. (a)(1).) The petition may be submitted for any of the purposes described above and may, but is not required to, be submitted in combination with a petition to make any other change authorized pursuant to the part of the Water Code that establishes the water right permitting and licensing system. (Wat. Code, § 1707, subd. (a)(2).)

The State Water Board may approve a petition filed under Water Code section 1707 subject to any terms and conditions which, in the board's judgment, will best develop, conserve, and utilize, in the public interest, the water proposed to be used as part of the change, whether or not the proposed use involves a diversion of water, if the board determines that the proposed

change: (1) will not increase the amount of water the person is entitled to use; (2) will not unreasonably affect any legal user of water; and (3) otherwise meets the requirements of the Water Code. (Wat. Code, § 1707, subd. (b).)

3.1 EVALUATION OF THE TEMPORARY CHANGES IS PROPER UNDER WATER TRANSFER STATUTE WHEN DEDICATING FLOWS FOR INSTREAM BENEFICIAL USES

SJTA argues that Water Code section 1725 requires a finding that identifies at least two parties, and without this, the change simply allows Reclamation to “recapture” water, and should be processed under Water Code section 1701. This argument is not supported by the plain text of Water Code section 1725 et seq. Further, it views the change petitions out of their proper context with Water Code section 1707, ignoring Reclamation’s right to dedicate portions of its water for the recognized beneficial uses of fish and wildlife and instream flow.

The Water Code does not limit temporary changes under Water Code section 1725 et seq. to transactions involving two different water right holders, or even different water rights. To the contrary, these provisions apply to “a transfer or exchange of *water or water rights*.” (Wat. Code, § 1725 [italics added].) The transfer or exchange involving two different water rights held by the same water right holder, or two different entities entitled to deliveries from the same water right holder, constitutes transfers of water or water rights, even though only one water right holder may be involved. Policies in favor of transfers and exchanges support transfers and exchanges between parties entitled to use water under contract, not just between water right holders. (See, e.g., Wat. Code, § 109; see also Central Valley Project Improvement Act §§ 3402(d), 3405(a) (Pub.L.No. 102–575 (Oct. 30, 1992) 106 Stat. 4600, 4706, 4709–12.) In this case, CVP contractors will receive water rediverted into the DMC pursuant to temporary changes in the permits and license for Friant Dam in exchange for water those CVP contractors would otherwise receive pursuant to the permits and license for Friant and other CVP facilities. This constitutes a transfer or exchange within the meaning of the Water Code provisions for temporary changes.

Although the transfer does not reduce water deliveries to CVP contractors, it expands public trust resources, and thus amounts to a transfer to the public. As such, Reclamation has included new users of the water as follows: (1) the public, through the protection and enhancement of instream beneficial uses held in the public trust, and (2) the California

Department of Fish and Wildlife (CDFW), which holds the fish and wildlife resources of the state in trust for the people of the state. (Fish & G. Code, § 711.7.)

The additional points of diversion at PID and BCID will provide water for instream beneficial uses in the San Joaquin River downstream of the confluence with the Merced River and enable flows to be captured and recirculated to CVP contractors including times when there is limited or no available capacity at the Delta Pumps. The instream flows would remain protected and removed from use in the downstream water supply. Regardless of whether the transfer is characterized as a transfer to instream use, or a transfer back to Reclamation from instream uses, this operation can be properly accommodated under Water Code sections 1725 and 1707.

3.2 CHANGES INVOLVE WATER THAT WOULD HAVE BEEN CONSUMPTIVELY USED OR STORED

Petitioner argues that the change does not involve water that would have been consumptively used or stored by the permittee because absent the temporary change the water would not have been consumptively used and would have remained instream for beneficial uses past the PID and BCID facilities. (Petition, p. 8.) This argument ignores the relationship of the transfer with Water Code 1707, and misses the fundamental purpose of the consumptive use or storage provision, which is to assure that the transfer is unlikely to injure other legal users of water or unreasonably affect instream beneficial uses. (See SWRCB Order 99-012 at p. 15.)

Restoration Flows that are released from Millerton Reservoir (behind Friant Dam) in accordance with the terms and conditions of the 2013 Order approving the SJRRP's dedication of Restoration Flows would have either remained in storage or have been directly diverted at Friant Dam for delivery and consumptive use by the Friant Division CVP contractors, or used in the CVP service area. Further, in the absence of this temporary change, the Restoration Flows, as authorized in the 2013 Order, would continue to remain under the dominion and control of Reclamation as currently authorized under the subject permits and license. Reclamation included Water Code section 1707 to its Change Petitions to make patently clear that the transfer operates in conjunction with and for the purpose of facilitating the dedication of instream flows. The current Change Petitions, by virtue of being filed under sections 1707 and 1725 function as a modification of the 2013 Order. The water subject to the Change Petitions is not water that would be available for use in the downstream water supply. Reclamation has indicated that all of the flows subject to the Change Petitions would be water that is released

from storage in Millerton Reservoir, and a term is included in the Order that reflects this commitment.

SJTA's interpretation of the statute is needlessly constrained and inconsistent with public policies in favor of encouraging transfers and protection of instream beneficial uses. (See Wat. Code, §§ 109, 1243, 85023.) As the State Water Board explained in 2016, the reference to direct diversion in the definition of "consumptive use" is intended to distinguish direct diversion from diversion by storage, not to exclude water that is consumed through dedication to instream beneficial use from being considered as consumptive use. At the time section 1725 was enacted, the Water Code did not authorize an appropriative right without a diversion, either by storage or direct diversion. An appropriative right without diversion is authorized only as provided under section 1707, which was enacted later. Reading sections 1707 and 1725 together, an appropriative water right that has been changed from a direct diversion to a dedication under section 1707 should be treated as a direct diversion for purpose of determining whether the water would have been consumptively used in the absence of a subsequent temporary change.

3.3 CHANGES WILL NOT INJURE OTHER LEGAL USERS OF WATER

As explained above, in the absence of the Change Petitions, Reclamation would continue to retain dominion and control of all instream flows downstream of the PID and BCID facilities for consumptive use as currently authorized under the subject permits and license and the 2013 Order. The instream flows would remain protected and removed from use in the downstream water supply. Water released from storage is not available to downstream users. (See e.g. *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 570 [When the stored water is released for use, it is not part of the river's natural flow and redirection of this water does not count toward the appropriator's current allocation of river water]; see *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 737–745 [a riparian or appropriator has no legally protected interest in other appropriators' stored water or in the continuation of releases of stored water].) In addition, the 2013 Order includes a condition specifically stating that the approved change in no way modifies the obligations and rights under the San Joaquin River Exchange Contract and other contracts. The conditions of that Order remain in force and effect.

SJTA argues that in low flow years, Reclamation has had difficulties meeting D-1641 requirements, which puts a disproportionate burden on New Melones Reservoir to satisfy Reclamation's water quality requirements at Vernalis. The hydrologic conditions have changed significantly from 2016 to 2017, and it appears that Reclamation should not have any difficulty meeting its water quality and contractual obligations this year. Further, the net effect of the release of the Restoration Flows is an increase in flows (not a reduction) along the lower San Joaquin River and into the Delta. In the absence of any Restoration Flows, no Friant water would be potentially available to contribute to Delta obligations. Finally, although the transfer flows recaptured above Vernalis would be small, the conditions of the 2013 Order remain in force and effect, which include compliance with D-1641 as it might be modified subject to approval by the State Water Board.

3.4 CHANGES WILL NOT UNREASONABLY AFFECT FISH, WILDLIFE, AND OTHER INSTREAM BENEFICIAL USES

In 2016, the SJTA argued that Restoration Flows could adversely affect fisheries by "luring" fish to a location that is not yet suitable. They argued that the loss of fall-run Chinook salmon to the Restoration area burdened the tributaries to the San Joaquin River that are compelled to operate their systems in order to protect and enhance fall-run fisheries. SJTA's comments on this issue were not persuasive.

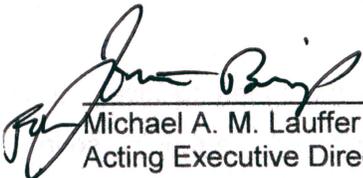
Fall-run salmon that pass the Merced River, straying past the Hills Ferry Barrier and getting into Reach 5 of the Restoration Area are doing so independent of SJRRP activities. In addition, since the fall of 2012 the SJRRP has been implementing a trap and haul program to capture stray fall-run salmon that are able to get past the Hills Ferry Barrier and transporting these fish to spawning areas in Reach 1 of the Restoration area. Restoration Flows would have little if any adverse effect on fall-run Chinook salmon on tributaries to the San Joaquin River, and any adverse effects are clearly outweighed by the benefits to the fishery from restoring flows in the San Joaquin River. Moreover, SJTA's argument does not appear to be related to the changes approved in the 2017 Order. Rediversions at PID and BCID would use existing facilities located downstream of the Restoration area, and have no ability to change conditions attracting salmonids into the Restoration Area. The changes would not unreasonably affect fish, wildlife, or other instream beneficial uses.

Petitioner's claim that the 2017 Order subverts the California Environmental Quality Act (CEQA) is equally unpersuasive. Reclamation and the Department of Water Resources (DWR) prepared and certified a joint Programmatic Environmental Impact Statement (EIS)/Environmental Impact Report (EIR) which covers the long-term implementation of the SJRRP, including the recapture of Restoration Flows at existing facilities. As a responsible agency, the State Water Board considered and relied on that document in approving the 2013 Order. Reclamation and DWR have conducted additional environmental analyses for implementation of interim flows and recirculation of recaptured water from existing facilities, including a final environmental assessment for the temporary points of diversion. These analyses do not reveal any new or changed environmental impacts not already addressed in the EIR. Reclamation is in the process of preparing a long-term Recapture and Recirculation Plan that will be accompanied by an EIS/EIR. A new EIS would be necessary because long-term actions contemplate construction of new facilities and other actions that may result in impacts not previously analyzed.

ORDER

For the foregoing reasons, the State Water Board finds that the challenged actions were appropriate and proper. Accordingly, SJTA's petition for reconsideration is denied.

Dated: July 5, 2017



Michael A. M. Lauffer
Acting Executive Director