

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF LICENSE 845 (APPLICATION 1739)
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 2,500 ACRE-FEET OF WATER
FROM THERMALITO WATER AND SEWER DISTRICT TO WESTLANDS WATER DISTRICT**

SOURCES: Concow Creek

COUNTY: Butte

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On June 7, 2013, Thermalito Water and Sewer District (Thermalito or Petitioner) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), a petition for Temporary Change under Water Code Section 1725, et seq. Pursuant to the petition, Thermalito seeks to transfer up to 2,500 acre-feet (af) of water to Westlands Water District (Westlands). Temporary changes approved pursuant to Water Code section 1725 may be effective for up to one year from the date of approval.

1.1 Description of the Transfer

The water proposed for transfer is currently stored in Concow Reservoir pursuant to Thermalito water right License 845 (Application 1739). The transfer water would be released from Concow Reservoir into the State Water Project's (SWP) Oroville Reservoir at a maximum flow of approximately 19 cubic feet per second (cfs). Water will then be released from Oroville Reservoir into the Feather River, then through the SWP's Clifton Court Forebay. From the Clifton Court Forebay, water will pass through Skinner Fish Protection Facility and enter the intake channel of the California Aqueduct leading to the Department of Water Resources' (DWR) Harvey O. Banks Pumping Plant. The Banks Pumping Plant will pump the water south of the Delta via the California Aqueduct. The water will then pass through O'Neill Forebay and continue moving south on the SWP's side of the San Luis Canal for delivery to Westlands' Central Valley Project (CVP) service area. Transfer releases would be scheduled in cooperation with DWR and the U.S. Bureau of Reclamation (Reclamation).

In the absence of this transfer, the 2,500 af of water would remain in storage in Concow Reservoir.

2.0 BACKGROUND

2.1 Substance of Thermalito's License

License 845 authorizes Thermalito to divert up to 8,200 af per annum (afa) from Concow Creek to storage in Concow Reservoir. License 845 also authorizes Oroville Dam and Thermalito Diversion Dam as points of diversion. The licensed season of diversion is from about December 1 to about April 1 of each season and the purposes of use under the license are domestic, agricultural, municipal and recreation. The authorized place of use includes recreation at Concow Reservoir and domestic, agricultural and irrigation uses within Thermalito's service area of about 13,800 acres within

T19-20,R3-4E, MDB&M, as shown on maps on file with the State Water Board dated August 1985, and revised on July 6, 1994.

Thermalito-DWR Long-Term Water Exchange Agreement

Thermalito operates under a long-term water exchange agreement with DWR that allows Thermalito to receive water released from Oroville Reservoir for use within its service area. Water released from storage by Thermalito from Concow Reservoir flows into Concow Creek, which flows directly into DWR's Oroville Reservoir. Once the water is in Oroville Reservoir, DWR releases water from Oroville Dam into the Feather River, then into the Power Canal. Thermalito has intakes on the Power Canal from which it diverts approximately 2,000 af of water to its treatment plant for distribution to its customers.

Thermalito provides DWR with a statement of the amount of water available in Concow Reservoir for beneficial use by March 1 of each year. DWR then provides Thermalito with a proposed release schedule from Concow Reservoir. An accounting of the quantity of water taken by Thermalito and the amount released from Concow Reservoir is made annually, and any shortfall between the amount taken by Thermalito and the amount released is made up by additional releases from Concow Reservoir into Oroville Reservoir in September of each year. Pursuant to the exchange agreement, except as necessary to meet the specified minimum flow requirements in Concow Creek, no stored water can be released from Concow Reservoir for consumptive use between June 1 and September 1 during any year that a water exchange contract is in effect with DWR allowing for release of stored water from Concow Reservoir after September 1.

2.3 Proposed Temporary Changes

The proposed change would temporarily modify License 845 with the addition of: (1) the SWP's Banks Pumping Plant as a point of redirection; and (2) the service area of Westlands to the place of use.

2.4 Governor's 2013 Executive Order to Streamline Approvals for Water Transfers

On May 20, 2013, Governor Edmund G. Brown Jr. issued Executive Order B-21-13 to streamline approvals for water transfers to address the dry conditions and water delivery limitations in 2013 to protect California's agriculture. The Governor's Order directs the State Water Board and DWR to expedite the review and processing of temporary transfers for 2013 (in accordance with the Water Code) and to assist water transfer proponents and suppliers, as necessary, provided that the transfers will not harm other legal users of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. The State Water Board and DWR were also directed to make all efforts to coordinate with relevant federal agencies, water districts, and water agencies to expedite the review and approval of water transfers in California.

3.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On June 14, 2013, public notice of the petition for temporary change was provided as follows: 1) via first class mail to interested parties; 2) by posting on the Division's website; and 3) via the State Water Board's Lyris email notification program. In addition, on June 17, 2013, the Petitioner noticed the project via publication in the Oroville Mercury-Register.

The State Water Board received comments regarding the proposed temporary change from the following: 1) a joint comment by California Water Impact Network (C-WIN), California Sportfishing Protection Alliance (CSPA) and AquAlliance; 2) Richard Morat; 3) Department of Fish and Wildlife (DFW); 4) DWR; 5) Reclamation; 6) Ralph Miller; 7) John Haugen; 8) Laurel Paulson-Pierce; 9) James Hart; 10) Dan Levine, LLL Ranch LLC; 11) Sarah Salisbury; and 12) the Butte Environmental Council. Thermalito provided responses to the comments by two letters dated July 31, 2013. The comments received and Thermalito's and the State Water Board's responses are summarized below.

3.1 Joint Comments by C-WIN, CSPA, and AquAlliance (Joint Commenters)

On June 3, 2013, the Joint Commenters indicated their concerns regarding all 2013 water transfers pending as of that date, including the Thermalito transfer proposal. Many of the concerns in the comment letters extend beyond the scope of the Thermalito transfer. To expedite transfer processing, those concerns are not repeated herein; however, the State Water Board response letter dated June 27, 2013, is incorporated by reference. The Joint Commenters replied to the Division's June 27 letter on July 5, 2013. The July 5 response letter is similar to the June 3 letter in that it addresses issues relevant to all 2013 water transfers. As such, some matters are outside the scope of the pending Thermalito transfer proposal. The Division's response letter, issued concurrent with this Order, is incorporated by reference. This is referred to as the Division's August 14, 2013 response below.

In its July 5 letter, the Joint Commenters provided specific comments regarding the Thermalito transfer. The commenters state that they "challenge the concept in this instance that surface water spilling from Concow Reservoir is "surplus water"". The comment letter states that the 2,500 af transfer volume would play a useful role in helping to replenish groundwater supplies and indicates how the water would help if it were spread to water users located throughout the groundwater basin. Information on groundwater depth at specific locations was provided. The letter also states that there is a potential that DWR's methodology for determining consumptive use in water transfers may not account for groundwater seepage in a drier year. The commenters ask that the linked groundwater-surface water system effects of the transfer be evaluated. The transfer area is covered by a Groundwater Management Plan (GMP). However, the commenters indicate that there are limitations and inadequacies with the local ordinances that buttress the GMP.

Thermalito's Response:

On July 31, 2013, Thermalito addressed the issues raised by the Joint Commenters, indicating: (a) the Thermalito transfer is not a groundwater transfer subject to the specific findings for a groundwater substitution transfer; (b) the increased flows in Concow Creek will not affect anadromous species because no fish ladder or other passage at Oroville Dam allows for such species to exist in Concow Creek. The timing of increased flows also avoids the primary life cycle of migrating fish in the Feather River. Further the proposed diversion point is downstream of the fish screen at the Skinner Fish Protection Facility – therefore avoiding harm to Delta fish species; (c) there is no injury to water rights holders. The petition explains how no injury or harm will occur to others. Thermalito was unable to provide further analysis of this issue because the Joint Commenters did not identify any persons that are injured; (d) the transfer is exempt from California Environmental Quality Act (CEQA) review; and (e) the transfer will not cause impacts which require the initiation of Term 91 requirements.

Thermalito incorporated the June 14, 2013 joint response to comments letter¹ on behalf of nine of the 2013 transfer petitioners in its response. The June 14 letter is also incorporated by reference herein.

State Water Board Response:

Division's June 27, 2013 response letter:

The State Water Board's June 27 response letter identifies a need to evaluate the following issues in the present order: (a) whether there is a change in return flow associated solely with the transfer, and (b) whether the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee in the absence of the proposed temporary change or conserved pursuant to Water Code section 1011.

In addition, the response letter indicates that use of the Delta Pumps for transfer purposes will be conditioned on compliance by DWR and Reclamation with Decision 1641 (D-1641), all applicable

¹ Letter prepared by Joshua Horowitz of Bartkiewicz, Kronick & Shanahan.

biological opinions and court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.

The objection is addressed upon a finding that: (a) no change in return flows is occurring, and (b) the transfer only involves water that would have been consumptively used or stored. Approval of the petition is also contingent on inclusion of the Delta pumping condition. The required evaluations are found in Section 5 of this order.

Division's August 14, 2013 response letter:

The Petitioner indicates that Concow Reservoir filled and spilled this year. It appears that this may be the basis for the reference to water spilling from the reservoir in the commenter's letter. The Division notes that the transfer water is not water that had spilled from the reservoir. It is water that was stored in the facility and retained there under Thermalito's water rights until made available for transfer. The water was stored by Thermalito during a time of non-injury.

Water Code section 1732 requires any temporary change petition substituting groundwater for surface water foregone to comply with sections 1745.10 and 1745.11 of the Water Code. The Thermalito transfer is not a groundwater substitution transfer. Accordingly, Water Code sections 1745.10 and 1745.11 are inapplicable. Thus, there is no need to evaluate the general status of the groundwater basin, groundwater pumping impacts or the adequacy of the GMP, as requested by the environmental commenters.

Thermalito's stored water is only available to its customers and is not available to groundwater users, irrespective of the transfer. Therefore, the expressed desire to provide the transfer water to groundwater users in lieu of making the transfer is not a valid basis of objection.

The Joint Commenters express concern whether DWR's transfer methodology is accurate regarding groundwater seepage. The State Water Board is not aware of any information showing that the DWR methodology is inaccurate. Absent any documentation that the methodology is inaccurate, the State Water Board will continue its inter-agency coordination with DWR, including utilization of the tools and methodologies developed by DWR for its transfer program.

Water Code sections 1745.04 and 1745.05 govern this water transfer. Under these statutes, a water supplier may transfer stored water outside the service area of the water supplier if the water supplier has allocated to the water users within its service area the water available for the water year, and no other user will receive less than the amount provided by that allocation or be otherwise unreasonably adversely affected without that user's consent. The Joint Commenter's letter does not provide any information to refute the petitioner's assertions that it has complied with Water Code sections 1745.04 and 1745.05, and the transfer involves water surplus to its customers' needs. Accordingly, the transfer requirement has been met.

3.2 Comments of Richard Morat

On June 14, 2013, Richard Morat commented on the proposed transfer regarding instream flows, natural hydrograph, using the Delta pumps for the transfer, and cumulative effects of water transfers.

In addition, Mr. Morat commented on reservoir refill criteria, asserting that there may be times when reservoir storage replenishment is harmful compared to baseline (no transfer) conditions. He asserts that storage replenishment should only be allowed when water is surplus to fishery needs. He further asserts that the State Water Board should not consider current regulatory conditions for operation, but instead use fishery needs as the standard for review. Mr. Morat also indicates that reservoir refill criteria developed pursuant to DWR requirements is only protecting DWR's water rights and is not protective of public trust resources.

Mr. Morat requests that the State Water Board consider the following issues regarding the proposed transfer: 1) is the transfer harmful, helpful, or neutral to estuarine aquatic resources; 2) will the conservation storage replenishment in Concow Reservoir be potentially harmful to the Feather River, Sacramento River and/or the estuary; and 3) if the transfer is harmful, what can be done to offset the adverse impacts.

State Water Board Response:

Mr. Morat's issues regarding: instream flows, natural hydrograph, use of the Delta pumps for the transfer, and cumulative effects of water transfers were addressed in the State Water Board's June 27, 2013 response letter. The information identified in item 3.1 of this Order also addresses the Morat objection.

The next issue evaluated is reservoir refill criteria. On its website, DWR provides an explanation of acceptable reservoir refill criteria (see <http://www.water.ca.gov/watertransfers/docs/TechInfoDoc-WaterTransfers-2013.pdf>). The criteria take into account a minimum of five years' reservoir operating data, historic reservoir releases, past operations including monthly data, instream requirements, and other factors. DWR requires refill criteria in part to ensure that the refill of a transferor's reservoir does not negatively impact the ability of DWR to provide delta in-flow necessary for protection of fish and wildlife as required pursuant to Decision 1641. Based on our review of the criteria, the reservoir refill criteria address maintenance of permit or license bypass flows and required Delta fishery flows. Therefore, it does not appear that there is any additional evaluation needed on this issue.

Use of DWR facilities is subject to Water Code section 1810, which in addition to requiring that the transfer not injure other legal users of water, also requires evaluation that the water can be transferred without unreasonably affecting fish, wildlife, or other instream beneficial uses and without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred. These evaluations are similar to the transfer approval requirements of the State Water Board, which are listed in Sections 5.2 and 5.3 of this Order.

The request to evaluate potential fishery needs, rather than to evaluate whether the transfer would unreasonably affect fish, wildlife, or other instream beneficial uses exceeds the required evaluation under the Water Code. The State Water Board includes an evaluation of whether the current transfer would unreasonably affect instream resources in this Order.

3.3 Comments of DFW

By letter dated June 27, 2013, DFW provided comments on the 2013 through-Delta transfers, including Thermalito's proposed transfer.

State Water Board Response:

DFW expresses concern that there will be a cumulative impact of this and other 2013 transfers. The potential for cumulative impacts was addressed in the Division's June 27, 2013 response to the Joint Commenters. Further, the transfer will be conditioned upon continued compliance with license conditions related to fisheries in Concow Reservoir and downstream. The license conditions are based on a March 22, 1993 Agreement between Thermalito and DFW. Additional information regarding the Agreement and a discussion of local fisheries can be found in Section 5.3. DFW has not presented information to demonstrate that this particular transfer will have unreasonable impacts on fish and wildlife.

Please note, the Delta Stewardship Council's Delta Plan recommends that the State Water Board and Department of Water Resources work with stakeholders to identify and recommend measures to address potential issues with recurring transfers of up to 1 year in duration and improved public notification for proposed water transfers. The State Water Board intends to collaborate with DFW as part of this effort.

3.4 Comments of DWR

On July 15, 2013, DWR objected to the transfer based on potential injury to its water rights. DWR is concerned that the transfer has the potential to impact the SWP if the water released from Concow Reservoir in 2013 and conveyed to Westlands is refilled in the reservoir at times when it will diminish the flows otherwise available to the SWP under its permitted water rights. Thermalito has agreed to execute a refill agreement with DWR and Reclamation to account for any potential refill impacts. DWR requested that any transfer order include a condition requiring the execution of a refill agreement acceptable to DWR.

State Water Board Response:

Refill criteria are needed to ensure that the refill of Concow Reservoir resulting from the proposed temporary change does not adversely impact operations and/or water rights of the SWP or CVP or other downstream water rights. This Order includes a condition requiring the execution of a refill agreement acceptable to DWR.

3.5 Comments of Reclamation

On July 15, 2013, Reclamation provided comments on the transfer indicating that a refill agreement is necessary in order to ensure that the transfer would not adversely affect the water rights or operations of the CVP, including operations at the Jones Pumping Plant. Reclamation has requested that any order approving the transfer contain language indicating that the transfer is subject to an approved refill agreement with Reclamation and DWR. Reclamation also requested that any order approving the transfer indicate that transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.

State Water Board Response:

In order to avoid injury to Reclamation's water rights, the transfer is conditioned based on the criteria requested by Reclamation.

3.6 Comments of Ralph Miller

Mr. Miller commented by letter dated July 10, 2013 that the residents of the Yankee Hill Big Bend area and the Concow Basin could be negatively impacted by the proposed transfer. He claims that the transfer could drain Concow Lake leaving it a 'smelly mud hole' all summer.

State Water Board Response:

The water proposed for transfer is currently stored in Concow Reservoir. Thermalito customers will receive their full allotment of water this year, as the transfer water is in addition to the amount of water that is needed to satisfy Thermalito customers' needs. Thermalito has indicated that in the last three years, approximately the same quantity of water that is proposed to be transferred was released from Concow Reservoir in order to conduct maintenance in the reservoir. Therefore, the reservoir level will be similar to the last three years, with related visual aesthetics. The State Water Board has not received any information indicating that there were aesthetic issues associated with the last three years of reservoir operations.

3.7 Comments of John Haugen

Mr. Haugen commented by letter dated July 11, 2013 that he is a property owner situated below Concow Reservoir and believes that the proposed transfer will negatively impact the area surrounding the reservoir. Mr. Haugen's concerns are as follows:

- a. The low water level in Concow Reservoir last year adversely impacted production from his groundwater well.
- b. A 2008 fire in the area reduced the soil's ability to hold water and resulted in increased runoff, which negatively impacted groundwater recharge. Therefore, the remaining water should be kept in the lake to help maintain groundwater levels.
- c. Less water in the lake will negatively impact fish and wildlife in the area.
- d. The potential 'mudhole' appearance as a result of low water levels in Concow Reservoir could adversely affect surrounding property values.
- e. The water should remain in Concow Reservoir for potential fire-fighting needs.
- f. Thermalito should not be allowed to sell to out-of-area interests a natural resource that local residents rely upon.

Thermalito's Response:

In its July 31, 2013 joint response letter to the commenters, Thermalito states:

- a. The Thermalito transfer is not a groundwater transfer, subject to specific findings for groundwater substitution.
- b. The increased flows in Concow Creek will not affect anadromous species because no fish ladder or other passage at Oroville Dam allows for such species to exist in Concow Creek. The timing of increased flows also avoids the primary life cycle of migrating fish in the Feather River. Further the proposed diversion point is downstream of the fish screen at the Skinner Fish Protection Facility – therefore avoiding harm to Delta fish species.
- c. Over at least the last three years, Thermalito has lowered the reservoir level nearly ten feet in September by voluntary water releases to conduct maintenance work. The transfer to Westlands is nearly the same amount as the previous voluntary releases. The reservoir operations, visual and other impacts will not be much different during the transfer period than it has over the past few years. The commenters did not: (i) provide evidence of previous injury or fluctuation of groundwater level associated with previously lowered reservoir levels; (ii) provide the location of threatened impacts; or (iii) document that Concow Reservoir is connected to groundwater under individual parcels or springs.
- d. Some commenters indicate that the reservoir holds less the licensed amount of 8,200. However, the last three or more years of voluntary releases for reservoir maintenance demonstrate that the capacity of Concow Reservoir is able to support the proposed transfer;
- e. The transfer will be subject to a reservoir refill agreement to protect against potential impacts to the SWP and CVP.

State Water Board Response:

Regarding Haugen issue (a), a water right holder may operate its project in any manner allowed by the water right license. This includes changing the rate and timing of downstream storage releases. Thermalito's past operating practice of reducing the reservoir level is said to have impacted the Haugen groundwater well². Thermalito indicated that it has drawn down the reservoir by nearly 10 feet during the past three Septembers. According to Thermalito, the transfer to Westlands is nearly the same amount of water as the previous voluntary releases. Approval of the transfer petition will not substantially change the method of operation that has been in effect for at least the last three years. Under the transfer, the difference in operations is that the released water will be re-captured in the Delta instead of being credited as Thermalito water in Oroville Reservoir. Insofar as the transfer will not result in a new method of operation, as compared to past operation of the reservoir, there is no impact to downstream groundwater users associated solely with the transfer.

Issue (b), the past effects of a fire, is not related to the current transfer.

Regarding issue (c), Thermalito is required by the license to maintain 1,000 af in the reservoir for fish habitat. Thermalito is also required to maintain minimum stream flow in Concow Creek of 2.0 cfs at all times. The license also contains conditions related to fish spawning. Additional evaluation of the fishery issue is found in Section 5.3 of this Order. The transfer will be conditioned on maintaining all existing license conditions, including the fishery conditions.

Issue (d) raises the aesthetic issue of a lower reservoir level. According to Thermalito, the reservoir has been operated with a similar drawdown in September for the last 3 years. Approval of the petition will not substantially change the method of operation that has been in effect for at least the last three years. Please refer to issue (a) for additional explanation.

Issue (e) raises the issue of preserving water in storage for fire protection. Thermalito will maintain water in reservoir storage which could be accessed as necessary for fire-fighting purposes.

Regarding issue (f), the State Water Board will evaluate whether there is any injury to other legal users of water. This evaluation is required by Water Code section 1727. Provided the petition meets the requirements of Water Code section 1725 et seq., a transfer is allowable.

3.8 Comments of Laurel Paulson-Pierce

By letter dated July 11, 2013, Ms. Paulson-Pierce commented as follows:

- a. Thermalito is using inaccurate figures to determine the volume of water held in Concow Reservoir as siltation in the lake has reduced its capacity. Therefore, Thermalito may not have a sufficient quantity of water in storage to supply its customers and transfer 2,500 af out of the service area.
- b. The reservoir provides habitat for sensitive fish and wildlife which could be adversely impacted by lower water levels.
- c. Water should remain in the reservoir for fire-fighting needs.
- d. The flows in Concow Creek will likely not be adequate for Thermalito to meet the required bypass of 2.0 cfs immediately below Concow Reservoir; therefore Thermalito may need to release water from Concow Reservoir to meet the bypass.

² As Thermalito notes, no specific information was provided regarding the alleged impact.

- e. The local water table could be adversely impacted if reservoir levels are reduced due to out-of-area sales.

State Water Board Response:

Issue (a) is addressed in Section 3.6 of this Order. Issues (b), (c), and (e) are addressed in Section 3.7 of this Order. Regarding issue (d), the transfer water will serve dual purposes and be counted toward the fishery flows while it is flowing in Concow Creek. Irrespective of whether the transfer occurs, Thermalito is required to maintain the minimum stream flows.

3.9 Comments of James Hart

On July 12, 2013, Mr. Hart provided comments regarding the proposed transfer via email. Mr. Hart's comments were identical to the comments of Ms. Paulson-Pierce.

State Water Board Response:

Refer to the above response in Section 3.8 to Ms. Paulson-Pierce.

3.10 Comments of Dan Levine, LLL Ranch, LLC.

On July 15, 2013, Mr. Levine commented that he believes that the proposed transfer may adversely impact the water supply on his property that is located south of Concow Reservoir. Mr. Levine relies on springs on his property to supply water for domestic and farming purposes. He expressed concern that the transfer may negatively impact the groundwater table affecting his wells, and the wells of others in the local community. In addition, the transfer may affect fish and wildlife.

Mr. Levine indicated that the signature on the petition was illegible; therefore, the petition may not have been properly signed by an authorized representative of Thermalito. Lastly, Mr. Levine believes there is a lack of communication between the community and Thermalito regarding the potential for negative local impacts from the transfer.

State Water Board Response:

The issue of impacts to local groundwater users and potential impacts to fish and wildlife are addressed in Section 3.7 of this order. The petition was accompanied by a cover letter, indicating that legal counsel for Thermalito (William C. Paris, III) was transmitting the petition to the Division. Both the cover letter and petition were signed by William C. Paris, III.

3.11 Comments of Sarah Salisbury

By letter dated July 15, 2013, Ms. Salisbury provided comments regarding the proposed transfer. Her concerns are as follows:

- a) Siltation in Concow Reservoir has altered the amount of water actually available in the reservoir such that the 2,500 af proposed for transfer will constitute a much larger percentage of the water remaining in Concow Reservoir following the transfer.
- b) The recharge rate for Concow Reservoir is unpredictable and she would like to know what the recharge rate is anticipated to be.
- c) Lowering of the water level in Concow Reservoir may negatively impact the local water table.
- d) Lowering the water level in the reservoir will create a muddy border around the reservoir that will have an offensive smell and a breeding ground for mosquitos thereby affecting the quality of life for people who use the reservoir.

- e) An archeological report should have been done regarding lowering the water level and local tribe members should have been informed of the potential impacts.
- f) Could the water spilled over the dam at Concow Reservoir be used to transfer instead of water taken from storage in Concow Reservoir?
- g) How much money will be made by Thermalito from the transfer?
- h) Who will monitor the impacts to environmental impacts from the transfer?
- i) The local residents should be notified when the transfer begins and ends.

State Water Board Response:

Item (a) is a statement regarding reservoir level and is addressed in Section 3.6. Item (b) is a statement regarding recharge rates. The local runoff will not be the only factor affecting reservoir refill. The transfer will be conditioned with a reservoir refill condition, which will control refill of the 2,500 af. Items (c) and (d) are addressed in Section 3.7 of this order. With regard to item (e), the reservoir will be operated within the levels that have occurred under past operations, so it is unclear how the transfer could affect archaeological resources. Regarding item (f), only water stored in Concow Reservoir is available for transfer under the license. The license does not authorize direct diversion. Item (g) requests information on money made from the transfer. The State Water Board does not receive or consider this information. Item (h) requests information on monitoring of environmental impacts. The petition is exempt from CEQA. Consequently, monitoring by Thermalito will be limited to terms and conditions in this order and any conditions imposed by DWR or Reclamation for use of their facilities. Item (i) requests local notification when the transfer begins and ends. Thermalito will be authorized to begin the transfer upon issuance of this order. The State Water Board does not maintain real time records for water transfers. Ms. Salisbury will need to contact Thermalito for this information.

3.12 Comments of Butte Environmental Council (BEC)

By letter dated July 15, 2013, BEC commented on the proposed transfer. BEC opposes the transfer and believes that the water resources of Butte County should not be transferred out of the area to the detriment of the local people and environment. BEC concerns are as follows:

- a. The proposed transfer should have been made public during Thermalito Board meetings but it was not.
- b. A CEQA document should have been prepared for the proposed transfer.
- c. Thermalito's proposed transfer is not protective of public trust resources.

State Water Board Response:

Item (a) is a statement regarding Thermalito Board meetings. Item (b) raises a CEQA issue. The transfer is statutorily exempt from CEQA. See Section 4.0 of this order. Item (c) is addressed in Section 5.3 of this order.

4.0 COMPLIANCE WITH CEQA

The Petitioner filed the petition for temporary transfer of water pursuant to Water Code section 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 issue a Notice of Exemption for this project.

In addition to any obligation the State Water Board may have under CEQA, the Board 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 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 independent evaluation of impacts to public trust resources was conducted concurrent with the Water Code section 1727 evaluation.

5.0 REQUIRED FINDINGS OF FACT

5.1 Transfer Only Involves Water That Would Have Been Consumptively Used or Stored

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, 1726.) Water Code section 1725 defines “consumptively used” to mean “the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.” The 2,500 af of proposed transfer water is currently in storage in Concow Reservoir and would remain in storage absent the transfer.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the water proposed for transfer pursuant to this Order would be stored Concow Reservoir and/or used within Thermalito’s service area in the absence of the proposed temporary change.

5.2 No Injury to Other Legal Users of Water

Before approving a temporary change due to a transfer or exchange of water pursuant to Article 1 of 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 water proposed for transfer pursuant to this temporary change consists of water previously stored in Concow Reservoir pursuant to License 845. In the absence of the proposed transfer, the water would remain in storage for future use by Thermalito and would not be available to other water users. There will be no change in return flows, because the water would otherwise remain in storage. Further, the releases from storage at Concow Reservoir pursuant to the temporary transfer will not reduce the available supply to any other legal user of water downstream of Concow Reservoir.

Thermalito will enter into a reservoir refill agreement with Reclamation and DWR ensuring that future refill of any storage space in Concow Reservoir created by the transfer will not reduce the amount of water that Reclamation, DWR, or other water users could otherwise divert under their water rights.

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

5.3 No Unreasonable Effect on 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).)

Concow Creek downstream of Concow Dam flows into Oroville Reservoir, which exists as a result of Oroville Dam. Since there is no fish ladder or other passage at Oroville Dam, there are no anadromous fish species living in Concow Creek; therefore increased flows will not affect any anadromous species in Concow Creek. The timing of the proposed transfer would also increase flows marginally in the Feather River downstream of the Oroville Complex in August and September. The Petitioner indicates that the proposed transfer period avoids adverse impacts to fall-run and spring-run Chinook salmon, and green sturgeon by timing the increased flows in the Feather River downstream of Oroville Reservoir when the fish are not seasonally present.

A change in temperature in Concow Reservoir is expected to occur, as water is released from storage in August and September in greater amounts than absent the transfer. However, the transfer is timed to occur after the spawning and hatching period of the bass living in Concow Reservoir, and thus any change in temperature or surface level will not affect the fish, wildlife or aquatic resources associated with Concow Reservoir, or violate any DFW requirements.

Further, this transfer will be conditioned to require continued compliance with all existing conditions of License 845 related to fisheries. This includes continued compliance with the requirements of Thermalito's March 22, 1993 Agreement with DFW which was designed to protect aquatic species in and around Concow Reservoir. License 845 was amended in 1996 to include the conditions from the Agreement that are subject to the State Water Board's enforcement.

Rediversion of water at Banks Pumping Plant pursuant to this Order is subject to compliance by the SWP and CVP project operators with the objectives currently required of DWR and Reclamation set forth in Tables 1,2, and 3 on pages 181-187 of Decision 1641 (D-1641), including compliance with the various plans required under D-1641. Rediversion at these facilities pursuant to this Order is also subject to compliance by the operators with all applicable biological opinions and any court orders applicable to these operations.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(2) that the proposed transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

6.0 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 Deputy Director for Water Rights redelegated this authority by memorandum dated July 6, 2012. This Order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2010-0029 and the subsequent redelegation by the Deputy Director's memorandum.

7.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1727, and therefore I find as follows:

I conclude that, based on the available evidence:

1. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.
2. The proposed temporary change will not injure any legal user of water.
3. The proposed temporary change will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change for the transfer of up to 2,500 af of water under License 845 is approved.

All existing terms and conditions of License 845 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing on the date of this Order and continuing for one year.
2. The place of use under License 845 is temporarily expanded to include the service area of Westlands as shown on the map submitted with the petition and on file with the State Water Board under Application 18085.
3. DWR's Banks Pumping Plant is temporarily added as an authorized point of rediversion under License 845.
4. Rediversion of water at Banks Pumping Plant is subject to compliance by the operators with the objectives currently required of DWR and Reclamation set forth in Tables 1,2, and 3 on pages 181-187 of State Water Board Revised Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at those points of diversion/rediversion, including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by DWR and Reclamation. Rediversion of water is also subject to compliance by DWR and Reclamation with all applicable biological opinions and court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.
5. Water may not be transferred through the Banks Pumping Plant until Petitioner has implemented a Refill Agreement between DWR and Petitioner to address potential refill concerns in Concow Reservoir. Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta. The executed Refill Agreement must be acceptable to DWR and Reclamation. Documentation that an acceptable Refill Agreement has been agreed to by Reclamation, DWR and Petitioner shall be submitted to the Division within 15 days of the date of execution of the agreement.
6. During the period of transfer, Petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies. This Order shall not be construed as authorizing the violation of any agreement entered into by the petitioner.

7. Within 90 days of the completion of the transfer, but no later than November 1, 2014, the petitioner shall provide the Deputy Director for Water Rights a report describing the transfer authorized by this Order. The report shall include the following information:
 - a. The average daily release rates and corresponding volume of water released from Concow Reservoir as a result of this transfer (reported on a daily basis); and
 - b. The value of the Refill Reservation as defined in the Refill Agreement (reported on a daily basis).

Should the value of the Refill Reservation exceed zero at the time of this report, Thermalito shall submit subsequent reports by June 1 of each year until the Refill Reservation equals zero. These reports shall include the daily values of the Refill Reservation.

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 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.

9. This order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050-2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531-1544). If a "take" will result from any act authorized under this transfer, the petitioners shall obtain authorization for an incidental take permit prior to construction or operation. Petitioners 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

ORIGINAL SIGNED BY:
PHILLIP CRADER FOR

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: AUG 14 2013