

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

**DIVISION OF WATER RIGHTS**

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**IN THE MATTER OF LICENSE 2685 (APPLICATION 1224)  
OF THE MERCED IRRIGATION DISTRICT**

**PETITION FOR TEMPORARY CHANGE  
IN PLACE OF USE INVOLVING THE TRANSFER  
OF UP TO 20,000 ACRE-FEET OF WATER**

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SOURCE: Merced River  
COUNTIES: Mariposa and Merced

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**BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:**

**1.0 SUBSTANCE OF PETITION**

On May 7, 2018 the Merced Irrigation District (MID or Licensee) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a Petition for Temporary Change pursuant to Water Code sections 1725 et al. Pursuant to the petition, MID seeks to transfer up to 20,000 acre-feet (af) of water for use upon lands near the boundaries of Merced's authorized place of use. The proposed addition to the place of use includes an area known as Merced's Sphere of Influence Lands (SOI Lands), an area known as the Red Top Area, Le Grand-Athlone Water District, Lone Tree Mutual Water Company, East Side Water District, and Chowchilla Water District, (collectively "Transferees"), all located within Merced County. Water will also be transferred to the U.S. Bureau of Reclamation (Reclamation) for delivery to the East Bear Refuge which is within the proposed additional place of use. Temporary changes under Water Code section 1725 may be effective for a period of up to one year.

**1.1 Description of the Transfer**

MID proposes to transfer up to 20,000 af of stored water under its License 2685 to irrigate land that is currently not included as a place of use under the license. MID is petitioning to increase the place of use covered by License 2685 (Application 1224) in order to supply previously stored surface water for use on Transferees' land. The majority of the SOI Lands have historically received surface water from MID during years that MID's Board of Directors determines water is available under MID's pre-1914 appropriative right claims, provided that adequate natural flow is available from the Merced River. During months when surface water is not available under the pre-1914 appropriative right claims for delivery to the SOI Lands, the individual landowners meet their demands through alternate supplies, such as groundwater. The landowners in the nearby water districts would also meet demands through alternate supplies.

The Sustainable Groundwater Management Act directs the Department of Water Resources to develop groundwater basin priorities and identify groundwater basins and subbasins in conditions of critical overdraft. The proposed additional place of use overlies the Merced Subbasin and the Turlock Subbasin which have been identified as critically overdrafted and high-priority, respectively. As of July 10, 2018, Merced has indicated that it has determined that natural flow from the Merced River per MID's pre-1914 water right is not available for SOI Lands for the remainder of the year. The proposed transfer may help

recharge and alleviate overdraft in portions of the subbasins by using the transferred surface water for irrigation in lieu of groundwater pumping.

In 2007 and 2011, MID petitioned and received approval from the Division for a temporary water transfer to deliver surface water to SOI Lands under License 2685. In 2016, MID petitioned to deliver surface water to SOI Lands as well as provide surface water supplies to the portions of Le Grand-Athlone Water District, Lone Tree Mutual Water Company, East Side Water District, San Luis Canal Company, and Chowchilla Water District located in Merced County. In 2017, MID petitioned to deliver surface water to the same agencies as in 2016 transfer, with the exception of the San Luis Canal Company. This 2018 petition is similar to the 2017 petition, with the addition of the Red Top Area.

In the absence of the proposed temporary change, the 20,000 af of water would remain in storage within Lake McClure pursuant to MID's License 2685.

## **2.0 BACKGROUND**

### **2.1 Substance of MID's License**

#### Original Water Rights under License 2685

License 2685 was issued to MID on August 11, 1944, pursuant to Application 1224. License 2685 allows the direct diversion of 1,500 cubic feet per second (cfs) of water from the Merced River from about March 1 through about October 31 of each year. License 2685 also allows the diversion from the Merced River to storage of 266,400 af per annum (afa) from about October 1 of each year to about July 1 of the succeeding year.

The point of diversion is at the New Exchequer Dam on Lake McClure. There are also two points of rediversion downstream of New Exchequer Dam – Merced Falls Diversion Dam for the North Side Canal and Crocker-Huffman Diversion Dam for the Main Canal. Water rediverted through the North Side Canal and the Main Canal is used for irrigation and domestic purposes on 164,395 gross acres within the boundaries of MID.

#### Modified Water Rights under License 2685

Effective February 16, 1995, License 2685 was modified from its original conditions to allow the direct diversion of 5,000 afa of water from the Merced River at a rate not to exceed 7 cfs from November 1 of each year to February 29 of the following year for municipal use in the Mariposa Town Planning Area. Storage under License 2685 is reduced in the amount of water diverted to the Mariposa Town Planning Area, up to 1,667 afa. Combined maximum direct diversion and storage under License 2685 cannot exceed 345,440 afa. The point of diversion for the water delivered to the Mariposa Town Planning Area is located approximately 40 miles upstream of New Exchequer Dam.

License 2685 was further amended effective June 20, 2003 to include an additional point of rediversion and modify the place of use resulting from MID's consolidation with the El Nido Irrigation District. The new point of rediversion downstream of New Exchequer Dam is on Duck Slough. Water rediverted through Duck Slough is used for irrigation purposes on 9,418.6 acres within the boundaries of El Nido Irrigation District.

### **2.2 Place of Use Under the Proposed Transfer**

The Transferees' Lands (as shown on a map submitted with the petition titled *Merced Irrigation District Map to Accompany Petition for Temporary Transfer under License 2685 (Application 1224) Proposed Addition to Place of Use* dated May 7, 2018 will be temporarily added to the place of use of License 2685.

The proposed place of use encompasses the boundaries of the Red Top Area, Le Grand-Athlone Water District, Lone Tree Mutual Water Company, East Side Water District, Chowchilla Water District, and the individual parcels comprising the SOI Lands located within Merced County. The proposed addition to the place of use totals 229,080 acres.

### **2.3 Water Available for Transfer**

MID proposes to deliver previously stored surface water to the Transferees. The quantity of surface water proposed to be delivered by MID to the Transferees will be made available by releases of up to 20,000 af from existing reservoir storage of water currently stored in Lake McClure. This transfer of previously stored surface water will involve the delivery of water to Transferees and refill of the reservoir, which normally occurs during periods of high runoff. Under the proposed transfer, releases of stored water would be increased compared to conditions in the absence of the proposed temporary transfer.

### **2.4 Refill Criteria**

Refill criteria developed in coordination with the Department of Water Resources (DWR) and Reclamation are required to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the State Water Project (SWP) or the Central Valley Project (CVP). The refill criteria provide for an accounting of refill of Lake McClure resulting from the proposed transfer. Pursuant to the criteria, any refill occurring during balanced conditions in the Delta is subject to repayment to DWR and Reclamation according to a schedule agreed to by MID, DWR, and Reclamation.

## **3.0 PUBLIC NOTICE AND COMMENTS ON THE PROPOSED TEMPORARY CHANGE**

Public notice of the petition for temporary change was provided May 17, 2018 on the Division's internet site, via regular mail and email to interested parties by May 17, 2018, and by publication in the Merced Sun-Star on May 18, 2018. Timely comments regarding the proposed temporary change were submitted by Reclamation, Mr. Richard Morat, and Mr. Michael Gibson. These comments and the State Water Board's response are briefly summarized below.

### **3.1 Comments of Reclamation**

Reclamation states that a refill agreement is necessary in order for the proposed temporary change to not adversely impact the water rights or operations of the SWP or CVP. Reclamation requests the Petitioner enter into a reservoir refill agreement containing conditions, criteria, and procedures that ensure that SWP or CVP operations and water rights are not adversely impacted by future refill following the release of transfer water. The agreement must protect SWP and CVP water rights and operations from injury regarding Reclamation's ability to meet all applicable water quality standards cited in Permits 16597, 20245, and 16600 (Applications 14858A, 14858B, and 19304, respectively) for New Melones Reservoir pertaining to the San Joaquin River and Sacramento-San Joaquin Delta Estuary. The agreement will also protect Reclamation's water right Permits 11315, 11316, 11967, 11968, 11969, 11971, 11973, 12364, 12721, 12722, 12723, 12727, 12860, and 15149 (Applications 13370, 13371, 5628, 15374, 15375, 16767, 17374, 17376, 5626, 9363, 9364, 9368, 15764, and 21542) and operations for the Jones Pumping Plant.

#### State Water Board Response:

As stated in Section 2.4 of this Order, refill criteria are needed to ensure that the refill of Lake McClure resulting from the proposed temporary change does not adversely impact operations and/or water rights of the SWP or CVP. A refill criteria agreement approved by DWR and Reclamation has been prepared for this transfer and submitted to the State Water Board. This Order requires MID to comply with the refill criteria.

### **3.2 Comments of Mr. Richard Morat**

On May 21, 2018, via email, Mr. Morat indicated that the transfer could adversely affect the Merced River, San Joaquin River, and estuarine fishery resources due to diminishment of flow-related habitat conditions. He asked that that transfer by reservoir release include a refill agreement to protect public trust resources.

#### State Water Board Response:

The proposed temporary transfer by MID is for water that would have otherwise been stored. By approving the transfer, additional water will flow down the Merced River thence the San Joaquin River, thence the Delta. Refill criteria approved by DWR and Reclamation are required as a condition of the Order. See section 2.4 of this Order.

As Mr. Morat indicated, the State Water Board is responsible for considering public trust resources, and while it does not anticipate any adverse public trust impacts to result from this transfer, the State Water Board is aware of long standing challenges with regard to management of flows and maintaining habitat conditions suitable for protection of fish and wildlife in the Delta and its tributaries. Current outflow and water quality requirements are established by State Water Board Water Right Decision 1641 (D-1641) and applicable Biological Opinions, which are the responsibility of DWR and Reclamation to fulfill during the entirety of this transfer. Additionally, on July 6, 2018, the State Water Board released a draft of the final Lower San Joaquin River/Southern Delta Bay-Delta Water Quality Control Plan Update, including a Framework document describing the major elements of the forthcoming Staff report for the Phase II effort that will include determination of flows protective of fish and wildlife in the Feather River and Sacramento-San Joaquin River Delta estuary. The proposed Phase II changes to the Bay-Delta Plan include: new inflow requirements for the Sacramento River, its tributaries, and eastside tributaries to the Delta (the Mokelumne, Calaveras and Cosumnes Rivers); new and modified Delta outflow requirements; new requirements for cold water habitat; new and modified interior Delta flow requirements; recommendations for complementary ecosystem protection actions that others should take; and adaptive management, monitoring, evaluation, special study, and reporting provisions.

### **3.3 Comments of Mr. Michael Gibson**

On June 18, 2018, via email, Mr. Gibson, a water rights holder on the Merced River, objected to the transfer and stated that MID should leave the transfer water in storage for times of drought that may occur in the future.

#### State Water Board Response:

Lake McClure is currently at 84 percent capacity (859,526 af as of July 11) which is well above the minimum pool of 115,000 af and 137 percent of the historical July monthly average storage. Absent the proposed transfer, storage in Lake McClure at the end of the irrigation season, October 31, is projected to be approximately 550,000 af. Therefore, even with the transfer, storage in Lake McClure at the end of the irrigation season will be maintained at 530,000 af, ample storage for potential future times of drought.

## **4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Water Code section 1729 exempts petitions for temporary changes involving a transfer of water from the requirements of the California Environmental Quality Act. The State Water Board will issue a Notice of Exemption for this project.

## 5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

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.)

The State Water Board shall approve a temporary change involving the transfer of water under Water Code section 1725 et seq., if it determines that a preponderance of the evidence shows both of the following:

- a. The proposed change would not injure any legal user of water, during any potential hydrologic condition that the State Water 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 water or return flows.
- b. The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(Wat. Code, § 1727, subd. (b).)

In addition, the proposed change must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary change. (*Id.*, § 1726, subd.(e).)

Temporary changes pursuant to Water Code section 1725 may be effective for a period of up to one year from the date of approval. (Wat. Code, § 1728.) The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out.” (*Ibid.*)

The State Water Board also 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 considers the evaluation of public trust resources as part of its evaluation of impacts to fish, wildlife, or other instream beneficial uses under Water Code section 1727, subdivision (b)(2).

## 6.0 REQUIRED FINDINGS OF FACT

### 6.1 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, 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 water proposed for transfer is currently stored in Lake McClure pursuant to the terms of License 2685. The petition states that in the absence of the proposed change, the 20,000 af of water proposed for transfer would remain in storage in Lake McClure and this quantity would be pumped at individual groundwater wells for use within the SOI Lands and alternate sources to the other Transferees with the exception of SOI Lands receiving Pre-1914 water when adequate natural flow is available per MID’s

Pre-1914 claims from the Merced River. Under License 2685, MID can both directly divert and collect water to storage. MID will not provide water by direct diversion under License 2685 to the Transferees.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the proposed transfer involves only an amount of water that would have been stored in the absence of the proposed temporary change.

## **6.2 No Injury to Other Legal Users of the 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).) This Order requires MID to comply with refill criteria to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the SWP or CVP.

MID has indicated it has sufficient supply to continue the same surface water deliveries to its existing customers with or without the proposed temporary water transfer. In addition, MID is required to release water to meet its other existing downstream commitments and requirements below the inlet to its Main Canal; this approval does not change those obligations. Therefore, there will be no downstream change of the streamflow, water quality, timing of diversion, return flows, effects on legal users of water, or change in the purposes of use authorized by License 2685 during the period of the proposed temporary transfer.

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

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

Water Code section 1729 exempts temporary changes involving transfer of water from the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 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 overall impact of this transfer will be to temporarily increase flows in a portion of the Merced River. This will correspondingly decrease storage in Lake McClure by the same volume of water. In general, reservoir storage release transfers result in incremental increase in instream flows between MID's point of diversion and the location where the water is removed from the stream system. The increase in flows is not anticipated to be harmful to instream resources, provided that the transfer water does not cause instream temperatures to increase to harmful levels and also does not result in other impacts such as false fish attraction flows to streams not suited for fish rearing. No information is available that suggests the transfer flows will contribute to false fish attraction flows or significantly change stream temperatures.

The transfer will deplete reservoir storage; thus it is appropriate to consider if the transfer would preclude MID from fully meeting its required instream flows such as the minimum insteam flows pursuant to License 2685, the Federal Energy Regulatory Commission (FERC) License (2179-043), and the Davis-Grunsky Contract. MID is required to meet these commitments with or without the transfer.

Lake McClure is currently at 84 percent capacity 859,526 af (as of July 11) which is well above the minimum pool of 115,000 af. Absent the proposed transfer, storage in Lake McClure at the end of the irrigation season, October 31, is projected to be approximately 550,000 af.

In light of this supplemental information, and in context of the transfer of 20,000 af consisting of a small portion of the overall current storage in Lake McClure, there appears to be no evidence indicating that minimum pool levels will not be maintained during the period of the transfer.

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.

## **7.0 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. This Order is adopted pursuant to the delegation of authority in Section 4.4.2 of Resolution 2012-0029.

## **8.0 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:

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 the water.
3. The proposed temporary change will not unreasonably affect fish, wildlife, or other instream beneficial uses.

## **ORDER**

**NOW, THEREFORE, IT IS ORDERED** that the petition filed for temporary change in the place of use under License 2685 (Application 1224) of MID for the transfer of 20,000 af of water to the Transferees is approved.

All existing terms and conditions of License 2685 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing on date of Order issuance and continuing for one year.
2. Only water previously stored in Lake McClure may be transferred. Water shall not be provided to the Transferees by direct diversion.
3. The place of use under License 2685 is temporarily expanded to include the Transferees' Lands as follows: Irrigation of a net area of 219,740 acres as shown on a map titled *Merced Irrigation District*

*Map to Accompany Petition for Temporary Transfer under License 2685 (Application 1224)  
Proposed Addition to Place of Use dated May 7, 2018, filed with the Division.*

4. A refill criteria agreement for the 2018 water transfer between MID and the Transferees, approved by DWR and Reclamation, is required, and was submitted to the State Water Board on June 28, 2018. The refill criteria shall govern the conditions under which refill of the water released pursuant to this Order occurs, including the conditions under which refill impacts may accrue and how MID shall rectify any impacts. At the conclusion of refilling water in Lake McClure for the water released pursuant to this Order, if a refill impact has occurred, MID shall release the amount of water identified in the refill criteria to DWR and Reclamation in a manner and on a schedule agreed to between MID, DWR, and Reclamation. Any release required pursuant to this paragraph shall be conducted in a manner that does not injure any legal user of water and does not unreasonably affect fish, wildlife, or other instream beneficial uses.
5. Within 90 days of completion of the transfer, the Licensee shall provide to the Deputy Director for Water Rights a report describing the transfer authorized by this Order. The report shall include the following information:
  - a. The quantity of water (in af) and identification of the specific place(s) of use and crops irrigated within Transferees' Lands pursuant to Condition 2 of this Order; and
  - b. The daily average rate of water that is released from Lake McClure pursuant to this Order.
6. Licensee shall provide a report to the Deputy Director, Division of Water Rights by September 1, 2019 describing its refill of the transferred amount of water pursuant to this Order. For periods of refill or refill impacts, including any releases made by the Licensee to address a refill impact, the report shall include the daily values for these periods. If reservoir refill or releases for refill impacts are not complete by September 1, 2019, subsequent reports shall be submitted by September 1 of each year until completion. This report shall include a discussion of any measures taken to ensure that releases made to satisfy refill criteria pursuant to Condition 4 were conducted in a manner that did not injure any legal user of water and did not unreasonably affect fish, wildlife, or other instream beneficial uses.
7. MID shall comply with the License 2685 instream flow requirements at all times while transferring water pursuant to this Order.
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 public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water. The continuing authority of the State Water Board also may be exercised by imposing specific requirements over and above those contained in the Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.
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 and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this temporary transfer, the Licensee shall obtain authorization for any incidental take prior to commencing transfer of water. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.

10. The State Water Board reserves 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:

*Erik Ekdahl, Deputy Director*  
*Division of Water Rights*

Dated: JUL 16 2018