

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF LICENSE 1986 AND PERMITS 11885, 11886, AND 11887
(APPLICATIONS 23, 234, 1465, AND 5638)
OF THE U.S. BUREAU OF RECLAMATION**

ORDER APPROVING TEMPORARY URGENCY CHANGE

SOURCE: San Joaquin River

COUNTIES: Fresno and Madera

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 INTRODUCTION

On May 14, 2019, the U.S. Bureau of Reclamation (Reclamation) submitted petitions for temporary urgency change (TUCPs) pursuant to Water Code section 1435 et seq., to the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). As a result of higher than average snowpack and runoff in the San Joaquin River watershed, Reclamation seeks to use water stored in Millerton Lake that is not needed by Friant Division contractors or the San Joaquin River Restoration Program (SJRRP) for delivery to various wildlife refuges for fish and wildlife enhancement purposes. Reclamation requests to temporarily add Mendota Dam as a point of rediversion to water right License 1986 (Application 23) and Permits 11885, 11886, and 11887 (Applications 234, 1465, and 5638). The water rediverted at Mendota Dam may then be conveyed through canal intakes off the dam and delivered to the following wildlife refuges: 1) San Luis Unit, West Bear Creek Unit, Kesterson Unit, and Freitas Unit of the U.S. Fish and Wildlife Service; 2) China Island Unit, Salt Slough Unit, Mendota Wildlife Area, and Los Banos Wildlife Area of the California Department of Fish and Wildlife; and 3) Grassland Resource Conservation District. Pursuant to Water Code section 1440, the authorization to divert and use water under a temporary change order automatically expires 180 days after the authorization takes effect, unless an earlier date is specified or the temporary change order is revoked.

2.0 BACKGROUND

2.1 Reclamation's Friant Division Water Rights

Reclamation's water right License 1986 and Permits 11885, 11886, and 11887 authorize diversion and use of water for the Friant Division of the Central Valley Project (CVP). The Friant Division diverts water from the San Joaquin River at Friant Dam and stores water in

Millerton Lake primarily for municipal, domestic, irrigation, and stockwatering uses. Water from Millerton Lake is rediverted from Friant Dam either south through the Friant-Kern Canal or north through the Madera Canal. Water is also released from Friant Dam into the San Joaquin River for flood control purposes, to provide water to riparian water right holders downstream of the dam, and for fish and wildlife enhancement purposes pursuant to the requirements of the SJRRP as described below.

2.2 SJRRP

The SJRRP was established to implement provisions of the 2006 Stipulation of Settlement (Settlement) In *Natural Resources Defense Council et al. v. Rodgers et al.*, and the San Joaquin River Restoration Settlement Act, Public Law No. 111-11, § 10001 et seq., 123 Stat 991, 1349 (2009). The Settlement addresses restoration of fish habitat in the San Joaquin River below Friant Dam that ended a lengthy dispute over the operation of Friant Dam. The parties that entered into the Settlement include the United States Departments of the Interior and Commerce, Friant Water Users Authority, and the Friant Defenders. The Settlement established two primary goals: 1) to restore and maintain fish populations, including Spring-run Chinook Salmon (salmon), in good condition in the mainstem of the San Joaquin River below Friant Dam; and 2) to reduce or avoid adverse water supply impacts to the Friant Division long-term contractors that may result from the restoration program. The Settlement limited water supply impacts to Friant Division long-term water contractors by providing for new water management measures, including the recirculation and recapture of released water and the creation of a recovered water account.

In 2013, to facilitate implementation of the SJRRP, the State Water Board approved changes to Reclamation's Friant Division water rights for long-term instream flow dedication and the rediversion of those flows at specified locations pursuant to Water Code section 1707. (See Order Approving Change and Instream Flow Dedication, October 21, 2013 [hereinafter referred to as "2013 Order"]). The 2013 Order anticipated that recapture and recirculation of Restoration Flows may occur at new points of rediversion that were added to Reclamation's Friant Division water rights. Consistent with the 2013 Order, the added points of rediversion are authorized solely for the purpose of implementing the SJRRP and recirculating Restoration Flows.

In the TUCPs, Reclamation raised its previous disagreement with the State Water Board's interpretation of the 2013 Order; "[h]owever, in an abundance of caution, and without waiving any of its rights or arguments as to the use of the PORDs added in the 2013 Order, Reclamation is filing this [TUCP] in order to assure there are no complications with the use of this PORD for delivery of CVP water released from Millerton Lake to wildlife refuges." To be clear, the State Water Board could not have authorized any additional points of diversion or rediversion for any purpose other than the dedication and downstream recapture of SJRRP Restoration Flows in the 2013 Order. It is not necessary for the State Water Board to initiate any proceedings at this time to clarify the language that is the subject to the disagreement or otherwise apply and enforce the limitations that would be in effect absent the approval of the TUCPs.

2.3 Water Supply for Central Valley Wildlife Refuges

The wildlife refuges that are the subject of the TUCPs primarily receive CVP water supplies from Mendota Pool that originate from the Sacramento-San Joaquin Delta. The Mendota Pool is located on the San Joaquin River at the confluence of the San Joaquin and Kings rivers. Because the majority of San Joaquin River water upstream of the Mendota Pool is normally diverted to the Friant-Kern and Madera Canals at Friant Dam, Reclamation provides Sacramento-San Joaquin Delta CVP water via the Delta Mendota Canal (DMC) to the Mendota Pool, which is then diverted from the pool or released for downstream use in the San Joaquin River.

Reclamation has various contracts and agreements for the conveyance of water to certain wildlife refuges, including the refuges that are proposed to receive water pursuant to the subject TUCPs. These contracts and agreements implement refuge water supply requirements pursuant to sections 3406(d)(1) and 3406(d)(2) of Title 34 of Public Law 102-575 of the Central Valley Project Improvement Act (CVPIA). The CVPIA was intended to mitigate the environmental impacts of the CVP, particularly for the protection, restoration, and enhancement of fish and wildlife. The contracts and agreements related to the wildlife refuges allow Reclamation to convey water supplies of suitable quality, either directly or through contractual agreements with other appropriate parties, to certain National Wildlife Refuges, State Wildlife Areas, and private wetlands in the Grassland Resources Conservation District. Specifically, Reclamation is required to provide each refuge with Level 2 and Level 4 water supplies for critical wetland habitat supporting resident and migratory waterfowl, threatened and endangered species, and wetland dependent aquatic biota on the refuges. These supplies are ideally used to allow refuges to optimally manage the preserved land for the improvement of waterfowl populations. Level 2 supplies represent the historical average amount of water deliveries prior to CVPIA enactment in 1992 and is the baseline water required for wildlife habitat management. Level 4 supplies represent the additional increment of water required for optimal wetland habitat development. Approval of the TUCPs will assist Reclamation in providing Level 2, and particularly Level 4, water supplies to the subject refuges this summer.

3.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The State Water Board must comply with applicable requirements of the California Environmental Quality Act (CEQA) prior to issuance of any order approving a TUCP, pursuant to Water Code section 1435. (See Cal. Code Regs. tit. 23, § 805.) The State Water Board has determined the project proposed with the TUCPs is categorically exempt under CEQA as the change meets the Class 7 and 8 exemption criteria.

A Class 7 exemption “consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment.” (Cal. Code Regs, tit. 14, §15307.) The proposed action will ensure the maintenance of a natural resource (i.e. the fish and wildlife resources of the wildlife refuges) by ensuring water supplies are

delivered to the refuges via rediversions of water previously stored in Millerton Lake. Approval of the TUCPs will assist Reclamation in providing both Level 2 and Level 4 water supplies (as described above) to the refuges, which assists in mitigation of environmental impacts from operation of the CVP.

A Class 8 exemption “consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment.” (*Id.*, §15308.) The proposed action will ensure the maintenance of the environment (i.e. the fish and wildlife resources of the wildlife refuges) in the same way as stated for the Class 7 exemption. Accordingly, these temporary changes are categorically exempt from CEQA pursuant to a Class 7 and Class 8 exemptions. The State Water Board will file a Notice of Exemption within five days of approval of this Order.

4.0 PUBLIC NOTICE OF TEMPORARY URGENCY CHANGE PETITION

On June 14, 2019, the State Water Board issued a public notice of Reclamation’s TUCPs. Pursuant to Water Code section 1438, subdivision (b)(1), Reclamation is required to publish the notice in a newspaper having a general circulation, and that is published within the counties where the points of diversion lie. The State Water Board has posted the notice of the TUCPs, copies of the TUCPs, and accompanying materials on its website. The State Water Board has also distributed the notice through its electronic notification system.

4.1 SVWA Comments

On July 9, 2019, the State Water Board received a comment letter from South Valley Water Association (SVWA). SVWA opposes Reclamation’s proposed changes based on potential injury to their contracted CVP water rights. SVWA commented that:

- 1) Reclamation has not demonstrated that there is any stored water in Millerton Lake in excess of what is necessary to provide Class 1 or Class 2 contracted water supply allocations;
- 2) Reclamation did not provide water supply or hydrologic analysis showing that water rediverted pursuant to the TUCPs would originate as flood control releases from Millerton Reservoir;
- 3) Flood control releases are stored under Friant Division water rights, so Friant Division contractors have a contractual right to that stored water and the contractors would be the parties to transfer water to the refuges;
- 4) Information in the TUCPs indicated that the flows would be available in the April to June timeframe, but the TUCPs were not filed until mid-May and was not publicly noticed until June 15, with a comment period ending on July 14. Therefore, the proposed temporary diversion would have ended before the end of the comment period and the TUCPs should be denied; and

- 5) SVWA has been in discussions with Reclamation staff regarding the possibility of transferring previously stored water during flood control release from Millerton Reservoir where the Friant Division contractors would be joint petitioners with Reclamation. This type of joint petition should be developed before Reclamation proceeds with the present TUCPs.

Reclamation's Response

By letter dated July 22, 2019, Reclamation responded to SVWA's comments. Reclamation responses were as follows:

- 1) On February 22, 2019, Reclamation announced an allocation of 100 percent class 1 and 150,000 acre-feet of Class 2 supplies, which was followed by an unlimited increase to the Class 2 allocation on March 16, 2019. Reclamation indicated that Friant Division contractors are limited by their contract total and their ability to put the water delivered to consumptive use, recharge, or banking. Reclamation stated that overall contract totals have been in excess of Friant Division contractors' ability to put water to use in 2019.
- 2) Reclamation filed the TUCPs as they anticipated having to release stored water from Millerton due to runoff from the wet spring this year and the annual operation reservoir goal for February. Reclamation provided information explaining all of the factors they need to consider before they can deliver previously stored water to the refuges. These factors need to be evaluated on a real-time basis, and Reclamation will only deliver water to the refuges pursuant to these TUCPs when it is determined that there is excess stored water being released into the San Joaquin River.
- 3) Reclamation indicated that SVWA's member agencies' rights to stored water in Millerton are defined by their contracts with Reclamation and the contracts do not grant member agencies a right to all stored water under Reclamation's water rights above what is spelled out in each contract. Further, Reclamation also stated that CVPIA section 3405(a)(1)(I) does not allow the transfer of CVP water that was previously stored, but not consumptively used or irretrievably lost to beneficial use.
- 4) Reclamation indicated that it initially identified the April to June timeframe for the TUCPs due to concerns of flood flows upstream of Mendota Pool requiring DMC deliveries to the Mendota Pool to cease, thereby the only water available for delivery to the refuges would be from storage releases from Millerton Lake. Reclamation claimed it did not file the petition when it determined that storage releases would not be available until possibly later in the season. Reclamation filed the TUCPs in May in anticipation of hydrology, canal demand, and reservoir operations eventually resulting in the opportunity to deliver stored water from Friant to the refuges sometime this summer and fall.
- 5) Reclamation acknowledged that it had discussions with SVWA and other Friant Division contractors regarding delivering water from Millerton Lake to the wildlife refuges and that the discussions were ongoing. However, Reclamation claimed that the filing of the TUCPs without prior agreement with SVWA does not injure SVWA, and Reclamation in part filed the TUCPs at the suggestion of SVWA, as SVWA thought a TUCP to deliver Friant Division CVP water would be appropriate under 2018/2019 hydrological conditions.

5.0 CRITERIA FOR APPROVING A TEMPORARY URGENCY CHANGE

Water Code section 1435 provides that a permittee or licensee who has an urgent need to change the point of diversion, place of use, or purpose of use from that specified in the permit or license may petition for a conditional temporary change order. The State Water Board's regulations set forth the filing and other procedural requirements applicable to TUCPs. (Cal. Code Regs., tit. 23, §§ 805, 806.) The State Water Board's regulations also clarify that requests for changes to permits or licenses other than changes in point of diversion, place of use, or purpose of use may be filed, subject to the same filing and procedural requirements that apply to changes in point of diversion, place of use, or purpose of use. (*Id.*, § 791, subd. (e).)

Before approving a temporary urgency change, the State Water Board must make the following findings:

1. the permittee or licensee has an urgent need to make the proposed change;
2. the proposed change may be made without injury to any other lawful user of water;
3. the proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses; and
4. the proposed change is in the public interest.
(Wat. Code, § 1435, subd. (b)(1-4).)

5.1 Urgency of the Proposed Change

Under Water Code section 1435, subdivision (c), an “urgent need” means “the existence of circumstances from which the board may in its judgment conclude that the proposed temporary change is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the fullest extent of which they are capable and that waste of water be prevented”

In this case, there is an urgent need for the proposed change. This year's wet hydrology in the San Joaquin River watershed is creating a potential to provide additional incremental Level 4 water supplies to the South of Delta wildlife refuges. Reclamation will meet all of their Class 1 and Class 2 Friant Division contract deliveries this year, but will also need to release additional stored water to make space in order to attenuate reservoir operations upstream of Millerton Lake. With these TUCPs, Reclamation has the opportunity to maximize the consumptive use of storage withdrawals by delivering stored water to the South of Delta wildlife refuges, which will assist Reclamation in meeting CVPIA requirements. Consequently, Reclamation needs to temporarily modify its Friant Division CVP water rights to enable rediversion of San Joaquin River water at the Mendota Pool to provide water supply to the refuges this year.

Accordingly, there is an urgency in granting these TUCPs, as the proposed temporary changes will enable Reclamation to maximize beneficial use under its Friant Division water rights by increasing water supplies delivered to the wildlife refuges for the protection and enhancement of fish and wildlife as mandated by the CVPIA.

5.2 No Injury to Any Other Lawful User of Water

Due to this year's projected runoff in the San Joaquin basin, Reclamation is anticipating they will have additional CVP water available from the San Joaquin River to put to beneficial use. At the time the TUCPs were filed, the snowpack in the San Joaquin basin was 152 percent of the April 1 average and runoff into Millerton Lake was estimated to be 113 to 145 percent of average (1,927 to 2,422 thousand af). Reclamation has also indicated that releases of stored water from Millerton Lake will be required in accordance with flood control requirements for the reservoir during this year's snowmelt. Reclamation stated that the released stored water will be in excess of the demands for the CVP's Friant Division contractors, therefore delivery of this water to the refuges will not injure the contractors by diminishing their supply. Reclamation also indicated that Friant Division contractors could potentially be offered uncontrolled season deliveries, SJRRP Recovered Water Account water, and Section 215¹ deliveries before making any releases downstream of Friant Dam that would be subsequently delivered to the above listed refuges. Also, because the stored water that will be rediverted pursuant to these TUCPs must be released for Millerton Lake to remain in accordance with flood control requirements during this year's snowmelt, the water cannot be carried over for storage and use next year.

Reclamation indicated that providing the stored water to the refuges will not affect water delivery obligations to other contractors and refuges and that there will be no expansion of existing obligations, or increases in demands, to provide CVP water supplies. The proposed temporary changes will not adversely impact Reclamation's ability to meet terms and conditions of its water rights for the operation of the CVP.

Reclamation indicated that the proposed temporary changes will not alter other CVP operations or release patterns from CVP facilities, or the maximum volume of stored water delivered to CVP contractors. Also, CVP water delivered to the refuges will not affect the amount of water used by the SJRRP. Additionally, the Order approving the TUCPs will be conditioned such that only water previously stored in Millerton Lake can be rediverted to the refuges after Reclamation has met all other prior right and/or contractual right commitments.

Accordingly, granting these TUCPs will not result in injury to any other lawful user of water. Pursuant to Water Code section 1439, the State Water Board shall supervise diversion and use of water under this temporary change order for the protection of all other lawful users of water.

¹ Section 215 of the Reclamation Reform Act, Public Law 97-293 authorizes Reclamation to provide temporary water service contracts (215 contracts) for unstorable flood flows (section 215 water) as a result of: (1) an unusually large water supply not otherwise storable for Project purposes; or (2) infrequent and otherwise unmanaged flood flows of short duration.

5.3 No Unreasonable Effect upon Fish, Wildlife, or Other Instream Beneficial Uses

This approval Order is conditioned to require that Reclamation continue to provide required SJRRP flows prior to rediverting water at the Mendota Dam for refuge supplies. Further, approval of the TUCPs will be protective of the downstream San Joaquin River and Sacramento-San Joaquin Bay Delta as rediversions will be subject to compliance with State Water Board Revised Decision 1641 and all Biological Opinions or other restrictions applicable to the rediversion operations.

Accordingly, granting these TUCPs will not result in an unreasonable effect upon fish, wildlife, or other instream beneficial uses. Pursuant to Water Code section 1439, the State Water Board shall supervise diversion and use of water under this temporary change Order for the protection of instream beneficial uses.

5.4 The Proposed Change is in the Public Interest

Approving the TUCPs in order to ensure a water supply to the wildlife refuges is in the public interest as it will support implementation of the CVPIA which mandated changes in management of the CVP, particularly for the protection, restoration, and enhancement of fish and wildlife. Specifically, approval of the TUCPs will assist in Reclamation complying with CVPIA section 3406(d) which mandates that water of suitable quality be delivered to maintain and improve wetland habitat area in 19 wetland areas in California, including all of the refuges that will receive water pursuant to this approval Order.

5.0 STATE WATER BOARD DELEGATION OF AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to Deputy Director for Water Rights the authority to act on petitions for temporary urgency change. This Order is adopted pursuant to the delegation of authority in Section 4.4.1 of Resolution 2012-0029 and the Deputy Director for Water Rights redelegation of authority dated October 19, 2017.

6.0 CONCLUSIONS

The State Water Board has adequate information to make the evaluation and findings required by Water Code section 1435.

I conclude that, based on the available evidence:

1. The right holder has an urgent need to make the proposed change;
2. The proposed change will not operate to the injury of any other lawful user of water;
3. The proposed change will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses; and,
4. The proposed change is in the public interest.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT: the petitions filed by the U.S. Bureau of Reclamation (Reclamation) for temporary urgency changes to water right License 1986 (Application 23) and Permits 11885, 11886, and 11887 (Applications 234, 1465, and 5638) are approved and effective until September 30, 2019.

All existing terms and conditions of the subject license and permits remain in effect, except as temporarily amended by the following provisions:

1. Up to 60,000 acre-feet of water previously stored in Millerton Lake may be rediverted for fish and wildlife enhancement purposes at Mendota Dam located as follows:

California Coordinate System, NAD 83, Zone 3, North 1,745,375 feet and East 6,598,943 feet, being within the SE¼ of the NE¼ of Section 19, T13S, R15E, MDB&M.
2. The water rediverted at Mendota Dam may be used for fish and wildlife enhancement purposes on the following wildlife refuges: 1) San Luis Unit, West Bear Creek Unit, Kesterson Unit, and Freitas Unit of the U.S. Fish and Wildlife Service; 2) China Island Unit, Salt Slough Unit, Mendota Wildlife Area, and Los Banos Wildlife Area of the California Department of Fish and Wildlife; and 3) Grassland Resource Conservation District.
3. Rediversion of water pursuant to this Order is subject to compliance with the requirements set forth in State Water Board Revised Decision 1641, or any future State Water Board order or decision implementing Bay-Delta water quality objectives.
4. Rediversion of water pursuant to this Order is subject to compliance by Reclamation with all existing Biological Opinions and court orders and any other conditions imposed by other regulatory agencies applicable to these operations. To prevent conflicting requirements upon issuance of any new Biological Opinion, the State Water Board's Executive Director may modify this term upon request of right holder after receiving the approval of National Marine Fisheries Service.
5. Rediversion of water pursuant to this Order is authorized only to the extent that it is surplus to the Friant Division contractors and the San Joaquin River Restoration Program (SJRRP).
6. Approval of the temporary urgency change petitions shall not modify or amend the rights or obligations of the parties to the San Joaquin River Exchange Contract or other contracts.
7. On the last day of each month, Reclamation shall provide a summary of the previous month's operations and delivery of water to the subject wildlife refuges pursuant to this Order. The reports shall include the average daily rate and volume of water rediverted

at Mendota Dam and directed to the individual refuges. The reports shall also include information substantiating that water rediverted pursuant to this Order was previously stored water in Millerton Lake and excess to all required releases for: 1) prior rights and/or contractual right commitments; 2) SJRPP deliveries; and 3) compliance with State Water Board Revised Decision 1641 and all applicable Biological Opinions.

8. Pursuant to Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this temporary change Order, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

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

9. This Order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531 to 1544). If a “take” will result from any act authorized under this temporary transfer, Reclamation shall obtain authorization for an incidental “take” permit prior to construction or operation. Reclamation 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 authority to supervise the 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
JULE RIZZARDO, FOR

*Erik Ekdahl, Deputy Director
Division of Water Rights*

Dated: AUG 02 2019