

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

DIVISION OF WATER RIGHTS

IN THE MATTER OF PERMITS 11885, 11886, 11887, 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860 AND 15735 (APPLICATIONS 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764 AND 22316) AND LICENSE 1986 (APPLICATION 23) OF U.S. BUREAU OF RECLAMATION

PETITIONS FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 100,000 ACRE-FEET OF WATER
FROM
ARVIN-EDISON WATER STORAGE DISTRICT TO METROPOLITAN WATER DISTRICT OF
SOUTHERN CALIFORNIA

SOURCES: San Joaquin River, American River, Old River, Sacramento River, Trinity River, Clear Creek, Rock Slough

COUNTIES: Madera, Fresno, Contra Costa, Sacramento, Trinity, Shasta, Glenn, Tehama

1.0 SUBSTANCE OF PETITION

1.1 Description of the Petitions

On January 5, 2012, U.S. Bureau of Reclamation (Reclamation) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), Petitions for Temporary Change under Water Code Section 1725, et seq. Reclamation seeks a one-year modification of Permits 11885, 11886, 11887, 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860 and 15735 and License 1986 to temporarily change the authorized place of use for municipal and industrial purposes to include a portion of the State Water Project (SWP) authorized place of use downstream of the Harvey Banks Pumping Plant as shown on the maps attached to the petitions. The temporary expansion of Reclamation's place of use would allow Central Valley Project (CVP) water supplies to be delivered from either the Delta Division or Friant Division into the Metropolitan Water District of Southern California (Metropolitan) service area. Delivered surface water to Metropolitan will be either water previously stored in San Luis Reservoir (San Joaquin River releases recovered and exchanged at Mendota Pool under the San Joaquin River Restoration Program (SJRRP) operations, under a separate petition), or contracted supplies scheduled for delivery to Arvin-Edison Water Storage District (Arvin-Edison) from Millerton Lake.

The petitions propose the transfer of up to 100,000 acre-feet (af).

Temporary changes approved pursuant to Water Code section 1725 may be effective for up to one year from the date of approval. Reclamation requests that the change remains in effect for one year from the date of approval. All other provisions of the above permits and licenses, as modified in accordance with petitions¹ previously approved by the State Water Board, would remain in effect.

¹ See water rights orders WR 2009-0033 and WR 2010-0032 DWR.

1.2 Reason for the Petitions

Arvin-Edison is a contractor with Reclamation's CVP. Arvin-Edison and Metropolitan currently operate a groundwater banking program. Under the program, Arvin-Edison pumps some of Metropolitan's water from the SWP into groundwater storage, and then returns it to Metropolitan within a year of Metropolitan's call. These petitions would enhance the program by allowing Metropolitan to directly use Arvin-Edison's CVP supplies. This would increase Arvin-Edison's flexibility in returning stored water to Metropolitan, and would allow Arvin-Edison to deliver CVP water to Metropolitan during wet periods and receive SWP water back in exchange at a later time to facilitate Arvin-Edison's use of CVP water supplies that have a limited opportunity for use under current CVP operations. Additionally, this would significantly reduce the amount of water first pumped into groundwater storage before use, reducing economic and environmental costs of pumping. The proposed change would also help to offset the impacts to Arvin-Edison of the SJRRP by increasing Arvin-Edison's ability to use wet year water supplies and by increasing the opportunities to complete the return of SJRRP releases to Arvin-Edison (and potentially other Friant Division contractors).

A change to Reclamation's permits is necessary to allow delivery of CVP water to Metropolitan. The SWP place of use already includes both Metropolitan and Arvin-Edison and thus a change in the SWP place of use is unnecessary.

2.0 BACKGROUND

2.1 Existing Place of Use

The service area of the CVP is shown on map 214-208-12581 (on file with the State Water Board under Application 5626).

2.2 Place of Use under the Proposed Transfer

The service area of the SWP is shown on maps 1878-1, 2, 3 and 4 (on file with the State Water Board under Application 5629). The petitions request the temporary addition of the SWP service area "downstream" of the Banks Pumping Plant to the Reclamation license and permits listed in Table 1.

3.0 LEGAL REQUIREMENTS FOR TEMPORARY TRANSFERS

California Water Code sections 1725 – 1735 set forth an expedited approval process for temporary petitions for change involving the transfer of water. After submitting a petition to the State Water Board, the petitioner must notice the proposed changes within 10 days. (Wat. Code, § 1726, subds. (a), (b)(d).) Commenters then have 30 days to submit comments. (*Id.* at subd. (f).) The State Water Board then renders a decision within 35 days of commencement of an investigation or the publishing of the notice, whichever is later, although the Board extends a decision for 20 more days due to comments or good cause. (*Id.* at subds. (g)(1)-(2).) The Board may further extend the decision-making period in order to make the required findings, with the petitioner's consent. (*Id.* at subd. (g)(3).) The Board makes a decision on the record, unless it determines that a hearing is necessary in order to make the required findings. (*Id.* at subd. (g)(3).) The Board shall not alter the terms and conditions proposed by the petitioner unless it is necessary to do so in order to carry out the transfer. (Wat. Code, § 1727, subd. (d).)

Temporary change petitions receive approval where the water 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, would not injure any legal user of water, and would not unreasonably affect fish, wildlife or other instream beneficial uses." (Wat. Code, §§ 1725, 1727.) Contractors are "legal users of water" for purposes of the no injury rule for transfers. However, the extent to which they are protected from injury is only to the extent that their contractual rights are violated: a harm within the bounds permitted by their contract is not legally cognizable. (*State Water Resources Control Board Cases* (2006) 135 Cal.App.4th 674, 803-805).

4.0 PUBLIC NOTICE AND COMMENTS

On January 18, 2012, 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; 3) via the State Water Board's Lyris email notification program; 4) and by publication in the Redding Record Searchlight, the Sacramento Bee and the Fresno Bee. The State Water Board received two comment letters.

4.1 Comments of Richard Morat

Mr. Morat requested a response to and consideration of four questions related to the petitions:

- a) whether the term "appropriated" means the same as water diverted and delivered out of stream,
- b) what are the adverse but reasonable impacts to fish and wildlife that are likely to occur,
- c) whether the Petitioner's statement that under the transfer Arvin-Edison could potentially use more of its CVP water is consistent with all other information on the proposed action, and
- d) whether the Petitioner's statement that the transfer would enhance the return quantity, timing and water quality is consistent with all other information on the proposed action.

State Water Board Response: Division staff contacted Mr. Morat several times to discuss his concerns, and Mr. Morat indicated that he did not have any additional questions or information regarding the transfer. A summary of the responses to his queries follows.

- a) "Appropriated" means diverted from a stream system under an appropriative basis of right. This does involve diverting water from the stream and delivering it outside the stream for beneficial use.
- b) Since there will be no increase in CVP appropriations and all diversions will be pumped consistent with the criteria and protective measures contained in D1641, the biological opinions for the protection of Sacramento River Winter-run Chinook salmon, Delta smelt, spring-run Chinook salmon, and steelhead, no adverse impacts to fish and wildlife are likely to occur.
- c) and d) These statements are consistent with the other information on the proposed action.

4.2 Joint Comments of San Joaquin River Exchange Contractors Water Authority (Exchange Contractors) and San Luis & Delta-Mendota Water Authority (Authority)

The Exchange Contractors, Authority and Arvin-Edison entered into a February 22, 2012 agreement limiting Arvin-Edison's actions under the transfer, in exchange for the Exchange Contractors and Authority not providing comments to the Reclamation petitions. The Exchange Contractors and Authority ask that the conditions Arvin-Edison agreed to be incorporated into the transfer order. The terms are as follows:

- (a) The transfer is not precedent setting;
- (b) The transfer will not interfere with or harm Reclamation's ability to meet any of their CVP contractual obligations including their obligations under the Second Amended Exchange Contract or the 1939 Purchase Contract between Miller and Lux and the Department of Interior;
- (c) The transfer will not cause a net reduction in CVP water supply to contractors South of the Delta;

(d) Recirculation water in San Luis Reservoir will not be moved to Metropolitan until after the "low point" in San Luis Reservoir has occurred;

(e) There is no resultant change to the Order Approving Temporary Transfer and Change, issued In The Matter of Permits 11885, 11886 and 11887 (Applications 234, 1465 and 5638) of U.S. Bureau of Reclamation, dated September 30, 2011; and

(f) Arvin-Edison will provide five days advance notice to the First Parties prior to any exchange being implemented between Arvin-Edison and Metropolitan. Notice shall be provided by email to the First Party signatories.

In a February 22, 2012 email to Division staff, the Authority explained the reasoning behind some of the terms of the joint agreement:

The San Luis Reservoir is one of California's largest reservoirs and a critical component of the CVP and [SWP]. Each year, water from Sacramento-San Joaquin River Delta is delivered to San Luis Reservoir via the California Aqueduct and Delta-Mendota Canal for storage. This water is subsequently released, in part, for use by the Authority's member agencies. San Luis Reservoir "low point" which generally occurs in late summer is an issue of operational concern that is addressed annually. Steps are taken as much as possible to avoid "low point" issues. When water levels in San Luis Reservoir reach low levels water quality becomes an issue due to algal blooms and the water becomes unsuitable for agricultural water users with drip irrigation systems and to municipal and industrial water users due to their inability to treat the water.

The [Arvin-Edison]-[Metropolitan] Transfer/Exchange, as initially proposed, has the potential to increase the occurrences of San Luis Reservoir to reach "low point" earlier in the year. Those results could have occurred from implementing the [Arvin-Edison]-[Metropolitan] Transfer/Exchange, for example, if Reclamation were to release water from San Luis Reservoir prior to low point that is not "replaced" until after low point or that would never have been released prior to low point. This concern is not hypothetical. Nothing in the petitions pending before the State Water Board would preclude Reclamation from releasing water from the San Luis Reservoir for delivery to [Metropolitan] with the hope that "debt" would be subsequently repaid with the recapture of water available under the [SJRRP]. Likewise, nothing in the petitions pending before the State Water Board would preclude Reclamation from releasing water from San Luis Reservoir prior to low point that, absent the [Arvin-Edison]-[Metropolitan] Transfer/Exchange, would not be released until after San Luis Reservoir "low point." The conditions to which the Authority, Exchange Contractors and Arvin-Edison agreed avoid those undue risks of harm.

State Water Board Response: Exchange Contractors and the Authority are contractors with Reclamation to receive CVP water, like Arvin-Edison. The Exchange Contractors receive water from the CVP by virtue of their contracts with Reclamation. Pursuant to these agreements, the Exchange Contractors forego diversion under their senior water rights on the San Joaquin River in exchange for delivery of an equal amount and supply from the CVP from sources other than the San Joaquin River. The water is delivered via the Delta-Mendota Canal. Authority members are also contractors with Reclamation, and have historically received deliveries of CVP water for irrigation along the San Joaquin Valley's West side and for wetlands situated in the Pacific Flyway.

The State Water Board may only condition a temporary transfer as necessary to make the findings required under Water Code sections 1725 and 1727, or to enforce other requirements described under Water Code sections 1725 - 1732. (Wat. Code, § 1727, subd. (d).) Neither the Exchange Contractors nor the Authority has alleged that the concerns they have raised would violate their contractual rights to a specific quantity or quality of water, and neither submitted their contract terms. Reclamation's petition indicates that the transfer will not cause them to violate the contract amounts, and Reclamation staff indicated on February 24, 2012, that the contracts have no explicit term regarding water quality.

Additionally, the environmental and water impact analysis petitioners submitted also indicates that the low point will not affect either the public trust or other legal users of water under this temporary transfer. The Petitioners and Arvin-Edison prepared a Draft Environmental Assessment/Initial Study and Negative Declaration (IS/ND) for the transfer/exchange dated February 2012, SCH #2012021031. The IS/ND does not identify any adverse impacts of the transfer, or propose any mitigation measures, related to water quality, frequency or timing of low point in San Luis Reservoir. The IS/ND states that the Cross Valley Canal, CVP and SWP facilities would not be impacted as the transfer must be scheduled and approved by Kern County Water Agency (KCWA), Reclamation, and Department of Water Resources, respectively. The project will be operated in accordance with Section VII of the Operational Guidelines for Water Service, Friant Division CVP, dated March 18, 2005. Additionally, the exchange must be conducted in a manner that would not harm other CVP contractors or other CVP contractual or environmental obligations, or SWP contractors. Therefore, the IS/ND indicates that normal obligations by the overseeing agencies to deliver water to their contractors and other obligations would not be impacted.

As there is no allegation of interference with contract rights, and because the evidence before the State Water Board indicates that the transfer will not cause public trust or water right impacts, the Board will not include proposed terms (c) and (d).

The State Water Board has incorporated a "no injury" term for water contractors, which includes the contracts addressed in proposed term (b) as Term 5 of this Order. Incorporation of this term allows the "no injury" requirement for approving a petition to become an enforceable requirement throughout the one-year transfer. While the State Water Board agrees that this order does not amend the terms and conditions of any other State Water Board order, except those adopting the permit terms hereby amended, inclusion of proposed term (e) is a legal conclusion not necessary to approval of the temporary order, and is therefore inappropriate to include as a term or condition. However, it is worth noting that this order does not amend Reclamation's permits or any other orders, including the Order Approving Temporary Transfer and Change regarding Reclamation's Permit Nos. 11885, 11886, and 11887, dated September 30, 2011. Orders issued by the Deputy Director for the Division are not precedent, so it would be redundant to include term (a). Exchange Contractors and the Authority have provided no evidence that requiring Arvin-Edison to give them notice prior to any transfer is required to make any required finding for a temporary transfer. Therefore, the State Water Board declines to include term (f) in this Order.

5.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Petitioners filed the petition for a 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.

6.0 REQUIRED FINDINGS OF FACT

6.1 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." According to the petition and the accompanying IS/MD water proposed for transfer/exchange consists of either:

- a) Water stored pursuant to the specified license and permits of the CVP; or

- b) Water directly diverted pursuant to the specified license and permits of the CVP for use outside of the Delta watershed, and thus removed from use in the downstream water supply.

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 consumptively used or stored in the absence of the proposed temporary change.

6.2 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/exchange consists of portions of the CVP entitlement of Arvin-Edison and the SWP entitlement of Metropolitan. In the absence of the proposed transfer, Arvin-Edison's Friant CVP water would be diverted to groundwater storage and an equivalent amount of previously-stored SWP water would be pumped from Arvin-Edison's groundwater storage for delivery to Metropolitan. The petitions state and the IS/ND supports that the total quantity of water delivered to SWP or CVP contractors as a result of the change will not exceed historic deliveries to any individual water user or be applied to any service areas that do not already receive water from the SWP or CVP. The petitions and the IS/ND also indicate that approval will not result in a reduction in San Joaquin River flows, an increase in Delta exports, or a change in upstream river or reservoir operations. Further, the petitions state, and the IS/ND supports, that there will be no increase in groundwater pumping levels, as Arvin-Edison is proposing to pump water that has been previously pumped for delivery to Metropolitan.

This order does not modify or amend the rights and obligations of Reclamation and the Exchange Contractors under the Second Amended Exchange Contract for Exchange of Waters, Contract Ilr-1144, dated February 14, 1968, or the 1939 Purchase Contract between Miller and Lux and the Department of Interior, or of any other contract that Reclamation has entered into with other CVP water users.

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.

6.3 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).) The petitions and the IS/ND indicate that the total quantity of water pumped by the CVP from the Delta during this period will not change as a result of this transfer/exchange. Instead, the transfer/exchange would provide the CVP with flexibility to deliver water to its contractors in a more efficient manner. Water diverted from the Delta at the Jones or Banks Pumping Plants is subject to the provisions of the CVP and SWP license and permits as amended by Decision 1641 and is also subject to the requirements of Biological Opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act. Approval of the petitions will not affect the compliance with the water quality objectives specified in Decision 1641 over which the projects have control, or any other orders adopted by the State Water Board. Therefore, the proposed temporary change would have no significant effect on the natural streamflow or hydrologic regime within the Delta. None of the agencies involved in the proposed exchange return flow to the San Joaquin River.

The IS/ND lists three environmental commitments: (a) no conversion of any land fallowed and untilled for three or more years may occur during the transfer, (b) exchange involving CVP and SWP water cannot alter the flow regime of natural water bodies, such as rivers, streams, etc. in order that the transfer not have a detrimental effect on fish or wildlife, or their habitats, and (c) existing Aqueduct

Pump-in Facilitation Group guidelines would be followed by both Arvin-Edison and KCWA when introducing water into the Aqueduct to insure that water quality would not be adversely impacted. These are incorporated as a condition of this order.

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 September 18, 2007, the State Water Board adopted Resolution 2007-0057, 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 2007-0057.

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:

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

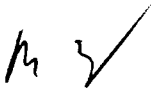
NOW, THEREFORE, IT IS ORDERED that the petitions filed for temporary change in the place of use, under Reclamation License 1986 and Permits 11885, 11886, 11887, 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860 and 15735 for transfer of up to 100,000 af of water is approved.

All existing terms and conditions of License 1986 and Permits 11885, 11886, 11887, 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860 and 15735 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 thereafter.
2. The place of use under License 1986 and Permits 11885, 11886, 11887, 11315, 11316, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860 and 15735 is temporarily expanded to include the portions of the SWP service area shown on a map titled *Petition for Temporary Change to Modify SWP and CVP Places of Use, Areas to be added to CVP Authorized Place of Use* (August 18, 2010), on file with the State Water Board under Application 23.
3. Water transferred/exchanged pursuant to this Order shall be limited to 100,000 af of CVP water to Metropolitan.
4. Reclamation shall not increase its allocation of water to Arvin-Edison beyond the quantity authorized by existing contract for purposes of this transfer/exchange.

5. This order shall not be construed as modifying or amending the rights and obligations of the parties to any contracts between Reclamation and users of CVP water.
6. Within 90 days of the completion of the transfer, but no later than June 15, 2013, the Petitioners 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 monthly and total volumes of water delivered to Metropolitan pursuant to this Order.
 - b. The monthly and total amounts of water delivered from Arvin-Edison to Metropolitan pursuant to this Order.
 - c. Documentation that the water transferred/exchanged between Metropolitan and Arvin-Edison did not result in an increase in water diverted to CVP facilities from the source waters of Reclamation's permits beyond the quantity that would otherwise have been diverted absent the transfer.
7. Reclamation shall comply with the environmental commitments listed in the IS/ND.

STATE WATER RESOURCES CONTROL BOARD



*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated: **APR 02 2012**