

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 2033 (APPLICATION 1699)  
PETITION FOR TEMPORARY CHANGE  
INVOLVING THE TRANSFER OF UP TO 5,000 ACRE-FEET OF WATER  
FROM GARDEN HIGHWAY MUTUAL WATER COMPANY  
TO STATE WATER CONTRACTOR AGENCIES**

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SOURCE: Feather River

COUNTY: Sutter

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BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

**1.0 SUBSTANCE OF PETITION**

On May 2, 2013, Garden Highway Mutual Water Company (GHMWC) 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, GHMWC seeks to transfer up to 5,000 acre-feet (af) to participating State Water Contractor (SWC) Agencies. The SWC Agencies that will use the water are Kern County Water Agency, Dudley Ridge Water District, and Empire-West Side Irrigation District. 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**

GHMWC proposes to transfer up to 5,000 af of water under License 2033 (Application 1699) to the SWC Agencies via groundwater substitution. To facilitate this transfer, GHMWC is requesting the following changes to its license: (1) the temporary addition of the State Water Project's (SWP) Harvey O. Banks Pumping Plant (Banks Pumping Plant) as a point of diversion; and (2) the temporary addition of a portion of the service areas of the SWP as an additional place of use. GHMWC will make surface water available for transfer via groundwater substitution. The groundwater substitution will involve the use of groundwater pumped to produce crops within GHMWC in exchange for a like amount of surface water that will remain instream for diversion at the proposed additional point of diversion. Absent the proposed temporary transfer GHMWC would divert the entire quantity of surface water proposed for transfer from the Feather River pursuant to its water right.

**1.2 Groundwater Substitution**

GHMWC proposes to transfer water to the SWC Agencies through groundwater substitution. The petition states that the transfer will be consistent with the Draft Technical Information for Preparing Water Transfer Proposals, dated February 2013 published by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation). Only wells approved by DWR and Reclamation will be used for the proposed transfer. The DWR and Reclamation well criteria used to evaluate groundwater substitution transfers is intended to minimize impacts to streamflow during balanced conditions and potential impacts to the SWP and CVP. DWR and Reclamation have estimated that streamflow impacts resulting from GHMWC's pumping to replace transferred water to be 12%. To account for those impacts, GHMWC will only transfer 88% of the total quantity pumped in exchange for the surface water released. The conditions identified in item 3.3 require compliance with DWR's and Reclamation's well construction, location and monitoring requirements as well as the

application of the streamflow depletion factor, which are intended to ensure that the groundwater substitution transfer will not unreasonably affect the surface streamflow.

The boundaries of GHMWC are within Sutter County, which completed and adopted a groundwater management plan (GMP) in March 2012 pursuant to Water Code Section 10753. The March 2012 GMP relies on data from an extensive network of DWR and water purveyor production and monitoring wells. The GMP identifies that DWR does not currently consider any of the groundwater sub-basins underlying Sutter County to be in an overdraft state.

## **2.0 BACKGROUND**

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

License 2033 authorizes the direct diversion of up to 39 cubic feet per second (cfs) from the Feather River between April 15 and October 31 of each year for irrigation purpose. The authorized point of diversion for License 2033 is located on the Feather River within the SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 24, T13N, R3E, MDB&M. The authorized place of use consists of a net of 3,708.45 acres within a gross area of 3,765.45 acres.

### **2.2 Proposed Temporary Changes**

The proposed transfer would temporarily add the Banks Pumping Plant as a point of diversion under License 2033. A portion of the service areas of the SWP (as shown on maps 1878-2 and 1878-3 on file with Application 5630) would be temporarily added to the place of use of the license.

### **2.3 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 AND COMMENTS**

On May 7, 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; 3) via the State Water Board's Lyris email notification program; and 4) by publication in the Appeal-Democrat on May 10, 2013.

The State Water Board received timely 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) Reclamation; and 4) DWR. The State Water Board received late comments from Department of Fish and Wildlife (DFW). These comments and the State Water Board's responses are summarized below.

### **3.1 Joint Comments of California Water Impact Network, California Sportfishing Protection Alliance and AquAlliance (Environmental Commenters)**

By letter dated June 3, 2013, the environmental commenters indicated their concerns regarding the proposed transfer. The concerns extend beyond the scope of the current transfer, and encompass all

pending 2013 water transfers being processed by the State Water Board. To expedite transfer processing, the concerns are not repeated herein; however, the State Water Board response letter, dated June 27, 2013, is incorporated by reference. The response letter details the issues raised by the environmental commenters. On June 17, 2013, GHMWC also provided a response letter to the environmental commenters as discussed below.

State Water Board Response:

The State Water Board 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 water right holders 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 Banks Pumping Plant for transfer purpose should be conditioned on compliance by DWR and Reclamation with Decision 1641, all applicable biological opinions and court orders, and any other conditions imposed by other regulatory agencies applicable to this operation.

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 condition 6 of this order. The required evaluations are found in Section 5 of this order.

GHMWC Response:

On June 14, 2013, GHMWC submitted a joint response by all petitioners to address the issues raised by the environmental commenters. By letter dated June 17, 2013, GHMWC also independently provided to the State Water Board details of its compliance with the applicable GMP.

**3.2 Comments of Richard Morat**

On May 7, 2013, Richard Morat commented on the proposed transfer. The Morat comments were similar to, but not as extensive as, the environmental commenters concerns.

State Water Board Response:

The State Water Board response letter, dated June 27, 2013, refers Mr. Morat to the more extensive responses provided to the environmental commenters. The information identified in item 3.1 also addresses the Morat objection.

**3.3 Comments of Reclamation**

By letter dated June 3, 2013, Reclamation commented on the proposed transfer. To protect Reclamation's water rights, Reclamation requested that the transfer be conditioned as follows:

- Only wells approved by Reclamation and DWR for suitability and acceptability may be used for groundwater substitution.
- The amount of transferable water credited to GHMWC's groundwater substitution water transfer operation is subject to the determination of Reclamation and DWR.
- Before commencing the groundwater substitution operation, Petitioner shall submit a Monitoring Program Plan and Mitigation Program Plan to DWR and Reclamation for evaluation and prior approval.

- 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 listed above.

**3.4 Comments of DWR**

By letter dated June 6, 2013, DWR objected to the proposed transfer based on potential injury to its permitted water rights. DWR's comments were similar to Reclamation's concerns. DWR requested that conditions similar to the Reclamation conditions listed above be included in any approval of the transfer.

State Water Board Response:

In order to avoid injury to DWR's water rights, the transfer is conditioned based on the criteria listed in item 3.3.

**3.5 Comments of DFW**

By letter dated June 27, 2013 DFW provided comments. DFW's comments were received after the 30-day deadline.

State Water Board Response:

The State Water Board is not required to evaluate or take into consideration comments that were not timely filed. Moreover, DFW has not presented any information to demonstrate that this particular transfer will have an unreasonable impact on fish and wildlife. Instead, the DFW comments express concern that there will be a cumulative impact of this and other transfers. That issue is addressed in the Division's June 27, 2013 response to the environmental commenters.

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

GHMWC 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 the transfer.

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 Transfers Only Involve 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 right holder 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 consists of surface water made available through increased groundwater pumping. To the extent that the additional groundwater pumped does not affect streamflow, this water represents water which would not be available for use in the downstream water supply. DWR and Reclamation have reviewed the proposed groundwater pumping and determined that 12% of the additional groundwater pumping will affect streamflow. This Order limits the amount of water available for transfer to 88% of the groundwater pumped.

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 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).)

GHMWC may not transfer water through the Banks Pumping Plant prior to obtaining approval from DWR and Reclamation for its groundwater substitution operation. Compliance with DWR’s and Reclamation’s well construction, location and monitoring requirements as well as the application of the streamflow depletion factor are intended to ensure that the groundwater substitution transfer will not unreasonably affect the surface stream. DWR and Reclamation have reviewed the proposed transfer and determined that, with inclusion of the 12% depletion factor described in Section 1.2 of this Order, the SWP and CVP will not be injured by impacts resulting from the additional groundwater pumping associated with the transfer. Under this operating scenario, the transfer will not result in increased diversion of stream flow or changes to return flow. Since there will be no increase in diversion of stream flow, there will be no injury to other legal users of water.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(1) that the proposed transfer will not injure any legal user of the water. I also find that the transfer of surface water that is replaced with groundwater pursuant to this Order meets the requirement of Water Code section 1745.10 subdivision (a). That section requires that the groundwater substitution transfer be consistent with a groundwater management plan adopted pursuant to state law for the affected area.

## **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).) The petition states that the flow downstream of the Licensee’s current point of diversion may increase by up to 5,000 af during the period of transfer due to the temporary change. The increased flows may provide benefits to fisheries, wildlife or other instream beneficial uses.

Diversion of water at the Banks Pumping Plant pursuant to this Order is subject to compliance by the SWP project operator with the objectives set forth in Tables 1, 2 and 3 on page 181 to 187 of Decision 1641 (D-1641), including compliance with the various plans required under D-1641. Diversion at this facility pursuant to this Order is also subject to compliance by the operator with all applicable biological opinions and any court orders applicable to this operation.

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. This order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2012-0029.

## **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 temporary changes will not injure any legal user of the water.
2. The proposed temporary changes will not unreasonably affect fish, wildlife, or other instream beneficial uses.
3. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary changes.
4. An increase in groundwater pumping associated with this transfer (i.e., groundwater substitution) will be performed in compliance with Water Code section 1745.10.

## ORDER

**NOW, THEREFORE, IT IS ORDERED** that the petition filed for temporary change for the transfer of up to 5,000 af of water is approved.

All existing terms and conditions of License 2033 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 maximum transfer quantity authorized under License 2033 is 5,000 af.
3. The Petitioner shall reduce its diversion rate at the original point of diversion authorized under License 2033 by an amount equal to the rate of additional groundwater pumped in order to make water available for transfer pursuant to this Order (both measured as a daily average). The amount of water transferred pursuant to this Order shall not exceed 88% of the rate of additional groundwater pumping.
4. The place of use under the license is temporarily expanded to include a portion of the service areas of the SWP (as shown on maps 1878-2 and 1878-3 on file with Application 5630).
5. The Banks Pumping Plant is temporarily added as an authorized point of diversion under License 2033.
6. Diversion of water at the Banks Pumping Plant pursuant to this Order is subject to compliance by the SWP project operator with the objectives set forth in Tables 1, 2 and 3 on page 181 to 187 of State Water Board's Revised Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at the point of diversion, including compliance with the various plans required under D-1641 as prerequisites for the use of the Banks Pumping Plant by DWR. Diversion of water at the Banks Pumping Plant pursuant to this Order is subject to compliance by the pumping plant operator with all applicable biological opinions, court orders, and any other conditions imposed by other regulatory agencies applicable to this operation.
7. Water may not be transferred through the Banks Pumping Plant until Petitioner has obtained the approval of Reclamation and DWR for its groundwater substitution operation. Such approval shall include the following elements:
  - a. Only wells approved by Reclamation and DWR for suitability and acceptability may be used for groundwater substitution.
  - b. The amount of transferable water credited to Petitioner's groundwater substitution water transfer operation is subject to the determination of Reclamation and DWR.
  - c. Before commencing the groundwater substitution operation, Petitioner shall submit a Monitoring Program Plan and Mitigation Program Plan to DWR and Reclamation for evaluation and prior approval.
  - d. Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.

Documentation that an acceptable groundwater substitution operation has been approved by Reclamation and DWR shall be submitted to the Division within 15 days of the date such approval is granted by those entities.

8. 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.

9. Within 90 days of the completion of the transfer, but no later than October 1, 2014, GHMWC 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. General locations where the transferred water was used;
  - b. The daily average rate water is made available for transfer pursuant to this Order;
  - c. The daily average diversion rate for water diverted pursuant to License 2033 during the transfer period;
  - d. The average daily streamflow measured at the nearest representative gaging station on the Feather River;
  - e. The daily average pumping rate of groundwater pumped by Licensee in excess of that which would have been pumped in the absence of this transfer; and
  - f. Groundwater elevations within the vicinity of the GHMWC prior to the proposed transfer.

Licensee shall also develop and submit to the Deputy Director for Water Rights, by July 1 of each year following 2014, a map defining the groundwater elevations within the vicinity of GHMWC, until such time as these elevations correspond to pre-transfer levels.

10. 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.

11. 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 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 Petitioner shall obtain authorization for an incidental take permit prior to construction or operation. The Petitioner shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.
12. 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:  
JAMES W. KASSEL FOR

*Barbara Evoy, Deputy Director*  
*Division of Water Rights*

Dated: JUL 01 2013