

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

DIVISION OF WATER RIGHTS

ORDER
IN THE MATTER OF LICENSE 2685 (APPLICATION 1224)
PETITIONS FOR LONG-TERM TRANSFER AND INSTREAM FLOW DEDICATION
INVOLVING UP TO 90,000 ACRE-FEET OF WATER PER YEAR FROM
MERCED IRRIGATION DISTRICT
TO U.S. BUREAU OF RECLAMATION

SOURCE: Merced River tributary to San Joaquin River

COUNTY: Merced

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On December 16, 2011, Merced Irrigation District (MID) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), a Petition for Long-Term Transfer under Water Code section 1735, et seq., and a Petition for Instream Flow Dedication under Water Code section 1707. Pursuant to the petitions, MID seeks to transfer up to 90,000 acre-feet (af) of water annually to the U.S. Bureau of Reclamation (Reclamation) under water right License 2685 (Application 1224). The long-term transfer and instream flow dedication will assist Reclamation by providing flows that contribute towards meeting the spring pulse flow objectives for the San Joaquin River included in Table 3 of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2006 Bay-Delta Plan). It will also assist in reaching the pulse flow targets for the San Joaquin River at Vernalis during April and May of 2012 and 2013 that were described in the San Joaquin River Agreement (SJRA) that expired in 2011.

1.1 Description of the Transfer Revised Water Right Decision 1641 (D-1641), adopted on March 15, 2000, in part implemented and assigned responsibility for meeting water quality objectives for the San Joaquin River contained in the 1995 Bay-Delta Plan. The State Water Board required Reclamation to implement the February through June spring flow objectives and October pulse flow objectives. For the April 15 through May 15 spring pulse flow objectives, the State Water Board allowed for a phased implementation of the objectives with the first phase consisting of conduct of the Vernalis Adaptive Management Plan (VAMP) experiment proposed in the SJRA in lieu of meeting the 1995 Bay-Delta Plan objectives for the April-May pulse flow. Pursuant to the SJRA, signatories to the agreement (including Merced Irrigation District) agreed to provide flows for a period of 12 years ending in 2011. The 2006 Bay-Delta Plan replaces the 1995 Bay-Delta Plan and updates it. The 2006 Bay-Delta Plan does not modify the San Joaquin River flow objectives but does include provisions for the VAMP in the program of implementation.

In D-1641, temporary changes in the place and purpose of use of various water right licenses¹ were allowed to facilitate provision of flows during April and May to achieve the VAMP target flow agreed to in the SJRA. The temporary changes allowed the reach of San Joaquin River between each Licensee's

¹ Licenses 990, 2684, 2685, 6047, 11395, and 11396 (Applications 1221, 1222, 1224, 10572, 16186, and 16187) of Merced Irrigation District; Licenses 7856 and 7860 (Applications 10872 and 13310) of Oakdale and South San Joaquin Irrigation Districts; and Licenses 5417 and 11058 (Applications 1233 and 14127) of Turlock and Modesto Irrigation Districts.

point of diversion and Vernalis to be added as a place of use and fish and wildlife enhancement to be added as a purpose of use. Following expiration of the SJRA on December 31, 2011, Reclamation is required to meet flows established in Table 3 of the 2006 Bay-Delta Plan.

MID requests to transfer up to 90,000 af of water annually in both 2012 and 2013 from the Merced River to Reclamation by utilizing the place of use and purpose of use from the SJRA. In other words, water will be released into the stream reach between MID's existing point of diversion at New Exchequer Dam (Lake McClure) on the Merced River and Vernalis on the San Joaquin River for fish and wildlife enhancement. With its petition for long-term transfer, MID is not requesting extension of the SJRA but is seeking to assist Reclamation in meeting spring pulse-flow targets at Vernalis.

MID also filed a petition pursuant to Water Code section 1707 to allow the change in purpose of use of License 2685 to include preservation and enhancement of fish and wildlife in the reach between New Exchequer Dam on the Merced River and Vernalis on the San Joaquin River.

1.2 Additional Information The quantity of surface water to be provided by MID under these petitions will be made available by the same methods as identified in D-1641 for flows provided by MID under the SJRA. This may include releases of stored water, reservoir reoperation, and if necessary during a significant drought, groundwater pumping under MID's groundwater exchange program. The pulse flows provided by MID could reduce the quantity of water held in storage at Lake McClure and/or may change the timing of releases from the reservoir. In order to help ensure that downstream legal users of water are not harmed by refill operations resulting from water provided under these petitions, MID and Reclamation have entered into an agreement (MID-Reclamation Agreement) which includes reservoir refill criteria. The refill criteria are consistent with the previous refill criteria included in D-1641 regarding the SJRA flows.

2.0 BACKGROUND

2.1 Substance of License 2685

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. License 2685 as originally issued did not include an annual limit on direct diversion quantities.

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

License 2685 was amended in 1995 to allow the inclusion of the Mariposa Town Planning Area to the place of use. In approving the change in place of use, the license was modified to include a direct diversion limit of 5,000 afa 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. Overall storage under License 2685 was 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 was limited to 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 Proposed Long-Term Changes With its petitions, MID requests the long-term addition (April and May of 2012 and 2013) of the reach between MID's point of diversion at New Exchequer Dam on the Merced River to Vernalis on the San Joaquin River as a place of use to License 2685. Pursuant to Water Code section 1707, fish and wildlife enhancement would also be added as the purpose of use for that river reach.

3.0 NOTICE OF THE PROPOSED LONG-TERM TRANSFER

The Division issued public notice of the transfer on December 31, 2011. Pursuant to Water Code section 1736, the Department of Fish and Game (DFG) was notified of the proposed transfer by MID and received notice by the Division. DFG had no comments regarding the transfer. Protests and/or comments to the transfer were filed by the following: 1) Stockton East Water District (SEWD); 2) the Natural Resources Defense Council and the Bay Institute (NRDC/BI); 3) Oakdale Irrigation District, South San Joaquin Irrigation District, Modesto Irrigation District, and Turlock Irrigation District (collectively referred to as "Districts"); 4) South Delta Water Agency (SDWA); and 5) Douglas N. Brower. All protests have been resolved. A summary of the resolved protests and the State Water Board's responses to comments follow.

SEWD Protest

SEWD protested the proposed transfer based on the potential injury to their contractual water supply via Reclamation's water right Permits 16597 and 16600. SEWD is concerned that the reservoir refill provisions originally proposed in MID's petitions could impact Reclamation's operations at New Melones Reservoir, thereby potentially decreasing the water allocated to SEWD from the Stanislaus River.

By letter dated March 14, 2012, SEWD provided modified language of the MID-Reclamation Agreement which was agreed upon by MID, Reclamation, and SEWD. SEWD indicated that its protest could be considered withdrawn with inclusion of the modified language. The modified version of the MID-Reclamation Agreement is as follows and is included as Condition 10 of this order:

Licensee agrees that the replenishment of stored water in Lake McClure released for the Reclamation-MID Agreement Vernalis Spring Flow Target may impact Reclamation. Reclamation is impacted during periods when Reclamation's releases from New Melones Reservoir, in addition to its releases absent the Reclamation-MID Agreement, are made to meet the State Water Board's Vernalis salinity objective, or when Standard Permit Term 93 is in effect. Licensee shall account for the impact to New Melones in an annual report to the State Water Board and will compensate for the impact by releasing an equivalent quantity of water from Lake McClure at times when releases from New Melones are being made to meet the State Water Board's Vernalis salinity objective, or when Standard Permit Term 93 is in effect, on a schedule coordinated with Reclamation. The impact will be set to zero if Reclamation makes a flood release from New Melones prior to or during releases by Licensee to compensate for an impact. The Deputy Director for Water Rights shall maintain authority to ensure that this condition is not used by Reclamation to increase the obligations of Licensee.

NRDC/BI and Districts Comments

The NRDC/BI comment letter and the Districts' comment letter both discussed their concerns regarding whether the water MID is offering to transfer is to enable Reclamation to meet spring pulse flow objectives based on the now-expired SJRA. NRDC/BI and the Districts state that Reclamation cannot solely propose to meet now-expired interim SJRA spring pulse flow requirements and instead must meet San Joaquin River Vernalis flow requirements as established in Table 3 of the 2006 Bay-Delta Plan.

State Water Board Response:

On January 31, 2012, the Division responded to both NRDC/BI and the Districts that MID is not requesting extension of SJRA flow requirements but is seeking to assist Reclamation in meeting flow targets at Vernalis. In order for the State Water Board to relax any Reclamation flow requirements at Vernalis relative to D-1641, Reclamation would have to first petition for such a change. Approval of MID's petitions will not change flow requirements in D-1641.

SDWA Comments

SDWA indicated that its comments regarding the transfer were not intended as a protest. SDWA's comments are summarized as follows: 1) MID's water transfers may negatively impact downstream right holders when MID is refilling storage to offset the transfer; 2) the State Water Board should require that Reclamation meet provisions of the 2006 Bay-Delta Plan; 3) concern that a pulse flow from the Merced River could adversely affect anadromous fish on the Stanislaus and Tuolumne Rivers; and 4) the State Water Board should insure that export levels during the 2012 pulse flow are limited by current permit terms and conditions.

State Water Board Response:

- 1) MID and Reclamation have entered into a refill agreement that clarifies the original intent of the previous refill agreement in D-1641 (Term 3 on page 169 of D-1641). The new refill agreement will continue to ensure that downstream legal users of water are not harmed by MID's refill operations resulting from the proposed releases under the transfer.
- 2) State Water Board action on MID's petitions will not, and cannot, modify the 2006 Bay-Delta Plan or Reclamation's compliance requirements in D-1641.
- 3) The transfer Order requires MID to coordinate water releases under the transfer with DFG, the U.S. National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (fisheries agencies) to assure that releases are made in a fashion that does not impact fish and wildlife. Additionally, CEQA review found no potential significant adverse impacts, and NMFS has commented that the transfer assists in compliance with the biological opinion on Central Valley Project (CVP) and State Water Project (SWP) operations. See Section 5.2 of this Order for more information.
- 4) State Water Board action on these petitions cannot modify any other parties' water right terms or conditions which regulate exports from the Delta.

Douglas N. Brower Protest

Mr. Brower indicated that he owns property contiguous to the Merced River and is concerned that additional diversions from the river will impact his downstream water rights. MID responded to Mr. Brower and their discussion concerning the effects of the transfer resulted in an unconditioned withdrawal of the protest on February 14, 2012.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

MID acted as Lead Agency under the provisions of CEQA and completed an Initial Study and Negative Declaration (IS/ND) for the Petitions for Long-Term Transfer and Instream Flow Dedication for the Two Year Water Purchase Agreement for San Joaquin River Flow and filed a Notice of Determination (NOD) with the Office of Planning and Research on February 28, 2012.

No significant adverse effects on the environment are identified in the IS/ND. The State Water Board is a responsible agency for purposes of considering whether to approve the transfer petition that will allow MID to proceed with the proposed project. As a responsible agency, the State Water Board must consider the environmental documentation prepared by the lead agency, and any other relevant evidence in the record, and reach its own conclusions on whether and how to approve the project

involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).) The State Water Board has considered the IS/ND in deciding whether to approve the petitions. The State Water Board will issue an NOD within five days of the date of this Order.

5.0 REQUIRED FINDINGS OF FACT

5.1 Would Not Result in Substantial Injury to Any Legal User of Water Before approving a petition for long-term transfer, 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 not result in substantial injury to any legal user of water. (Wat. Code. §1736.) The quantity of water intended for transfer under the proposed long-term transfer is within the amount authorized for diversion under License 2685. In the absence of the proposed transfer, the water would remain in storage until it is delivered for use within MID's service area. Therefore, the transfer will not result in an increase in diversions from the Merced River or any other source. MID has also entered into a refill agreement with Reclamation to ensure that downstream legal users of water are not harmed by MID's refill operations resulting from the proposed releases under the transfer. Additionally, no protest based on injury to any legal user of water remains outstanding.

In light of the above, I find in accordance with Water Code section 1736 that the proposed transfer will not result in substantial injury to any legal user of the water.

5.2 No Unreasonable Effect on Fish, Wildlife, or Other Instream Beneficial Uses Before approving a petition for long-term transfer, 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 not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1736.)

Pursuant to CEQA, MID prepared and certified an IS/ND addressing potential impacts of the proposed long-term transfer. The IS/ND does not identify any significant adverse impacts on the environment from the proposed transfer.

In addition to any obligation the State Water Board may have under CEQA, the State Water 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 [189 Cal.Rptr. 346].) There is no evidence that approval of the petitions will unreasonably impact public trust resources. In fact, the transfer will assist in implementing water quality standards approved in part to protect public trust resources. By letter dated January 26, 2012, the NMFS commented that the transfer constitutes partial compliance by Reclamation with NMFS's biological opinion on long term operations of the CVP and SWP.

In D-1641, the State Water Board determined that the changes in purpose of use and place of use in the water right licenses to implement the SJRA, as conditioned in the Order, would not unreasonably affect or substantially injure any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses of water. Because approval of these petitions would basically (with the exception of the two-step) continue operations relative to providing pulse flows at Vernalis as detailed in D-1641 and because this transfer Order requires coordination with the fisheries agencies, this transfer as conditioned in the Order, will not unreasonably affect or substantially injure any legal user of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses.

In light of the above, I find in accordance with Water Code section 1736 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 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 long-term transfers if the State Water Board does not hold a hearing. This Order is adopted pursuant to the delegation of authority in section 4.4.3 of Resolution 2007-0057.

7.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1736, and therefore I find as follows:

I conclude that, based on the available evidence:

1. The proposed long-term transfer will not result in substantial injury to any legal user of the water.
2. The proposed long-term transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed by MID for long-term transfer under License 2685 to facilitate the delivery of up to 90,000 af of water per year to Reclamation is approved.

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

1. The long-term transfer is effective during April and May of 2012 and 2013. All use changes described in and all diversion under this Order expires on June 1, 2013, without any further action on the part of the State Water Board. However, the reporting criteria, including but not limited to the reservoir and groundwater recharge criteria, shall remain in effect until full compliance is attained.
2. The maximum amount of water that may be delivered to Reclamation pursuant to this Order is 90,000 af of water per year in 2012 and 2013. The total quantity of water that may be provided under this transfer is limited to a combined total of 180,000 af for 2012 and 2013. The transfer is limited to the quantities made available annually as a result of water conservation, valid groundwater substitution, releases of previously stored water, or reservoir re-operation.
3. In addition to all other purposes of use authorized by this license, the purpose of use of License 2685 is temporarily amended to include preservation and enhancement of fish and wildlife along the reach of river between Licensee's point of diversion at Lake McClure on the Merced River and Vernalis on the San Joaquin River.
4. The place of use of License 2685 is temporarily expanded to include the reach between New Exchequer Dam on the Merced River and Vernalis on the San Joaquin River within the following boundaries: Upstream Limit – North 2,035,601 feet and East 6,627,969 feet, being within the NW ¼ of the SE ¼ of Section 13, T4S, R15E, MDB&M. Downstream Limit: - North 2,069,532 feet and East 6,339,889 feet, being within the SW ¼ of the NW ¼ of projected Section 13, T3S, R6E, MDB&M. All coordinates are by California Coordinate System of 1983, Zone 3.
5. Insofar as the changes allowed by the Order are exercised by MID, they shall be exercised as provided by the Reclamation-MID Agreement and below, while the Reclamation-MID Agreement is in effect. This Order allows Licensee to assist Reclamation in meeting the following target flows, or transfer flows for the protection of fish and wildlife beneficial uses on the San Joaquin River at Airport Way Bridge, Vernalis during a 31-day pulse flow period in April and May of each year. The target flow shall be based on the base flow, as defined below. Nothing herein is intended to, nor does it alter the relative responsibilities of the parties or others, if any, to meet flow obligations on the San Joaquin River, or to set or modify those responsibilities, except to the

extent that the transfer assists Reclamation in meeting those responsibilities. References to elements of the prior SJRA are included only to define the relative obligations of the parties under their transfer agreement with respect to the quantity of water transferred and the timing thereof.

Base Flow in Lower San Joaquin River at Vernalis* (cfs)	Reclamation-MID Agreement Vernalis Spring Flow Target, Minimum Average Flow Rate Over 31-day Pulse Flow Period (cfs)
0-1,999	2,000
2,000-3,199	3,200
3,200-4,449	4,450
4,450-5,699	5,700
5,700-6,999	7,000
7,000 or greater	Base Flow

* Base flows will be determined by Reclamation in consultation with MID. Base flow is defined as the estimated flow absent the pulse flow, excluding the incremental releases from New Melones Reservoir to satisfy Reasonable and Prudent Alternatives under the Biological Opinion in effect at the signing of the Reclamation-MID Agreement.

Water provided by the Licensee shall be measured at the Licensee's gage at Schaffer Bridge or at the Department of Water Resources' Cressey gage, as indicated in the Reclamation-MID Agreement.

6. Licensees shall coordinate water release planning for this transfer with Reclamation, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the Department of Fish and Game to assure that releases are made in a fashion that does not adversely impact fish and wildlife.
7. Annually, Licensee shall submit an operations report to the Deputy Director for Water Rights by January 30 of 2013 and 2014. The reporting shall continue on January 30 of each subsequent year, until reservoir refill has occurred. The report shall identify: (a) the source and quantity of water released from storage, or storage and direct diversions foregone to meet the April-May pulse flow objective in the San Joaquin River at Airport Way Bridge in Vernalis; (b) the time period when this water was released from storage, or not diverted; (c) a monthly accounting of reservoir operations to refill reservoir storage; (d) the quantity, timing, and location of groundwater extractions made to maintain water supply deliveries due to the Reclamation-MID Agreement; (e) an analysis showing that all storage releases, storage and direct diversions foregone, and replenishment operations listed above were performed within the limits, terms and conditions of the license.
8. Licensee shall notify the State Water Board immediately if the Reclamation-MID Agreement is not executed, or upon termination of the Reclamation-MID Agreement if such occurs in advance of December 31, 2013.
9. Prior to pumping groundwater as a result of the authorized change, Licensee shall provide to the Deputy Director for Water Rights a recharge plan specifying the amount of groundwater to be pumped, the location of the pumping, and the location and method of recharge that will be undertaken to balance the groundwater pumping. The plan shall contain an analysis of how the recharge program will prevent overdraft or a decrease in flow in the Merced River due to groundwater pumping, and shall contain a measurement plan to determine whether the pumping is exacerbating groundwater overdraft in the Merced Groundwater Basin. Upon approval of the plan by the Deputy Director for Water Rights, Licensee shall implement the plan. If the measurement plan indicates that groundwater substitution used to effect the transfer approved in this Order is exacerbating groundwater overdraft in the Merced Groundwater Basin, Licensee shall take additional measures to recharge the basin, and these are to be submitted beforehand to the Deputy Director for Water Rights.
10. Licensee agrees that the replenishment of stored water in Lake McClure released for the Reclamation-MID Agreement Vernalis Spring Flow Target may impact Reclamation.

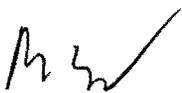
Reclamation is impacted during periods when Reclamation's releases from New Melones Reservoir, in addition to its releases absent the Reclamation-MID Agreement, are made to meet the State Water Board's Vernalis salinity objective, or when Standard Permit Term 93 is in effect. Licensee shall account for the impact to New Melones in an annual report to the State Water Board and will compensate for the impact by releasing an equivalent quantity of water from Lake McClure at times when releases from New Melones are being made to meet the State Water Board's Vernalis salinity objective, or when Standard Permit Term 93 is in effect, on a schedule coordinated with Reclamation. The impact will be set to zero if Reclamation makes a flood release from New Melones prior to or during releases by Licensee to compensate for an impact. The Deputy Director for Water Rights is delegated authority to ensure that this condition is not used by Reclamation to increase the obligations of Licensee.

11. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this long-term transfer 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.

12. This Order does not authorize any act that results in the taking of a threatened or endangered or candidate species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050 - 2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531 - 1544). If a "take" will result from any act authorized under this long-term transfer, the Licensee shall obtain authorization for an incidental take prior to construction or operation of the project. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the long-term transfer authorized under this Order.
13. 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



*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated: **APR 02 2012**