

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

DIVISION OF WATER RIGHTS

IN THE MATTER OF PERMITS 12721, 11967, 12722, 12723, 12727, 11315,
11316, 11968, 11969, 11970, 12860, 11971, 11972, 11973 AND 12364
(APPLICATIONS 5626, 5628, 9363, 9364, 9368, 13370, 13371,
15374, 15375, 15376, 15764, 16767, 16768, 17374 AND 17376)
OF U.S. BUREAU OF RECLAMATION

AND PERMIT 16479 (APPLICATION 14443) DEPARTMENT OF WATER RESOURCES

**PETITIONS FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF 52,320 ACRE-FEET OF WATER**

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITIONS

1.1 Description of the Transfer. On May 18, 2012, the U.S. Bureau of Reclamation (Reclamation) and the Department of Water Resources (DWR) 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.

With the petitions, Reclamation requests a one-year modification of Permits 12721, 11967, 12722, 12723, 12727, 11315, 11316, 11968, 11969, 11970, 12860, 11971, 11972, 11973 and 12364 (Applications 5626, 5628, 9363, 9364, 9368, 13370, 13371, 15374, 15375, 15376, 15764, 16767, 16768, 17374 and 17376) and DWR requests a one-year modification of Permit 16479 (Application 14443) to temporarily change the authorized place of use of (1) the Reclamation permits to include the State Water Project (SWP) authorized place of use downstream of Harvey O. Banks Pumping Plant (Banks); and (2) the DWR permit to include the Central Valley Project (CVP) authorized place of use downstream of Jones Pumping Plant (Jones). The maximum total transfer quantity will be 52,320 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.

2011/2012 Water Supply Conditions

Water supply conditions are currently classified as “Dry” for the Sacramento River basin and “Critical” for the San Joaquin River basin. The dry conditions in the 2011/2012 water year to date have resulted in allocations of 60 percent of contract Table A amounts to the SWP contractors and only 40 percent of contract amounts to CVP agricultural contractors south of Jones.

In addition to annual hydrology conditions, the ability of DWR and Reclamation to deliver Project water south of the Sacramento-San Joaquin Delta (Delta) is affected by operational restrictions which limit diversions from the Delta. The operational restrictions include those contained in State Water Board Decision 1641 (D1641) as well as the current biological opinions issued for the protection of Delta smelt and anadromous fishes and marine mammal species. Operational limitations severely restrict Project exports through June, impacting the ability of the Projects to capture excess spring flows and move water from upstream storage to contractors south of the Delta.

Changes Proposed Under the Transfer

The petitions will further the following list of projects:

- a. Santa Clara Valley Water District (SCVWD) contracts for a water supply from both the CVP (delivered from San Luis Reservoir via the San Felipe Division) and the SWP (delivered via the South Bay Aqueduct (SBA)). Based on projected operating conditions for 2012/2013, total storage in San Luis Reservoir may drop to levels which can result in impaired water quality, potentially causing reductions in CVP supplies available through the San Felipe Division. Further, aging infrastructure in the San Felipe Division could result in both planned and unplanned facility shutdowns for maintenance and repair.

When SCVWD's pumping capacity through the San Felipe Division is limited, meeting district water demands can be impacted, necessitating the request to transfer SCVWD's CVP water through an exchange with the SWP. The proposed transfer will allow for up to 30,000 af of SWP water to be pumped at Banks and delivered to SCVWD via the SBA. In exchange, an equal amount of CVP water will be delivered to the SWP service area south of Banks. The proposed exchange would not increase the total amount of CVP or SWP water delivered to SCVWD.

The SWP-CVP exchange for SCVWD is only to allow delivery of allocated CVP supply to SCVWD in the event a San Luis Reservoir low point results in water quality and water supply problems. In the absence of this exchange, the water would have been consumptively used or stored.

- b. Oak Flat Water District (Oak Flat), a SWP contractor, and Del Puerto Water District (Del Puerto), a CVP contractor, are adjacent districts located north of San Luis Reservoir in San Joaquin, Stanislaus and Merced Counties. The districts share common landowners with water supply allocations from both projects. These landowners have requested the ability to optimize the application of available supplies on their combined properties. The proposed exchange would allow 1) the delivery of 1,000 af of the landowners' allocated CVP supplies through SWP turnouts on the California Aqueduct to lands within Del Puerto; 2) delivery of a portion of their allocated CVP supply to lands within Oak Flat; and 3) delivery of a portion of their allocated SWP supplies through CVP turnouts on the Delta Mendota Canal to lands within Del Puerto. The proposed exchanges would result in no increase in total SWP or CVP allocations to either district.

In the absence of this exchange, the water would be used within the applicable SWP or CVP contractor service areas.

- c. Kern County Water Agency (KCWA) is a SWP contractor with numerous member units within Kern County. Kern Tulare Water District (Kern Tulare) is a CVP contractor located in Kern County with a contract for water through the Cross Valley Canal (CVC). Due to limited capacity at Jones, conveyance of CVP-CVC water through SWP facilities is often required to affect deliveries to the CVC contractors. As a result of projected hydrologic conditions and anticipated operational restrictions, it is possible there will be no capacity to move CVC water through Jones or Banks until fall 2012. In order to assist Kern Tulare in meeting peak irrigation demands this summer, KCWA will deliver up to 21,320 af of SWP water to Kern Tulare through the summer months. In exchange, Kern Tulare will deliver an equivalent amount of CVP-CVC water to KCWA in the fall. The exchange will not result in an increase in allocations to either district.

In the absence of this exchange, the CVC water would have been placed in surface or groundwater storage south of the Delta.

2.0 BACKGROUND

2.1 Existing Place of Use

The service area of the SWP is shown on maps 1878-1, 1878-2, 1878-3, and 1878-4 (on file under Application 5629) and the service areas of the CVP is shown on map 214-208-12581 (on file under Application 5626).

2.2 Place of Use under the Proposed Transfer

The petitioners request the temporary addition of the CVP service area downstream of Jones to the place of use under DWR's Permit 16482. The petitioners also request the temporary addition of the SWP service area downstream of Banks to Reclamation Permits 12721, 11967, 12722, 12723, 12727, 11315, 11316, 11968, 11969, 11970, 12860, 11971, 11972, 11973 and 12364. These temporary additions would be for the purpose of completing the three transfers/exchanges described above and would be effective from the date the petitions are approved through May 31, 2013. The areas to be added to the SWP are shown on Map 214-202-84 and the areas added to CVP are shown on Map 214-202-83 on file with the State Water Board under Applications 14443 and 5626, respectively.

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, subs. (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 subs. (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 May 25, 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; and 4) by publication in the Sacramento Bee and the Fresno Bee. The State Water Board received no comment letters.

5.0 REQUIRED FINDINGS OF FACT

5.1 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 petitions, the transfer/exchange will not result in the diversion of additional water from the Delta or the delivery of more water to any individual water supplier or user than has been delivered historically. Instead, the requested change will provide the operational flexibility the Projects need to get available supplies where they are needed most and in the most efficient manner possible. The water proposed for transfer/exchange consists of either:

- a) Water stored pursuant to the specified license and permits of the CVP and SWP; or
- b) Water directly diverted pursuant to the specified license and permits of the CVP and SWP 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.

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).)

There will be no impact to other legal users of water. The quantity of water diverted from the Delta will not change as a result of the proposed exchanges. The terms and conditions contained in D1641 protect other in-basin diverters from any potential impacts of Project diversions of natural flow. DWR and Reclamation are required to operate in conformance with D1641 and all other applicable regulatory restrictions governing SWP and CVP operations. There are no other legal users downstream of the points of diversion that would be affected by the exchanges.

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.

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

In accordance with Water Code section 1729, temporary changes involving transfer of water are exempt from the requirements of the California Environmental Quality Act (Public Resources Code section 21000 et seq.) However, the State Water Board must consider potential impacts to fish, wildlife, or other instream beneficial uses in accordance with Water Code section 1727(b)(2).

All the water to be exchanged is water that would have been consumptively used or stored in the absence of the exchanges. The water is diverted out of the watershed from which it originates in conformance with the provisions of the respective DWR and Reclamation water right permits governing those diversions. The total quantity of water diverted will not change. The timing of deliveries to specific SWP or CVP contractors will change, and in the case of the Oak Flat/Del Puerto exchange, there may be minor changes in the total quantity delivered to either district, but the aggregate quantity delivered to both districts will not change.

There will be no change in the amount of SWP or CVP water diverted at the Banks or Jones Pumping Plants. Therefore, there will be no change in flow or water quality conditions in the Delta. All water exported at the SWP and CVP pumping plants is pumped consistent with the criteria contained in D1641 and all other applicable regulatory restrictions governing SWP and CVP operations. Although the total amount of pumped at Banks and Jones will not change, the delivery rates from San Luis Reservoir may be slightly different. The scheduling of the deliveries will be coordinated between DWR and Reclamation so as not to adversely impact any SWP or CVP contractor deliveries.

Adequate capacity in the California Aqueduct and in the Delta Mendota Canal is available, and will not be adversely impacted as a result of the exchanges.

The exchanges will not result in a measurable change in quantity or quality of return flows. There will be no increase in either SWP or CVP allocations as a result of the proposed exchanges. There could be some shift in the timing of deliveries of SWP and CVP allocated supplies, and in the case of the Oak Flat/Del Puerto exchange, some localized, very minor shifts in return flow pattern. The exchanges will not result in an increase in deliveries to any drainage impaired lands. Exchanges similar to those proposed above have been implemented in previous years by both DWR and Reclamation. No measurable effects on other legal users of water, fish and wildlife or the environment were noted from those transfers.

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 2010-0029.

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 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 DWR Permit 16479 and Reclamation Permits 12721, 11967, 12722, 12723, 12727, 11315, 11316, 11968, 11969, 11970, 12860, 11971, 11972, 11973, and 12364 for transfer of 52,320 af of water are approved.

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

1. The transfer/exchanges of water are limited to the period commencing on the date of this Order and continuing through May 31, 2013.
2. The place of use under DWR Permit 16479 is temporarily expanded to include portions of the CVP service area shown on map titled *Petition for Temporary Change to Modify SWP and CVP Places of Use, Areas to be added to SWP Authorized Place of Use*, Map 214-202-84.
3. The place of use under Reclamation Permits 12721, 11967, 12722, 12723, 12727, 11315, 11316, 11968, 11969, 11970, 12860, 11971, 11972, 11973, 12364 is temporarily expanded to include portions of the SWP service area as *Petition for Temporary Change to Modify SWP and CVP Places of Use, Areas to be added to CVP Authorized Place of Use*, Map No.214-202-83.
4. Water transferred/exchanged pursuant to this Order shall be limited to 52,320 af within the following locations: (a) 30,000 af to SCVWD, (b) 1,000 af to Oak Flat and Del Puerto and (c) 21,320 af to KCWA and Kern Tulare. Although the transfer limits water service as noted herein, the one-for-one repayment of exchanged transfer water is not limited to service areas (a), (b) and (c), but may occur within the more general service areas shown on Maps 214-202-83 and 214-202-84.
5. DWR and Reclamation shall not increase their allocations of water to SCVWD, Oak Flat, Del Puerto, KCWA and Kern Tulare beyond the quantities authorized by existing contract for purposes of this transfer/exchange.
6. Within 90 days of the completion of the transfer; but no later than September 1, 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 SCVWD, Oak Flat, Del Puerto, KCWA and Kern Tulare pursuant to this Order.
 - b. The monthly and total amounts of Delta and delivered water to SCVWD, Oak Flat, Del Puerto, KCWA and Kern Tulare for the period covered by this transfer. This total shall include SWP and CVP deliveries, other water transfers, and any other amount of Delta water each location received.
 - c. Documentation that the water transferred/exchanged did not result in an increase in water diverted to SWP and CVP facilities from the source waters of DWR's permit and Reclamation's permits beyond the quantities that would otherwise have been diverted absent the transfer.
7. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change order, including method of 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.

8. This order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & 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 transfer, the petitioners shall obtain authorization for an incidental take permit prior to construction or operation. Petitioners shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this order.

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9. 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:

*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated: JUL 06 2012