

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

ORDER WR 2016-0017-EXEC

In the Matter of Petition for Reconsideration of

**PETITIONS FOR TEMPORARY CHANGE INVOLVING THE TEMPORARY
TRANSFER OF UP TO 76,069 ACRE-FEET OF WATER FROM THE
U.S. BUREAU OF RECLAMATION TO FRIANT WATER CONTRACTORS**

License 1986 AND Permits 11885, 11886, and 11887

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 OVERVIEW

On December 15, 2015, the U.S. Bureau of Reclamation (Reclamation) submitted four petitions under Water Code sections 1725-1732, to the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) for temporary change to add two points of rediversion of instream restoration flows (Restoration Flows) through Patterson Irrigation District (PID) and Banta-Carbona Irrigation District (BCID) facilities to the Delta-Mendota Canal (DMC), for reuse by Central Valley Project (CVP) contractors through direct delivery, exchange, and/or transfer. The temporary changes facilitate implementation of the San Joaquin River Restoration Program (SJRRP), and are viewed in combination with the instream flow dedication pursuant to Water Code section 1707. (See Order Approving Change and Instream Flow Dedication, October 21, 2013 [hereinafter referred to as "2013 Order"].) This will allow Reclamation to transfer up to 76,069 acre-feet (af) of Restoration Flows for the benefit of instream beneficial uses and still deliver a portion of that water to existing contractors once the benefits of the dedicated instream flows are realized. In the absence of the transfer and instream dedication, this water would be stored in Millerton Reservoir and/or taken under control at Friant Dam pursuant to direct diversion rights. Without the additional points of rediversion, water would be taken at other locations to be used for consumptive use, or released to meet water quality standards in lieu of stored water in New Melones or other reservoirs.

On March 23, 2016, after making the requisite findings, the Deputy Director approved the change petitions. (2016 Order.) The San Joaquin Tributaries Authority and San Joaquin River Exchange Contractors Water Authority (Petitioners) timely filed a petition for reconsideration, arguing that the change petition is not a "transfer" under Water Code section 1725, and that the proposed changes do not

¹ State Water Board Resolution No. 2012 - 0061 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of a Division order issuing a permit falls within the scope of the authority delegated under Resolution No. 2012 - 0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

involve water that would have been consumptively used or stored. Petitioners also challenge the finding that the temporary changes will not unreasonably affect fish, wildlife, and other instream beneficial uses. Upon review, I find that the Deputy Director's 2016 Order was appropriate and proper.²

2.0 GROUNDS FOR RECONSIDERATION

Any person interested may petition the State Water Board for reconsideration of a water right decision or order within 30 days on any of the following grounds:

- (a) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) the decision or order is not supported by substantial evidence;
- (c) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced; or
- (d) error in law. (Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 BACKGROUND

On December 15, 2015, Reclamation submitted four petitions under Water Code sections 1725-1732, to the State Water Board for temporary change to add two points of rediversion through PID and BCID facilities to the DMC. This would allow Reclamation to transfer up to 76,069 acre-feet (af) of Restoration Flows previously stored in Millerton Reservoir and/or taken under control at Friant Dam pursuant to direct diversion rights to be reused by CVP contractors through direct delivery, exchange, and/or transfer.

In 2013, to facilitate implementation of the SJRRP, the State Water Board approved changes for long-term instream flow dedication and the rediversion of those flows at specified locations pursuant to Water Code section 1707. The SJRRP implements the provisions of the 2006 Stipulation of Settlement (Settlement) in *Natural Resources Defense Council et al. v. Rodgers et al.*, and the San Joaquin River Restoration Settlement Act (Settlement Act), Public Law No. 111-11, § 10001 et seq., 123 Stat. 991, 1349 (2009). The Settlement addresses restoration of fish habitat in the San Joaquin River below Friant Dam and ends an 18-year legal dispute over the operation of Friant Dam.

Under the 2013 Order, the place of use for instream beneficial uses includes the San Joaquin River from Friant Dam to the San Joaquin River near Vernalis (including portions of the Eastside and Mariposa Bypasses), and thence to the Delta channels at the Jones and Banks Pumping Plants. The 2013 Order anticipated that recapture and recirculation of flows may occur in the future at PID and BCID facilities. Reclamation is developing a long-term recirculation plan, which may involve modifications to facilities, construction of new facilities, or changes to existing contract totals. The temporary change petitions

² The Water Code directs the State Water Board to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner who filed a timely petition for reconsideration may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Assn v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WR 2009-0061 at p. 2, fn. 1; SWRCB Order WQ 98-05-UST at pp. 3-4.)

temporary change involving and instream flow dedication of Walker River Irrigation District].) The water will in fact be used for the protection and enhancement of instream beneficial uses held in trust for the benefit of the people of the state. Interpreting Water Code section 1725 to include temporary changes that provide additional flows for instream beneficial uses is consistent with the broad language of the statute and the public policies in favor of encouraging transfers and protection of instream beneficial uses. (See Wat. Code, §§ 109, 1243, 85023.)

In their Supplemental Brief, Petitioners mischaracterize an email message written by Assistant Chief Counsel to Division staff. Petitioners assert that "Mr. Sawyer clearly believed that naming a transferee would be necessary," notwithstanding the main point of the email which is that for an instream transfer, the fish are the transferee. The suggestion to consider naming a fishery agency as a trustee was just that—suggestion that would avoid the need to address the issue whether a transfer requires multiple parties.

Petitioners insistence that a transfer or exchange may not occur absent a designated third party disregards the purpose of Water Code section 1707, public trust transfers, and the recognized beneficial uses of fish and wildlife.

4.2 PROPOSED CHANGES INVOLVE WATER THAT WOULD HAVE BEEN CONSUMPTIVELY USED OR STORED

Petitioners argue that the change does not involve water that would have been consumptively used or stored by the permittee because preservation and enhancement of fish and wildlife is not a consumptive use. (Petition, p. 7.) This argument ignores the relationship of the transfer with Water Code 1707, and misses the fundamental purpose of the consumptive use or storage provision, which is to assure that the transfer is unlikely to injure other legal users of water or unreasonably affect instream beneficial uses. (See SWRCB Order 99-012 at p. 15.)

When reviewing a petition for temporary change, Water Code section 1725 provides that a permittee may temporarily change the point of diversion, place of use, or purpose of use to a "transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored" by permittee in the absence of the temporary change. (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."

In arguing that the transferred water would not have been consumptively used or stored, Petitioners characterize the water to be transferred as the Restoration Flows, not Reclamation's water in the absence of the 2013 Order dedication of instream flows under Water Code section 1707. As explained previously, the changes must be viewed in context with the 2013 Order, which anticipated recapture and recirculation of flows at PID and BCID facilities. Restoration Flows that are released from Friant Dam in accordance with the terms and conditions of the 2013 Order would have either remained in storage or have been directly diverted at Friant Dam for delivery to and consumptive use by the Friant Division CVP contractors, or used in the CVP service area. (2013 Order at p. 8.)

Petitioners do not suggest that the transferred water improperly expands the scope of Reclamation's existing water right, or would otherwise be available to other users in the absence of the transfer. Their construction of the statute is unduly rigid in the context of water dedicated to protection of instream beneficial uses, disregarding the fundamental purpose of the consumptive use provision in Water Code section 1725, which is to ensure that a water transfer is unlikely to cause injury to legal users of water.

The definition of "consumptive use" in section 1725 of the Water Code refers to water that would have been "otherwise removed from use in the downstream water supply as a result of direct diversion" in the absence of the change. The reference to direct diversion in the definition of "consumptive use" is intended to distinguish direct diversion from diversion by storage, not to exclude water that is consumed

relate only to the new temporary points of diversion through existing facilities and consistent with existing contracts. PID is south of the Delta and upstream of Vernalis. BCID is located in the Delta downstream of Vernalis. Both PID and BCID are located downstream of the Merced River.

The proposed transfer would assist Reclamation in meeting the two primary goals of the San Joaquin River Settlement Act to: (1) restore and maintain fish populations, including salmon, in good condition in the mainstem of the San Joaquin River below Friant Dam; and (2) reduce or avoid adverse water supply impacts on the Friant Contractors that may result from Restoration Flows. The transfer will be subject to existing provisions in the 2013 Order, Reclamation's License 1986 and Permits 11885, 11886, and 11887, and Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) under the federal Endangered Species Act (ESA).

4.0 DISCUSSION

Pursuant to Water Code section 1725, a permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if 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, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1725.)

4.1 EVALUATION OF THE PROPOSED TEMPORARY CHANGES IS PROPER UNDER WATER TRANSFER STATUTE WHEN DEDICATING FLOWS FOR INSTREAM BENEFICIAL USES

Petitioners argue that approving the temporary changes under Water Code section 1725 et seq. is a legal error because there is no transfer or exchange of water or water rights from Reclamation to any party or from one place to another. (Petition, p.5.) Petitioners suggest that the statute requires a finding that identifies at least two parties, and without this, the change simply allows Reclamation to "recapture" water, and should be processed under Water Code section 1701. This argument is not supported by the plain text of Water Code section 1725 et seq. Further, it views the change petitions out of their proper context with Water Code section 1707, ignoring Reclamation's right to dedicate portions of its water for the recognized beneficial uses of fish and wildlife and instream flow.

The Water Code does not limit temporary changes under Water Code section 1725 et seq. to transactions involving two different water right holders, or even different water rights. To the contrary, these provisions apply to "a transfer or exchange of *water or water rights*." (Wat. Code, § 1725 [italics added].) The transfer or exchange involving two different water rights held by the same water right holder, or two different entities entitled to deliveries from the same water right holder, constitutes transfers of water or water rights, even though only one water right holder may be involved. And the policies in favor of transfers and exchanges support transfers and exchanges between parties entitled to use water under contract, not just between water right holders. (See, e.g., Wat. Code, § 109; see also Central Valley Project Improvement Act §§ 3402(d), 3405(a) (Pub.L.No. 102-575 (Oct. 30, 1992) §§ 106 Stat. 4600, 4706, 4709-12.) In this case, CVP contractors will receive water rediverted into the DMC pursuant to temporary changes in the permits and license for Friant Dam in exchange for water those CVP contractors would otherwise receive pursuant to the permits and license for Friant and other CVP facilities. This constitutes a transfer or exchange within the meaning of the Water Code provisions for temporary changes.

In addition, and as a separate and independent basis for determining that the proposed transfer is in fact a transfer, the transfer expands public trust resources, and thus amounts to a transfer to the public for flows within the restoration reach. The State Water Board has interpreted Water Code section 1725 broadly in other cases in order to encourage and promote voluntary instream flows dedication under the statute. (See e.g., Order WR 2010-0029-DWR [approving temporary addition of PID and BCID intakes for rediversion of SJRRP Restoration Flows]; Deputy Director Order dated February 21, 2014 [approving

through dedication to instream beneficial use from being considered as consumptive use. At the time section 1725 was enacted, the Water Code did not authorize an appropriative right without a diversion, either by storage or direct diversion. Thus, the reference to direct diversion included all appropriations except those where diversions was by storage. An appropriative right without diversion is authorized only as provided under section 1707, which was enacted later. Reading sections 1707 and 1725 together, an appropriative water right that has been changed from a direct diversion to a dedication under section 1707 should be treated as a direct diversion for purpose of determining whether the water would have been consumptively used in the absence of a subsequent temporary change.

In the 2016 Order, the Deputy Director stated that water permanently removed as a result of entering the ocean (saline sink) would be consistent with the definition of "consumptively used" under Water Code section 1725. This interpretation would not apply to water that would otherwise be available for other water right holders downstream of the reach where it is used for protection of instream beneficial uses, but is appropriate in the reach covered by the dedication, because that water would not be available to other users in the absence of the temporary change. Reclamation has the responsibility to mitigate impacts that are specific to the export pumps and other operations of the CVP. Other diverters do not have a right to use water that has been previously stored and released for use by contractors or to meet flow objectives. While the water may not be consumed through evaporation or percolation, it is nonetheless used in a manner that makes it unavailable in the downstream water supply. To the extent that some of the transferred water would otherwise flow to the ocean to meet delta flow objectives in the absence of the transfer, this water is provided in lieu of stored water that otherwise would be released from New Melones or other reservoirs.

Without the SJRRP, Restoration Flows would have either remained in storage or have been directly diverted at Friant Dam for delivery to and consumptive use by the Friant Division CVP contractors, or used in the CVP service area. The flows subject to the transfer would be consumptively used because Reclamation would continue to retain dominion and control of all instream flows downstream as currently authorized under the subject permits and license. This includes water released from storage to meet water quality standards in the Delta. California is experiencing one of the most severe droughts on record with below-average rainfall since 2012. In 2014 and 2015, drought conditions were extreme, particularly in the San Joaquin River watershed, where 2015 was the driest year in recorded history. Every drop of water is precious and is managed in a way to maximize its beneficial uses, which is why this transfer is important to provide fisheries benefits but also be rediverted to help contractors who received zero water allocations in the last two years.

4.3 PROPOSED CHANGES WILL NOT UNREASONABLY AFFECT FISH, WILDLIFE, AND OTHER 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).) As explained in detail by the Deputy Director in the 2016 Order, Petitioners' comments on this issue were not persuasive. The purpose of the SJRRP is to protect instream beneficial uses in the San Joaquin River. Recapture would occur only at screened facilities. The transfer will be subject to provisions of Reclamation's License 1986 and Permits 11885, 11886, and 11887, and BOs issued by the USFWS and the NMFS under the federal ESA.

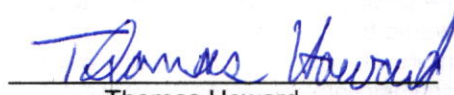
Petitioners' claim that the Order subverts the California Environmental Quality Act (CEQA) is equally unpersuasive. Reclamation and the Department of Water Resources (DWR) prepared and certified a joint Programmatic Environmental Impact Statement (EIS)/Environmental Impact Report (EIR) which covers the long-term implementation of the SJRRP, including the recapture of Restoration Flows at existing facilities. As a responsible agency, the State Water Board considered and relied on that document in approving the 2013 Order. Reclamation and DWR have conducted additional environmental analyses for implementation of interim flows and recirculation of recaptured water from existing facilities, including a draft environmental assessment for the temporary points of rediversion. These analyses do not reveal any new or changed environmental impacts not already addressed in the EIR. Reclamation is

in the process of preparing a long-term Recapture and Recirculation Plan that will be accompanied by an EIS/EIR. A new EIS would be necessary because long-term actions contemplate construction of new facilities and other actions that may result in impacts not previously analyzed.

ORDER

For the foregoing reasons, the State Water Board finds that the challenged actions were appropriate and proper. Accordingly, Petitioners' petition for reconsideration is denied.

Dated: 7/21/16



Thomas Howard
Executive Director