

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

**ORDER WR 2018-0110-EXEC**

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In the Matter of Petition for Reconsideration of

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**THE U.S. BUREAU OF RECLAMATION**

**Regarding Order Approving Temporary Change Involving the  
Temporary Transfer or Exchange of up to 55,885 Acre-Feet of Water  
from the U.S. Bureau of Reclamation to Friant Water Contractors  
For Instream Flow Dedication and Rediversion  
License 1986 and Permits 11885, 11886 And 11887**

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**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR:<sup>1</sup>

**1.0 OVERVIEW**

On December 7, 2017, the U.S. Bureau of Reclamation (Reclamation) submitted four petitions under Water Code sections 1707 and 1725 et seq. (Change Petitions), to the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) for temporary change to transfer up to 76,069 acre-feet (af) of dedicated San Joaquin River instream flows (Restoration Flows) previously stored in Millerton Reservoir and/or taken under control at Friant Dam pursuant to Reclamation's direct diversion rights. Restoration Flows would be rediverted 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 change would assist Reclamation in meeting the two primary goals of the San Joaquin River Restoration Settlement Act (Pub. Law No. 111-11, Title X, § 10001 et seq. (Mar. 30, 2009), 123 Stat. 991, 1349-1414) 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 all of the Friant Contractors that may result from Restoration Flows.

To facilitate implementation of the San Joaquin River Restoration Program (SJRRP), Reclamation petitioned the State Water Board under sections 1701 and 1707 of the Water Code for approval of changes in the long-term instream flow dedication and the rediversion of those flows at specified locations, and the State Water Board approved those changes. (See Order Approving Change and Instream Flow Dedication (October 21, 2013) [hereinafter referred to as "2013 Order"].) Approval of the Change Petitions would provide a means to supply water to the Friant Division CVP contractors at times

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<sup>1</sup>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.

when there is limited or no capacity at the Jones Pumping Plant and Banks Pumping Plant (Delta Pumps) in the Delta. The transfer would 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).

On March 6, 2018, after making the requisite findings, the Deputy Director approved the Change Petitions (2018 Order). Prior to issuing the 2018 Order, a possible misinterpretation of the underlying 2013 Order had come to the State Water Board's attention through separate correspondence between the Friant Water Authority and Reclamation. In that correspondence, it appeared that Reclamation may have routed non-Restoration Flows through the points of diversion added pursuant to the 2013 Order approving the 1707 petition. The 2013 Order does not authorize such diversions and did not intend to authorize such diversions. The Change Petitions, being sufficiently related to the implementation of the 2013 Order, presented an opportunity to make a clarification to avoid any future violations of state law. The 2018 Order added a provision and a Term 12 to clarify that the points of diversion in Permits 11885, 11886, 11887 and License 1986 authorized by the 2013 Order are solely for the purpose of implementing the Settlement Agreement and recirculating Restoration Flows.

Reclamation timely filed a petition for reconsideration, arguing that the 2018 Order should not include Term 12 because it is outside the procedural scope of Water Code section 1725 et seq., lacks support of substantial evidence, and was issued without proper notice that the State Water Board "was re-adjudicating a substantive issue relevant to Reclamation's license and permits." (Memorandum of Points and Authorities in Support of Petition for Reconsideration of the Order Dated March 6, 2018 Approving Temporary Changes Involving the Transfer of 55,885 Acre Feet of Water by the Bureau of Reclamation Under Water Right License 1986 and Permits 11885, 11886, and 11887, p. 1.) Based on Reclamation's petition for reconsideration, it is clear that there is a misinterpretation of the 2013 Order, and the clarification included in the 2018 Order is timely and necessary.

Upon review, I find that the Deputy Director's 2018 Order was appropriate and proper.<sup>2</sup>

## 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

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<sup>2</sup> 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.)

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 DISCUSSION

#### 3.1 The Clarification in Term 12 is Properly Within the Scope of the Change Petitions

Reclamation's petition for reconsideration is based solely on procedural arguments that the State Water Board may not make the clarification it made because of restrictions in the temporary transfer statute. Water Code section 1727, subdivision (d) provides:

In reviewing a petition for a temporary change, the board shall not modify any term or condition of the petitioner's permit or license, including those terms that protect other legal users of water, fish, wildlife, and other instream beneficial uses, except as necessary to carry out the temporary change in accordance with this article.

Subdivision (e) further states that "the board shall not deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change. Neither the Department of Fish and Wildlife, nor any other state agency that comments on the proposed temporary change, shall propose conditions to mitigate effects on fish, wildlife, or other instream beneficial uses that are not caused by the proposed temporary change. This subdivision does not limit the board, the Department of Fish and Wildlife, or any other state agency, in proceedings pursuant to any provision of law other than this article."

Reclamation characterizes Term 12 as a "stand-alone" term that is unrelated to the findings necessary to approve the temporary change. Reclamation argues that the term relates to points of diversion not at issue in the Change Petitions, that these points of diversion were previously added to its permits and license with no conditions, and that the flexibility provided by the 2013 Order (as construed by Reclamation) is not ambiguous.

While it is true that the previously added points of diversion authorized by the 2013 Order are not specifically at issue in the current Change Petitions, the Change Petitions are inextricably linked with the 2013 Order, and the proper scope of that 2013 Order is integral for the processing of temporary changes associated with implementation of that 2013 Order. The State Water Board has been in litigation over a similar change petition order approved in 2016. In that litigation, petitioners asserted that the procedural text of Water Code section 1725 et seq. barred the use of the temporary transfer for environmental purposes. The superior court agreed with the State Board's argument that Water Code section 1725 must be read together with Water Code section 1707, and viewed in light of the 2013 Order.

"The water at issue here remained instream, as established by the Board's 2013 Order, but then was diverted back to Contractors. The 2013 Order permitted Reclamation to change its operations of the Friant Division of the CVP to implement the SJRRP." (*San Joaquin Tributaries Authority v. California State Water Resources Control Board, et al.*, Sacramento County Superior Court, Case No. 34-2017-80002654, Ruling on Submitted Matter and Order, p. 7.) This case was decided in the State Water Board's favor on June 5, 2018 and may be appealed.

The specific provisions being challenged in the litigation are different, but the legal arguments are similar in that Reclamation attempts to use a strict application of text in Water Code section 1725 et seq., in disregard of Water Code section 1707 and the 2013 Order. This is an overly-narrow construction of the statute. Water Code section 1727, subdivisions (d) and (e) cited above prevent the opening of larger issues in the temporary transfer process that may be associated with a given project or water right. For example, a commenter cannot raise a general public trust complaint or Fish and Game Code 5937 violation associated with an existing reservoir, nor could the State Water Board impose bypass flows to

mitigate broader project impacts outside the scope of the transfer. This scenario is not what is happening with the inclusion of Term 12.

Term 12 is directly related to the 2013 Order, and the Change Petitions are directly related to the implementation of the 2013 Order and the SJRRP generally. The Change Petitions cannot be viewed in isolation of the 2013 Order, and in fact, the 2018 Order requires compliance with the 2013 Order to support its findings of no injury and no unreasonable effects on fish and wildlife. Since the Change Petitions rely on the 2013 Order, a clarification of that Order is entirely proper within the context of the 2018 Order.

Further, contrary to Reclamation's argument that the points of rediversion were "previously granted by the Board with no such conditions" (Points and Authorities, p.4), the clarification is not a modification of a permit or license condition. Upon adoption of the 2013 Order, a column of new points of rediversion was added to Reclamation's permits and license that included, *inter alia*, Canal Intakes Off Mendota Dam, and the Jones and Banks Pumping Plants. A footnote attached to these points of rediversion provides: "The points of rediversion are for: (a) water released from storage or (b) water previously diverted at Friant Dam that remains under the dominion and control of Reclamation from Friant Dam to the points of rediversion pursuant to Water Code section 1707." The footnote means that the points of rediversion are authorized solely for recapture of dedicated Restoration Flows bypassed or released pursuant to Water Code section 1707.

While the footnote could have been drafted with more clarity, the interpretation that rediversion is authorized solely for flows bypassed or released pursuant to Water Code 1707 is the only interpretation consistent with the issues before the State Water Board when it issued the 2013 Order. The 2013 Order, and the subsequent amendments to Reclamation's permits and license made in connection with that order, were made pursuant to Water Code section 1701 and 1707. The State Water Board could not have authorized any additional points of diversion or rediversion for any other purpose other than the dedication and downstream recapture of flows for fish and wildlife. An interpretation of the 2013 Order to authorize use of the added points of rediversion for flows other than the Restoration Flows that were the subject of the 2013 Order is legally wrong, and it is important that any confusion be corrected to prevent unauthorized diversions in the future. Accordingly, the 2018 Order includes a term that clarifies this provision to ensure that there is no ambiguity on this point. Term 12 is important and related to the Change Petitions and the underlying 2013 Order that they help implement.

### **3.2 The Clarification in Term 12 is not a Factual Matter and a Hearing was not Necessary**

Reclamation also incorrectly casts the Term 12 clarification as a factual issue. Reclamation argues that it was not provided notice in order to make an informed decision on whether to request a hearing on Term 12, and was deprived of any meaningful opportunity to comment on the issue raised in the separate correspondence.

Water Code section 1726, subdivision (g)(3) provides:

If the board or the petitioner determines that an additional extension of time for a decision is necessary for the board to make the findings required by Section 1727, or that a hearing is necessary for the board to make those findings, the board may extend the time for a decision with the consent of the petitioner. If the petitioner agrees to a hearing, the board shall identify the issues for which additional evidence is required and shall fix a time and place for the hearing. The board shall provide notice of the time, place, and subject matter of the hearing to the petitioner, the Department of Fish and Wildlife, the board of supervisors of the county or counties described in subdivision (c), the water right holders of record identified pursuant to subdivision (d), the proposed transferee, and any party who has filed a written comment in accordance with subdivision (f).

Although the 2018 Order references separate correspondence as a way of introducing the needed clarification, the explanation and term clarifying the authorization granted in the 2013 Order do not rest on any content contained in this separate correspondence. These documents were communications between the Friant Water Authority and Reclamation about several possible water diversions of non-Restoration Flows through the points of rediversion added under the 2013 Order. They are referenced simply because they alerted the State Water Board that Reclamation could be misinterpreting the authorization granted by the 2013 Order, which Reclamation has subsequently confirmed as evidenced by its petition for reconsideration on the issue.

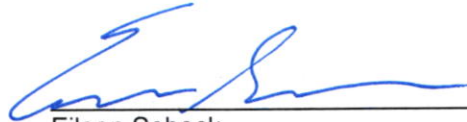
The State Water Board considers the clarification a legal issue, not a factual matter, and a hearing is unnecessary. In its petition for reconsideration, Reclamation never explains or offers any argument about why the clarification is wrong. The provision in the 2018 Order is clear about the purpose of the clarification. This is not a complicated, factual dispute. The 2013 Order could only add points of rediversion for the underlying water at issue in the 1707 petition.

Reclamation may file a separate petition if it wants to propose adding points of diversion for water other than Restoration Flows.

#### ORDER

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

6/24/18  
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Dated

  
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Eileen Sobeck  
Executive Director

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

**DIVISION OF WATER RIGHTS**

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**IN THE MATTER OF PERMITS 11885, 11886 AND 11887 AND LICENSE 1986  
(APPLICATIONS 234, 1465, 5638 AND 23, RESPECTIVELY) OF  
U.S. BUREAU OF RECLAMATION**

**PETITIONS FOR CHANGE PURSUANT TO  
WATER CODE SECTIONS 1700 AND 1707**

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SOURCE: San Joaquin River

COUNTIES: Fresno, Madera, Tulare, Kern, Merced, Stanislaus, Contra Costa, Alameda, San Joaquin  
and Sacramento

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**ORDER APPROVING CHANGE AND INSTREAM FLOW DEDICATION**

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

**1. BACKGROUND**

On May 9, 2012, the U.S. Bureau of Reclamation (Reclamation) submitted petitions for change pursuant to Water Code sections 1700 and 1707 with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). Reclamation seeks modification to its water right permits for the purpose of implementing 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. The parties that entered into the Settlement include the United States Departments of the Interior and Commerce, Friant Water Users Authority (a public agency serving 20 member water districts), and the Friant Defenders (a coalition of environmental organizations led by the Natural Resources Defense Council). The San Joaquin River Restoration Program (SJRRP or restoration program) was established to implement the Settlement. Congress provided federal authorization for implementing the Settlement in the Settlement Act.

The Settlement establishes two primary goals: (1) to restore and maintain fish populations, including Spring-run Chinook Salmon (salmon), in good condition in the mainstem of the San Joaquin River below Friant Dam; and (2) to reduce or avoid adverse water supply impacts to the Friant Division long-term contractors that may result from the restoration program. The restoration program involves a series of projects to improve the river channel in order to restore and maintain healthy salmon populations. Flow restoration is to be coordinated with channel improvements. At the same time, the Settlement limits water supply impacts to Friant Division long-term water contractors by providing for new water management measures, including the recirculation and recapture of released water and the creation of a recovered water account.

The Settlement provides for releases of both interim flows and restoration flows. The purpose of the interim flows is to collect relevant data on flows, temperatures, fish needs, seepage losses, and water recirculation, recapture and reuse. The interim flow program began on October 1, 2009 pursuant to Order WR 2009-0058-DWR, and was continued under Orders WR 2010-0029-DWR and Division Order

dated September 30, 2011. The present order is a long-term authorization to modify Reclamation's water rights to implement the long-term restoration program.

## 2. PETITIONS

On May 9, 2012, Reclamation submitted petitions for change pursuant to Water Code sections 1700 and 1707 for the above-referenced water right permits. The petitions request authorization to change the method of operation of the Friant Division of the Central Valley Project (CVP) in order to implement the provisions of the Settlement and the Settlement Act. Reclamation seeks to (1) add points of redirection, (2) add the San Joaquin River channel within the designated reaches to the place of use, and (3) add preservation and enhancement of fish and wildlife resources as an authorized purpose of use within: (a) the San Joaquin River channel and (b) on designated service area maps. The purpose of use of all four water rights will be conformed to municipal, domestic, irrigation, incidental domestic, stockwatering, fish and wildlife preservation and enhancement and recreational.

Water will be released to the natural watercourse of the San Joaquin River for the instream flow dedication, but due to capacity issues, both natural and artificial conveyance means may be utilized to facilitate flow throughout the designated stretch of the river.

Reclamation proposes to dedicate for instream use in the stream channel from Friant Dam to the Sacramento-San Joaquin Delta Estuary (Delta): (a) water released from Millerton Reservoir that was previously collected to storage and that subsequently remains under its dominion and control, and (b) water taken, and subsequently remaining, under dominion and control through the exercise of direct diversion rights at Friant Dam but allowed to pass into the river channel in lieu of being conveyed into and through canals. Water collected to storage would be released downstream at Friant Dam or water that would otherwise be directly diverted at Friant Dam would be bypassed for the beneficial use of preservation and enhancement of fish or wildlife. In lieu of making deliveries to Reclamation's contractors from the Delta-Mendota Canal (DMC), releases of stored water would remain instream and subsequently be redirected at and near Mendota Dam for delivery through various canals and to flow through Mendota Dam. Similarly, water taken through the exercise of direct diversion rights at Friant Dam would remain instream and subsequently be redirected at and near Mendota Dam for delivery through various canals and to flow through Mendota Dam. Water would also be redirected into the Arroyo Canal and would flow past Sack Dam and would also be conveyed through the Sand Slough Control Structure to and through the Eastside Bypass. Water in the Eastside Bypass would thence flow through the Mariposa Bypass and thence the San Joaquin River and would also continue to flow through the Eastside Bypass to Bear Creek. Water would be re-diverted along the Eastside Bypass at designated locations both north and south of the Mariposa Bypass. Water in Bear Creek would thence continue to flow into the San Joaquin River. Once additional channel improvements are made, water would also flow past Sack Dam and continue in the San Joaquin River channel.

The place of use for instream beneficial uses would include 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.

In addition to redirecting water into various canals downstream of Friant Dam, Reclamation plans to redirect water at the Jones and Banks Pumping Plants and at the San Luis Dam for delivery within the existing place of use to meet demands of the Friant Division of the CVP. However, recirculation of recaptured water to the Friant Division could require mutual agreements between Reclamation, Department of Water Resources (DWR), Friant Division long-term contractors, and other south-of-Delta CVP/State Water Project (SWP) contractors. (DPEIS/R, p. 2-36.) Also, SJRRP water in San Luis Reservoir could be used for the benefit of Friant Division CVP contractors through subsequent transfers and/or exchanges. In addition to direct use, water made available as a result of the proposed changes could be utilized through subsequent transfer and/or exchange actions separate from this action to facilitate the recapture and recirculation plan. (DPEIS/R, P. 2-36.)

It is anticipated that recapture and recirculation may occur in the future at Patterson Irrigation District, West Stanislaus Irrigation District, and/or Banta-Carbona Irrigation District facilities.

The petitions included proposed water right conditions that were subject to changes based on agreements with protestants and language alterations to conform to appropriate permit conditions. These are included as conditions of this Order.

### 3. PROTESTS

The State Water Board issued notice of the petitions on May 18, 2012. Any protests were required to be submitted by June 18, 2012. Protests were filed by: (1) San Joaquin Tributaries Authority<sup>1</sup> (SJTA); (2) the Exchange Contractors<sup>2</sup> and the San Joaquin River Resource Management Coalition (collectively, Exchange Contractors); (3) the San Luis and Delta-Mendota Water Authority and Westlands Water District (collectively, SLDMWA<sup>3</sup>), and (4) Paramount Farming Company (Paramount).

The following persons or entities joined in the Exchange Contractors protest: D.T. Locke Ranch, Inc., Gary and Mari Martin, Pikalok Farming, Bowles Farming Company, Inc., Nickel Family LLC, and Wolfsen Land and Cattle Company, Inc. (Wolfsen). The response to the Exchange Contractors constitutes the response to the other joined parties, with the exception of Wolfsen. Wolfsen filed supplemental comments not included in the Exchange Contractors protest and these were separately evaluated.

On June 26, 2012, the State Water Board received the protest of Farmers Water District, seeking to join in the Exchange Contractors protest. Although the protest was dated June 18, 2012, it was not timely filed and is not further considered. As noted below, the Exchange Contractors have resolved their protest.

#### A. *SLDMWA Protest*

On August 31, 2012, SLDMWA informed the State Water Board that its protest had been unconditionally withdrawn.

#### B. *Exchange Contractors Protest*

On October 19, 2012, the Exchange Contractors advised the State Water Board that its protest had been conditionally resolved. Resolution was contingent on inclusion of an additional point of diversion at the Mowry pumps and recognition of specific commitments made in section 6.2 the Record of Decision (ROD). The Mowry pumps have been added as diversion facilities in Reclamation's amended rights, and the preparation and submittal of an Annual Work Plan consistent with section 6.2 of the ROD is included as a condition in the amended water rights.

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<sup>1</sup> SJTA is a California joint-powers authority comprised of the Oakdale, South San Joaquin, Turlock, Modesto and Merced Irrigation Districts, and the City and County of San Francisco.

<sup>2</sup> The Exchange Contractors are comprised of four agencies: the Central California Irrigation District (CCID), the San Luis Canal Company, the Firebaugh Canal Water District, and the Columbia Canal Company.

<sup>3</sup> The SLDMWA member agencies include: Banta-Carbona Irrigation District; Broadview Water District; Centinella Water District; City of Tracy; Del Puerto Water District; Eagle Field Water District; Fresno Slough Water District; James Irrigation District; Laguna Water District; Mercy Springs Water District; Oro Loma Water District; Pacheco Water District; Panoche Water District; Patterson Water District; Plain View Water District; Reclamation District 1606; San Benito County Water District; San Luis Canal Company; San Luis Water District; Santa Clara Valley Water District; Tranquillity Irrigation District; West Side Irrigation District; West Stanislaus Irrigation District; Westlands Water District; and Widren Water District.



Note also that protective mitigation and monitoring measures from past Temporary Urgent Change Petition Orders on the SJRRP are included in the order section below and in Reclamation's amended water rights

C. *Persons Joining in Exchange Contractors Protest*

On October 19, 2012, Division staff provided opportunity for the persons that had joined in and incorporated the Exchange Contractors protest into letters protesting Reclamations' petitions to identify whether there were any unresolved concerns. Response was required to be submitted by November 19, 2012. The protestants were informed that failure to respond would result in protest dismissal. No response was received. Therefore, the protests of D.T. Locke Ranch, Inc., Gary and Mari Martin, Pikalok Farming, Bowles Farming Company, Inc., Nickel Family LLC, and Wolfsen Land and Cattle Company (only insofar as the Wolfsen protest adopted and incorporated the Exchange Contractors protest) were dismissed on November 19, 2012.

D. *SJTA Protest*

On July 10, 2013, the Division informed SJTA that the record supported a finding of non-injury and the protest would be considered cancelled on August 9, 2013 if SJTA did not provide further information in support of its protest. No additional information was submitted. The protest was cancelled on August 9, 2013.

E. *Paramount*

Paramount advised the Division that its protest was conditionally resolved on September 11, 2013. The following conditions are included in Reclamation's amended water rights: (a) notification when flows in excess of the flows needed to satisfy CVP purposes are available instream; and (b) Reclamation will not object to Paramount's use of such flows.

F. *Wolfsen*

The protest filed by Wolfsen Land & Cattle Company, Inc. (Wolfsen) is based on three remaining protest assertions. The claim that Reclamation lacks sufficient water to meet contractual obligations to the Exchange Contractors was dismissed November 19, 2012, contingent on inclusion of an additional point of diversion at the Mowry pumps and recognition of specific commitments made in the ROD. (See discussion B and C above.) To facilitate review and analysis, the remaining protest assertions are separately listed and addressed below.

*Protest Assertion 1:*

*Reclamation does not own the water it intends to release for fish flows. Water right License 1986 was issued for irrigation, stockwatering and domestic purposes on designated agricultural lands. License 1986 was conveyed to Reclamation from its original owner solely for agricultural uses. There was no fish preservation enumerated in this right. Permits 11885, 11886 and 11887 have a similar issue.*

Wolfsen does not provide any support for a right to revert to the original owners if the purpose of use changed. Henry Miller (Miller-Lux) assigned License 1986 to Reclamation October 30, 1939. (Assignment by Miller & Lux Incorporated to the United States of America of Application 23 and Permit No. 273.) The conveyance documents do not contain language to suggest that the transfer was limited to, or contingent on, the water being applied for irrigation only. The assignment document provides that "Vendors [Miller & Lux, Inc. and Gravelly Ford Canal Co] agreed to convey to the United States certain rights to store, divert and use waters of the San Joaquin River... as set forth in Article 9, subdivision (a) of said contract [contract dated July 27, 1939]...." That contract provided that Vendors "assign, transfer and

set over to the United States its right, title and interest in and to all fillings...and appropriations... necessary to enable the United States to use and enjoy the rights to be conveyed...." (Assignment, p. 2.) Under Article 9, subdivision (a) of the Purchase Contract, Vendors agree "to grant, sell, convey and confirm unto the United States, its successors and assigns forever, the right as against them, and each of them, their successors and assigns, and as against the lands, canals and other properties of Vendors, the right to divert, store and use, by means of Friant Dam, diversion works, or other works, perpetually, each and every year, from and after the delivery of the deed and deed of reconveyance and the payment of the purchase price as hereinafter provided, all of the waters of the San Joaquin River...."

Wolfsen asserts that under the Water Sales Contract, water title and ownership is retained by Miller-Lux and its successor owners of the land (namely Wolfsen) if Reclamation ever seeks to use the water for any non-irrigation purpose. Wolfsen's only support for this argument is the water right license itself, which lists irrigation as the purpose of use. All permits and licenses specify the purpose of use, but that specification does not freeze for all time the water right holders' options to change or add purposes of use. Reclamation is the sole owner of License 1986, and may use its right in a manner that it chooses so long as it does not injure other legal users of water and/or violate the public trust. Reclamation has complied with the statutory requirements for requesting modification of its water rights.

Approval of the SJRRP petitions under the permits and license will be conditioned to protect existing contractual rights arising from the Miller/Lux contract. The water right condition is listed below:

To the extent that Reclamation shall divert water from San Joaquin River at Friant Dam under rights initiated other than pursuant to Applications 23, 234, 1465 and 5638, the amount of water diverted under rights issued pursuant to said applications shall be reduced by a like amount.

Wolfsen asserts that Permits 11885, 11886 and 11887 have a similar issue to the issue raised for License 1986. As discussed above, the applicable Miller-Lux conveyance documents contain no right of reverter or other indication that the rights were not transferred in full. Moreover, Wolfsen did not provide any substantiation that these permits were held by Miller-Lux or subject to contract with Miller-Lux. Permits 11885 and 11886 were originally held by Madera Irrigation District, and subsequently assigned to Reclamation. Permit 11887 is a State filed Application originally held by the State Water Board's predecessor agency.<sup>4</sup> Permit 11887 explicitly provides that the right is "subject to the right to change the point of diversion, place of use, and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California...." (Permit 11887 at 11(a).) This permit language expressly articulates the law applicable to all appropriate water rights, including License 1986, and Permits 11885 and 11886.

Accordingly, this protest issue is canceled pursuant to Water Code section 1703.6, subdivision (d).

*Protest Assertion 2:*

*Use of the Eastside Flood Control Bypass (Bypass) will constitute an unlawful trespass upon Wolfsen's property without prior just compensation because he sold only a limited winter flood water easement to the Flood District to construct the Bypass for flood waters.*

The access issue has been temporarily addressed. Wolfsen provided a copy of the June 28, 2012 Agreement for Access and to Convey Flows on Wolfsen lands (Reclamation Contract Number 12-LC-20-0177) and the May 28, 2013 letter extending the access agreement until June 28, 2014. Protestant's remaining claims for just compensation are similar to those made through litigation in the case *Wolfsen Land & Cattle Company v. United States of America*, Case No. 10-580L, United States Court of Federal Claims. The State Water Board does not adjudicate disputes over the right to occupy or use land as part of a proposed water project. (Cal. Code Regs., tit. 23, § 777.) Instead, those issues may be resolved through negotiations or litigation among those who claim rights to the land in question. A dispute

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<sup>4</sup> The State of California, Department of Finance.

concerning the right to occupy land is not a reason to deny a water right change petition. (*Id.*)

California Code of Regulations, title 23, section 749 provides that a protest issue may be rejected if it fails to raise a valid ground for protest. This protest issue does not raise a valid ground for protest and is therefore rejected.

*Protest Assertion 3:*

*The SJRRP flows in the Bypass will cause flooding, seepage, erosion, loss of access to farmland, and related physical damage to Wolfsen's property along the Bypass. Also, Wolfsen will not be able to travel from one side of the ranch to the other side through the Bypass, as was always done in the past dry spells, since there will be water in the Bypass.*

The EIS/EIR proposed a number of mitigation measures that are responsive to the Wolfsen concerns regarding flooding and seepage. After the final EIS/R was issued, the Division's August 1, 2012 letter afforded Wolfsen an opportunity to inform the Division whether there was any additional information that it wanted the Division to consider. Wolfsen did not submit any additional information. Thus, there does not appear to be any material dispute as to facts regarding the evaluation of project impacts and related mitigation measures in the final EIS/R.

Moreover, there has been no evidence developed during the temporary operation period that the water right conditions associated with both the temporary annual orders and the long-term change petitions do not adequately protect legal users of water. Based on operating experience, the seepage control measures have resulted in Reclamation's limiting of SJRRP flows to only minimal flows downstream of Mendota Pool to date. Although flows downstream of Mendota Pool are expected to increase in the future, such increase is contingent on removal or reconstruction of instream flow impediments or implementation of other seepage control measures.

This Order continues the existing protective mitigation measures which were included in the previous temporary Orders of the State Water Board. Specifically, the Order requires Reclamation to: (a) obtain any necessary access agreements, (b) continue to meet contractual obligations, (c) implement the Seepage Monitoring and Management Plan, (d) limit flows to then-current channel capacities, (e) reduce flows as needed consistent with the Management Plan, Appendix D of the DPEIS/R, (f) require that Reclamation not exceed the maximum non-flood releases shown in Table 13-63, (g) implement the Mendota Pool Water Quality Response Plan, and (h) finalize the Recirculation Plan.

Wolsfen is seeking financial compensation from Reclamation on the assumption that damages will occur if water flows down the Bypass on a year-round basis. These claims for just compensation are similar to those made through litigation in the case *Wolsfen Land & Cattle Company v. United States of America*, Case No. 10-580L, United States Court of Federal Claims. The merits of these claims will be addressed through that litigation.

Now, therefore, the Wolfsen protest is disposed of and no further action is required.

#### **4. CRITERIA FOR APPROVING THE PROPOSED CHANGE**

Water Code section 1707 authorizes the use of the change petition provisions of Water Code section 1700 et seq. for a change for the purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water if the proposed change meets the following requirements:

- a. The proposed change will not increase the amount of water Reclamation is entitled to use.
- b. The proposed change will not unreasonably affect any legal user of water.

- c. Otherwise meets the requirements of Division 2 of the Water Code.

Similarly, the State Water Board must find that the change will not operate to the injury of any legal user of the water involved. (Wat. Code, § 1702.)

#### **A. No Injury to Any Legal User of Water**

In the petitions, Reclamation addressed whether there would be any legal injury to downstream prior right and riparian right holders, San Joaquin River Holding Contractors (Holding Contractors), Exchange Contractors and other Water Rights Settlement Contractors, Friant Division CVP Water Service Contractors, CVP and SWP Contractors including South-of-Delta Water Service Contractors, Eastside Division Water Service Contractors or Water Users on Eastside Tributaries, in-Delta Diverters and Contra Costa Water District and water for fish hatchery purposes. Sections 10004(g) and 10004(j) of the Settlement Act specifically provide that, except as provided in the Settlement Act, nothing in the act shall modify the rights and obligations of the parties to any contracts. In its supplement to its petitions (page 8), Reclamation indicates that the proposed change would not affect or expand existing obligations or increase demand for CVP water supplies.

##### **1. Holding Contractors**

The releases from Millerton Reservoir would be in addition to that quantity of releases otherwise required under the San Joaquin River Holding Contracts to maintain the 5 cfs requirement at Gravelly Ford and would not interfere with the ability of landowners from Friant Dam to Gravelly Ford to exercise existing riparian or overlying rights. Reclamation estimates that up to 230 cfs of flow is needed to maintain the 5 cfs flow requirement at Gravelly Ford. (Table 2-4 of DPEIS/R.)

##### **2. Exchange Contractors**

The Exchange Contractors receive water from the CVP by virtue of their contracts with Reclamation. Pursuant to these agreements, the Exchange Contractors forego diversion under their senior water rights on the San Joaquin River in exchange for delivery of an equal amount and supply from the CVP from sources other than the San Joaquin River. The Exchange Contractors members include landowners and water users along the San Joaquin River.

Reclamation and the Exchange Contractors entered into the Second Amended Contract for Exchange of Waters, Contract Ilr-1144, dated February 14, 1968. Under the terms and conditions of that contract, Reclamation is obligated to supply the Exchange Contractors with water delivered through the Delta Mendota Canal (DMC) or by other means. Reclamation delivers water to the Exchange Contractors at the Mendota Pool via the DMC. Under the contract, Reclamation can fulfill its contract obligations by delivering water to Mendota Pool through the DMC or through the San Joaquin River, at its discretion.

In its petitions, Reclamation states that the proposed change would not affect water delivery quantities to contractors outside the Friant Division, including the Exchange Contractors and various water right and settlement adjustment contractors. Reclamation will ensure that sufficient Millerton Reservoir storage is maintained, and that available San Joaquin River channel capacity is not impeded by the presence of Interim or Restoration Flows, in order to make releases of available storage from Millerton Reservoir in lieu of deliveries from the DMC if such releases become necessary under the terms and conditions of the Exchange Contract and various water right and settlement adjustment contracts. Necessary deliveries from the DMC pursuant to the terms and conditions of the Exchange Contract and various water right and settlement adjustment contracts will be made. Reclamation will also coordinate its operations of Friant Dam with the San Luis Canal Company (SLCC) and the Central California Irrigation District (CCID). SLCC operates Sack Dam at the end of Reach 3 and delivers water to the Arroyo Canal. CCID operates and maintains Mendota Dam in Reach 2 and would release Interim and Restoration Flows from Mendota Dam.

In addition, Reclamation concurred with inclusion of a condition recognizing its contractual obligations.

### **3. Friant Division CVP Water Service Contractors**

The Friant Division CVP Water Service Contractors (Friant Division contractors) are signatories to the Settlement Act. As such, they have had opportunity to evaluate the impacts of the proposed changes and have agreed to accept the Interim Flow and Restoration Flow schedules. (See Settlement, ¶¶ 9-15, pp. 7:9-20:7.) Further, the signatories agreed to the Water Management Goal which is generally to be accomplished by redirecting, recapturing, reusing, exchanging or transferring the Interim and Restoration Flows and by establishing a Recovered Water Account to reduce or avoid impacts on Friant Division contractors who made water available for Interim or Restoration Flows. (See id., ¶ 16, pp. 20:8-22:21.)

### **4. Other CVP and SWP Contractors, Including South-of Delta Water Service Contractors**

Reclamation's water rights are currently conditioned to require release of water at Friant Dam to maintain 5 cfs at Gravelly Ford and provide flows in accordance with the Exchange Contract. To prevent injury, a condition will be included in the amended water rights to clarify that Reclamation must continue to maintain sufficient Millerton Lake storage and available San Joaquin River channel capacity in order to make releases of available storage from Millerton Lake as required under the terms and conditions of the San Joaquin River Exchange Contract, IIR-1144, as amended February 14, 1968. However, the condition will clarify that the releases are only required to the extent such releases would be made in the absence of the change.

Reclamation evaluated water supply impacts in a Water Operations Model, which was circulated as an Appendix to the 2010 EA/IS for this project and referenced in the petitions. Millerton Lake is operated as a single-year reservoir, with no annual carryover, and is fully exercised (i.e., full to minimum storage) in virtually all years. This operational scenario did not change when SJRRP flows were included into the model. (WY 2010 EA/IS, p. 4-93.) Only minimal variation in seasonal Millerton Lake water level fluctuations is expected, and fluctuations in reservoir levels would remain within historical operational scenarios. (WY 2010 EA/IS, p. 4-93.) Reclamation evaluated whether substantial changes in water supply would occur for five geographic subareas and concluded that the additional instream flows would result in less than significant impacts to water supply in each of the subareas. (WY 2010 EA/IS, pp. 4-93 to 4-150.)

### **5. Downstream Prior Right and Riparian Right Holders**

All water that is subject to the instream flow dedication would have remained in storage at Millerton Reservoir or would have been diverted into the Madera and Friant-Kern Canals for consumptive use in the Friant Diversion service area of the CVP. Water that would be present in the channel under the proposed change would be water diverted under existing permit and license terms and conditions but used for instream purposes instead of being diverted or rediverted at the Madera and Friant-Kern Canals for other beneficial use. Therefore, water would be dedicated to instream flow at Friant Dam without legal injury to downstream prior right and riparian water right holders.

Some of Reclamation's rights that are subject to this action include a provision that direct diversion is not authorized downstream of Friant Dam. The amended water rights will authorize direct diversion of water dedicated for instream purposes downstream of the dam. To ensure that diversions are not increased, the following condition is included in the amended water rights:

Direct diversion of flows originating downstream of Friant Dam is not authorized. Only water available at the Friant Dam point of diversion may be directly diverted downstream of the dam.

#### **B. No Increase in Entitlement**

In the petitions, Reclamation estimates that the total quantity of water proposed to be released or

bypassed at Friant Dam for subsequent downstream diversion is 623,000 af per year, measured at Gravelly Ford after Reach 1 losses, as shown in Table 2-4 of the DPEIS/R. The water subject to the petitions would normally be consumptively used by Friant Division contractors by means of deliveries through the Madera and Friant-Kern Canals or would remain in storage for other authorized purposes and uses. There would be no expansion of existing obligations, or any increases in demands, to provide CVP water.

### **C. No Unreasonable Effect on Fish, Wildlife, or other Instream Beneficial Uses**

In its petitions, Reclamation states that the proposed change would not significantly affect fisheries resources. (Petition Supplement, pp. 13-14.) The EIR/EIS indicates that the proposed change would augment streamflow and provide generally high-quality water. Any flow modifications would be in coordination with the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS), as applicable. Recapture of flows dedicated for instream purposes would occur only in compliance with regulatory requirements, including the USFWS and NMFS biological opinions or other requirements.

## **5. COMPLIANCE WITH CEQA**

Reclamation and the Department of Water Resources (DWR) have prepared and certified a joint Programmatic Environmental Impact Statement (EIS)/Environmental Impact Report (EIR) which covers the long-term implementation of the San Joaquin River Restoration Program, including interim and future restoration flows. Reclamation filed its Record of Decision (ROD) adopting the PEIS/R on September 28, 2012, and DWR filed its Notice of Determination on October 1, 2012. Additionally, Reclamation and DWR conducted environmental analysis under the National Environmental Policy Act (NEPA) and CEQA, respectively, for prior years' implementation of interim flows. These documents are a joint Environmental Analysis (EA)/Initial Study for the Water Year (WY) 2010 Interim Flows Project, and the resulting Finding of No Significant Impact (FONSI) and Mitigated Negative Declaration, finalized July 2010; Reclamation's EA and FONSI for the WY 2011 Interim Flows Project, finalized September 2010; and Reclamation's EA and FONSI for the WY 2012 Interim Flows Project, finalized September 2011. As a responsible agency under CEQA, the State Water Board has reviewed and considered these environmental documents in making a determination on the instant petitions.

The State Water Board action is limited to approval of the following aspects of the Settlement: release, conveyance, and recapture of Interim and Restoration flows; monitoring and management actions; and conservation measures. In its role as responsible agency, the State Water Board has included the applicable monitoring and management plans and water quality mitigation measures identified in the PEIS/R as conditions of this Order.

The PEIS/R identifies a series of potentially significant impacts on water resources and public trust uses within the State Water Board's jurisdiction. Attachment 1 is the State Water Board's Findings of Fact and Statement of Overriding Consideration for the SJRRP PEIS/R. Attachment 2 is the DWR Certification, Findings of Fact and Statement of Overriding Considerations for the SJRRP, PEIS/R. Attachment 3 is the State Water Board Mitigation Monitoring and Reporting Program.

The State Water Board will also issue a Notice of Determination within five days of the date of issuance of this Order.

**NOW, THEREFORE, IT IS ORDERED THAT** Reclamation's petitions for change and dedication of water for instream purposes pursuant to Water Code sections 1707 and 1700 are approved subject to the following conditions.

1. Direct diversion of flows originating downstream of Friant Dam is not authorized. Only water available at Friant Dam may be dedicated for preservation of fish and wildlife pursuant to Water Code section 1707 and subsequently utilized downstream of the dam at the authorized locations.
2. Any San Joaquin River Settlement Restoration Flows or Interim Flows that are recaptured and stored or routed through San Luis Reservoir shall be used consistent with the Settlement and Settlement Act. The water need not be delivered back to the Friant Division Contractors, but may be made available to others through transfers, exchanges and sales. Reclamation shall document that it has taken all practicable measures to provide contract water to the Friant Division Contractors, while complying with all other conditions of this water right.

One of these practicable measures shall include implementation of the February 2011 Draft Plan for the Recirculation, Recapture, Reuse, Exchange or Transfer of Interim and Restoration Flows, unless superseded by a final recirculation plan, which is anticipated by October 31, 2013. The Recirculation Plan may be revised and amended from time to time as the physical conditions in the river change due to implementation of the SJRRP. To the extent the Recirculation Plan or any revision thereto, includes components that are subject to state approval, such as additional exchanges or transfers, those components are subject to review, modification and approval by the State Water Board. The plan shall be timely implemented.

3. The SJRRP flows dedicated for the purpose of preservation and enhancement of fish and wildlife resources are in addition to that quantity of releases otherwise required to maintain the 5 cubic feet per second (cfs) requirement at Gravelly Ford and that would be sufficient to provide necessary flow in the river reach from Friant Dam to Gravelly Ford pursuant to the obligations of the Holding Contracts executed by Reclamation.
4. Reclamation shall dedicate water to instream beneficial uses to the extent possible in compliance with this Order and the terms and conditions of the Settlement and Settlement Act. Release volumes shall be in accordance with the water-year type allocation made using either the Restoration Flow schedules included in Exhibit B of the Settlement, or a more continuous hydrograph as listed below. (DPEIS/R, Figures 2-5 and 2-6) Release rates shall be in accordance with the schedule for release volumes of Interim and Restoration flows, also as listed below, subject to the additional releases called for in Paragraph 13 and Exhibit B of the Settlement, as described below (DPEIS/R, Table 2-4).

**Figure 2-6 from DPEIS/R**  
**Continuous Annual Restoration Flow in Thousand Acre-feet (TAF)**

Forecasted Water Year	Annual Flow	Continuous-Line Annual	Restoration Year Type
Inflow below Friant Dam (TAF)	Allocation (TAF) <sup>1</sup>	Flow Allocation (TAF)	
Less than 400	116.7	116.9	Critical-Low
Greater than 400 to 670	187.5	187.8	Critical-High
Greater than 670 to 930	300.8	272.3 to 330.3	Dry
Greater than 930 to 1,450	364.6	Greater than 330.3 to 400.3	Normal-Dry
Greater than 1,450 to 2,500	473.0	Greater than 400.3 to 574.4	Normal-Wet
Greater than 2,500	672.3	673.5	Wet

<sup>1</sup>Friant Dam releases includes water for riparian water right holders in Reach 1 under "holding contracts", and instream flow dedication water.

Figure 2-5 from DPEIS/R

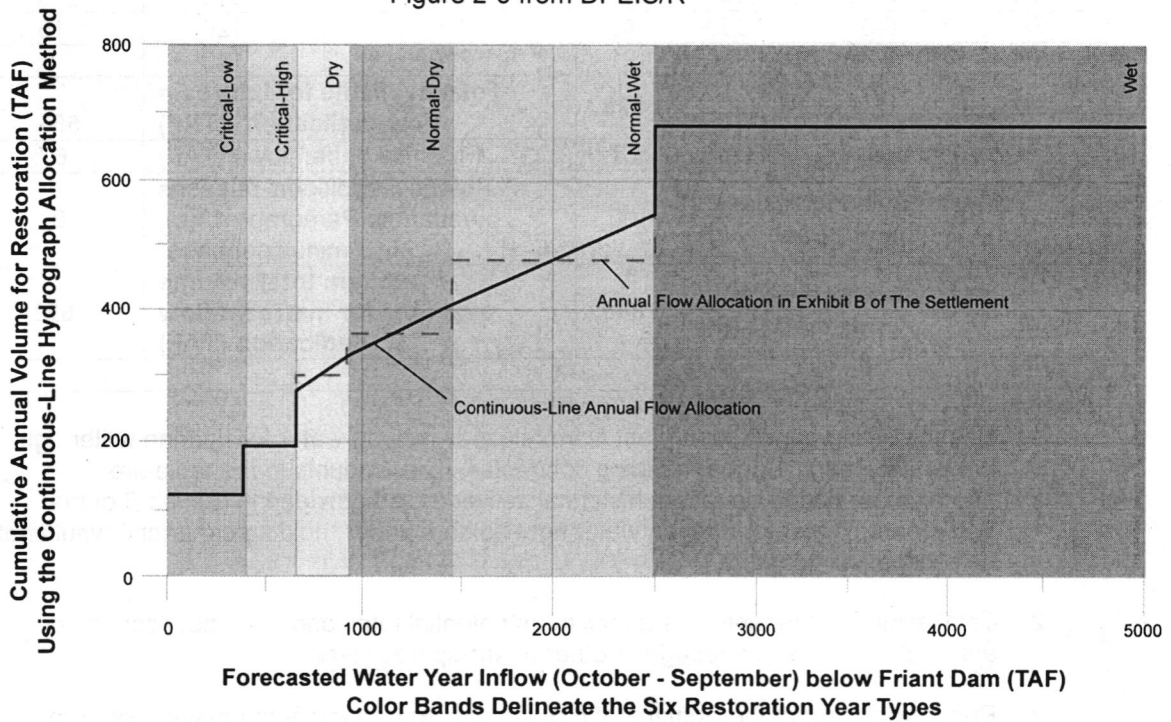




Table 2-4 from Draft PEIS/R.  
Estimated Maximum Water Available for Instream Flow Dedication  
Under Action Alternatives

Begin Date	End Date	Friant Dam Releases According to Settlement		Reach 1 Holding Contract Diversions Estimated as in Exhibit B1	Friant Dam Releases Eligible for Recapture <sup>1</sup>	
		(cfs)	(TAF)		(cfs)	(TAF)
10/1	10/31	350	22	160	190	12
11/1	11/10	700	14	130	570	11
11/11	12/31	350	35	120	230	23
1/1	2/28	350	41	100	250	29
3/1	3/15	500	14	130	370	10
3/16	3/31	1,500	48	130	1,370	43
4/1	4/15	2,500	74	150	2,350	70
4/16	4/30	4,000	119	150	3,850	115
5/1	6/30	2,000	242	190	1,810	219
7/1	8/31	350	43	230	120	15
9/1	9/30	350	21	210	140	8
<b>Total flows released (TAF)</b>			<b>673</b>	<b>Total available for instream flow dedication<sup>2</sup> (TAF)</b>		<b>556</b>
Potential buffer flows (TAF)			67	Potential buffer flows (TAF)		67
Potential additional releases pursuant to Paragraph 13(c)			100	Potential additional releases pursuant to Paragraph 13(c), <sub>3</sub> minus seepage <sub>3</sub>		0
<b>Maximum total volume released (TAF)</b>			<b>840</b>	<b>Maximum total volume available for instream flow dedication (TAF)</b>		<b>623</b>

Notes:

- 1 Under existing conditions, Friant Dam releases include water for riparian water right holders in Reach 1 under "holding contracts." The amounts in the table are approximate based on recent historical deliveries, as provided in Exhibit B of the Settlement. Water for riparian water right holders under "holding contracts" would not be eligible for recapture.
  - 2 Total eligible for recapture is a maximum potential total, and does not account for anticipated losses to seepage or other unanticipated losses.
  - 3 Paragraph 13(c) of the Settlement requires the acquisition of purchased water to overcome seepage losses not anticipated in Exhibit B. These Paragraph 13(c) releases are available for instream flow dedication starting from Friant Dam; however, because these potential releases would only be made to overcome seepage, this water would not be available for instream flow dedication downstream of Reach 5.
5. For purposes of tracking protected instream flows, Reclamation shall monitor river stage and flow conditions at the following locations during all periods when SJRRP flows are likely to be flowing at those locations:

- below Friant Dam (river mile 267);
- at Gravelly Ford (river mile 228);
- below Chowchilla Bifurcation Structure (river mile 216);
- below Sack Dam (river mile 182);
- at the head of Reach 4B1 (river mile 168); and
- above the Merced River confluence (river mile 118).

Monitoring shall be conducted on a daily basis, and Reclamation shall make the information from such monitoring readily available to the public by posting it on a daily basis on a publicly available website whenever the flows at Friant Dam are modified, and daily for a period of three days after any modification, and on a weekly basis under all other circumstances. River stage and flow conditions shall also similarly be monitored at the Vernalis gaging station, which is operated by the U.S. Geological Survey and DWR, with provisional monitoring data reported on the California Data Exchange Center website at [cdec.water.ca.gov](http://cdec.water.ca.gov) on a daily basis. Flow conditions shall also similarly be monitored by Reclamation at the Jones Pumping Plant and the Clifton Court Forebay in coordination with DWR, with provisional monitoring data reported on a daily basis on Reclamation's website.

Reclamation shall, within 5 working days of determining that a station is non-working: (1) report the non-working flow monitoring station to the Deputy Director for Water Rights; and (2) submit to the Deputy Director for Water Rights a plan for timely restoration of the monitoring station. All stations shall be calibrated and report flow data in accordance with standards established by the U.S. Geological Survey.

After the SJRRP flows have been fully implemented and monitored for five years from date of this amended right incorporating approval of the SJRRP Petitions, this condition may be modified by the Deputy Director for Water Rights, upon written request by Reclamation showing that any requested modifications to the monitoring locations, procedures, or reporting are reasonable, prudent and provide adequate data for the Physical Monitoring and Management Plan (DPEIS/R, Appendix D.) Unless the Deputy Director for Water Rights objects in writing to the request within 30 days of notification, the request is approved.

6. The SJRRP instream flow dedication is conditioned upon implementation of the following elements of the Physical Monitoring and Management Plan (Management Plan): (a) the Flow Monitoring and Management Component Plan, (b) the Seepage Monitoring and Management Component Plan (including the Seepage Management Plan Attachment), (c) the Channel Capacity Monitoring and Management Component Plan, and (d) the Native Vegetation Monitoring and Management Component Plan. (DPEIS/R, Appendix D.) Reclamation is also required to implement the following monitoring programs from the Management Plan for the SJRRP instream flow dedication: flow monitoring, levee condition monitoring, groundwater level monitoring, aerial and topographic surveys, vegetation surveys, and sediment mobilization monitoring. (Id.) SJRRP flows shall only be released in a manner consistent with the Management Plan.

Although already incorporated in the Management Plan, it is emphasized herein that Reclamation shall establish groundwater elevation thresholds to determine when impacts to agricultural lands or levee stability are imminent. The groundwater elevation thresholds and action thresholds shall be reviewed by Reclamation annually for: (a) at least five years from approval of this amended permit incorporating approval of the SJRRP petitions, and (b) a minimum of two years after implementation of full SJRRP flows, defined as the maximum flow volume and rate as set forth in Exhibit B of the

Settlement, to determine whether any updates or revisions are required based on problems reported from the seepage hotline or identified by the monitoring well network.

Reclamation shall initially publish any revisions or updates to the Management Plan on the SJRRP website for public review and comment and shall also provide this information to the Division. Reclamation shall consider any comments submitted within 20 days of initial publication and shall draft written responses within 45 days of initial publication, which shall include additional changes to the Management Plan or changes to the initially published revisions or updates. Reclamation shall publish comments, responses, and the revised Management Plan on the SJRRP website within 45 days of the initial publication and shall also submit at that time the revised Management Plan, along with the comments and responses, to the Deputy Director for Water Rights for review, modification and approval. Unless the Deputy Director for Water Rights objects in writing within 30 days of the submittal, the revised Management Plan is approved.

7. Reclamation shall implement the Seepage Monitoring and Management Plan in Appendix D of the WY 2010 EA/IS, as updated in Appendix G to the WY 2012 DEA.

As part of implementing the Seepage Monitoring Plan, Reclamation shall publish the then-current well locations, monitoring/buffer groundwater thresholds, and proposed process for development of and updates to action thresholds on the SJRRP website by January 10, 2014 for public review and comment and shall also provide this information to the Division. Reclamation shall consider any comments submitted by January 30, 2014 and shall draft written responses, which may include revisions to the thresholds, by March 1, 2014. Comments, responses, and then-current thresholds shall be published on the SJRRP website by March 1, 2014, and also provided to the Deputy Director for Water Rights for review, modification and approval. Any future revisions to action thresholds shall follow the same process.

Recognizing that many factors contribute to groundwater elevations, Reclamation shall manage Interim Flows to avoid exceeding an action threshold to the extent possible. In addition, and prior to January 10, 2014, Reclamation shall publish on the SJRRP website the location of all new monitoring wells installed in 2013 and its plans for installation for additional monitoring wells in 2014, including proposed well locations and estimated timelines for installation. Plans for installation of new monitoring wells shall include surveying well locations.

8. Reclamation shall issue a notification on the flow monitoring page of the SJRRP website, with a short description of status and decision made, within 5 working days of the following:
  - a. A seepage hotline call is reported.
  - b. A monitoring well crosses a threshold.
  - c. An operational change or constraint arises from the daily coordination call; or
  - d. A flow change is made.
9. Seepage will be monitored for at least five years from implementation of full SJRRP flows, defined as the maximum flow volume and rate as set forth in Exhibit B of the Settlement, subject to discontinuation as provided for in this condition, and Reclamation shall submit an annual report with its electronic report of water diversion and use covering the previous water year describing: (a) the stream reach where any modifications to SJRRP flows were made to address seepage issues, (b) the flow modification, and (c) whether construction measures or other actions have been taken, or will be taken (and the time schedule for implementation) to address the problem. If the fourth and fifth annual reports indicate that no monitoring wells have crossed the identified threshold during the reporting period, and the water year classification was normal or better during this time period, the monitoring program may be discontinued.

If the fourth or fifth annual report indicates that one or more monitoring wells has crossed the threshold during the reporting period, seepage management techniques will be implemented to correct the identified problem and monitoring shall continue until corrective action is completed and two consecutive reports during water years classified as normal or better indicate that no wells have crossed the threshold during the reporting period.

If the water year was dry, very dry or critical, monitoring shall be continued past the fifth year until two consecutive reports during normal or better water years indicate that no monitoring wells have crossed the identified threshold during the reporting period.

Reclamation shall indicate in the appropriate electronic annual report of water diversion and use the discontinuance of seepage monitoring authorized consistent with this condition.

10. SJRRP flows shall not exceed the channel capacities identified in DEIS/R Table 11-1 – Design Capacities of San Joaquin River and Bypasses within the Restoration Area and in the USACE 2003 San Joaquin River Mainstem, California Reconnaissance Report Sacramento District, but are subject to periodic update. (Final PEIS/R, p. 4-216, Table 11-1.) Reclamation shall also operate in accordance with the Seepage Monitoring and Management Plan. In the event of a conflict between these two requirements, the most restrictive channel flow shall prevail.
11. The Channel Capacity Advisory Group established and convened by Reclamation provides independent review of then-existing San Joaquin River estimated channel capacities that are determined and updated by Reclamation. (DPEIS/R, p. 2-24 to 2-25, and p. 11-43) Reclamation shall timely submit to the Deputy Director for Water Rights any revised channel capacity final informational report prepared in accordance with the process described on page 2-25 of the DPEIS/R. Thereafter, the updated channel capacity information may be utilized in lieu of previous channel capacity information.
12. In the event that SJRRP flows create seepage conditions, Reclamation shall reduce or redirect SJRRP flows to the last known flow volume that did not result in seepage conditions until Reclamation determines that increasing flows would not create seepage conditions (i.e., seepage is caused by an activity not related to the SJRRP flows). Recognizing that many factors contribute to groundwater elevations, Reclamation shall manage SJRRP flows to avoid exceeding a seepage action threshold to the extent possible.
13. Reclamation shall coordinate its operations with the Central California Irrigation District (CCID) and the San Luis Canal Company (SLCC). When SJRRP flows are or are anticipated to be flowing into Mendota Pool, Reclamation shall communicate with CCID, as the owner/operator of Mendota Dam, at least once daily via telephone, email, or other written communication. This daily communication shall identify, for the following 24 hours: (1) how much water is expected as inflow into the Mendota Pool for the purposes of the SJRRP flows; (2) how much water is to be exchanged to satisfy the Exchange Contract at Mendota Pool; and (3) how much water is to be released below Mendota Dam for the SJRRP flows. Reclamation shall communicate with SLCC, as the owner/operator of Sack Dam, at least once daily via telephone, email, or other written communication when SJRRP flows are being released from Mendota Dam. This daily communication shall identify, for the following 24 hours: (1) how much water is expected as inflow into Reach 3 below Mendota Pool for the purposes of the SJRRP flows; (2) how much water is to be exchanged to satisfy water delivery contracts at the Arroyo Canal; and (3) how much water is to be released below Sack Dam for the SJRRP flows.

Reclamation shall also notify facility owners annually that flows dedicated for preservation and enhancement of fish and wildlife resources pursuant to Water Code section 1707 are protected under the California Water Code and shall not be diverted or stored unless otherwise authorized by Reclamation, subject to the conditions of Reclamation's water rights.

14. The authorization to release and to dedicate SJRRP flows for instream use at Friant Dam shall not be construed as authorizing any act that results in damage that could result in imminent failure to: (a) private levees located along the San Joaquin River, (b) facilities, including levees and related structures, which are part of the San Joaquin River Flood Control Project, (c) Mendota Dam, (d) bifurcation structure at Chowchilla Bypass, (e) Sand Slough control structure, or (f) headworks of Mariposa Bypass. Reclamation shall be responsible for operating the SJRRP in a way that does not result in such damage.
15. Release and dedication of SJRRP flows for instream use at Friant Dam shall be managed to avoid interference with operations of the Lower San Joaquin River Flood Control Project.
16. Until the features of the SJRRP program are fully implemented, Reclamation shall annually consult with the Central Valley Flood Protection Board, Lower San Joaquin Levee District, DWR, or any other appropriate agency to ensure that the proposed flows will not compromise the flood safety features of the San Joaquin River and Eastside and Mariposa Bypasses. A finding by an agency with regulatory oversight on flood control that the full SJRRP flows will not compromise the flood safety features may substitute for annual consultation. Reclamation shall provide information on the consultation to the Deputy Director for Water Rights with the electronic annual report of water diversion and use, until compliance is achieved and shall document achievement of compliance in the appropriate electronic annual report of water diversion and use.
17. Approval of the SJRRP petitions shall not modify or amend the rights and obligations of the parties to: (a) the San Joaquin River Exchange Contract, Ilr-1144, as amended February 14, 1968, and (b) contracts executed as of the date of this amended permit incorporating approval of the SJRRP petitions, between the United States and various contracting entities providing for adjustment and settlement of certain claimed water rights in and to the use of the San Joaquin River to satisfy obligations of the United States under Schedule 1 and Schedule 2, respectively, of the Contract for Purchase of Miller and Lux Water Rights (Contract Ilr-1145, dated July 27, 1939). Nothing herein changes Reclamation's obligations with respect to the Exchange Contractors or with respect to obligations under Schedule 2 of Contract Ilr-1145.
18. Pumping and conveyance of SJRRP flows under Permits 11885, 11886 and 11887 and License 1986 by or through CVP and SWP facilities: (1) shall be consistent with all applicable provisions of law (including the Agreement of November 24, 1986, between the United States of America and the Department of Water Resources of the State of California for the coordinated operation of the CVP and the SWP as authorized by Congress in section 2(d) of the Act of August 26, 1937 (50 Stat. 850, 100 Stat. 3051)), or any successor agreement, and (2) is limited to pumping and conveyance that is available at the C.W. Jones Pumping Plant, at the Harvey O. Banks Pumping Plant, in the Delta-Mendota Canal or in the California Aqueduct, after satisfying the Secretary's obligation to make CVP water (other than the SJRRP Flows) and water acquired through the transfer agreements available to existing south-of-Delta CVP contractors.
19. Pumping of SJRRP flows at the Jones Pumping Plant and the Banks Pumping Plant is subject to compliance by the operators with the objectives currently required of Reclamation or DWR set forth in Tables 1, 2, and 3 on pages 181 to 187 of State Water Board Revised Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at those plants, including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by Reclamation and DWR. Pumping of SJRRP flows at the Jones Pumping Plant and the Banks Pumping Plant is also subject to compliance by the operators with all applicable biological opinions and any court orders applicable to these operations.
20. Reclamation shall include the following information in its electronic annual report of water diversion and use to the State Water Board: documentation for each individual water right of

(a) monthly quantities stored in Millerton Reservoir (for water rights authorizing storage), (b) monthly direct diversion quantities (for water rights authorizing direct diversion), (c) quantities bypassed or released and dedicated for instream use at Friant Dam pursuant to Water Code section 1707, and (d) separate information on quantities of flow dedicated pursuant to Water Code section 1707 diverted at each authorized location downstream, including Clifton Court Forebay and the Jones Pumping Plant.

Reclamation shall also submit documentation of its compliance with the conditions established by the State Water Board for the SJRRP. For those mitigation measures with sunset clauses, Reclamation shall note on its report when it is the final year of reporting on the measure, and need not report on compliance with the mitigation measure in subsequent years.

21. Reclamation shall implement the Mendota Pool Water Quality Plan dated February 1, 2011 (2011 Plan) until such time as the Deputy Director for Water Rights determines that the 2011 Plan is no longer needed (for example, after the Mendota Pool Bypass called for in Paragraph 11(a)(1) of the Settlement is constructed and operational). Reclamation shall submit any changes to the 2011 Plan in writing to the Deputy Director for Water Rights for review, modification and approval. Reclamation shall also submit any recommendation for elimination of the 2011 plan in writing to the Deputy Director for Water Rights for approval. Unless the Deputy Director for Water Rights objects in writing to a requested change or recommended elimination within 30 days of notification, the request is approved.
22. Reclamation shall monitor temperature in Millerton Reservoir as needed for the purpose of determining the availability of cold water for fishery purposes. Consistent with the Settlement and Settlement Act, Reclamation shall coordinate its SJRRP releases of the available cold-water pool made at Friant Dam for instream flow dedication with USFWS, NMFS, DFW and DWR to maximize benefits to fishery resources. Consistent with the Settlement and Settlement Act, Reclamation shall also coordinate the ramping of SJRRP releases made at Friant Dam for instream flow dedication with USFWS, NMFS, DFW and DWR to protect fishery resources.
23. Consistent with the Settlement and Settlement Act, Reclamation shall coordinate any flow modifications with the USFWS and NMFS, as applicable. Recapture of water dedicated for instream flow shall be in compliance with the USFWS and NMFS biological opinions.
24. Reclamation shall implement the Conservation Measures for Biological Resources that May Be Affected by Settlement Actions as described in Table 2-7 (p. 4-135 through p. 4-159) of the Final PEIS/R, in accordance with the schedule found therein, only for those items identified as "project level". Reclamation shall document completion of the mitigation measures within its electronic report of water diversion and use filed with the Division of Water Rights. Reclamation shall inform the Division of Water Rights once specific mitigation measures have been completed, and eliminate those measures from future reporting.
25. Reclamation shall prepare and submit an Annual Work Plan consistent with section 6.2 of the ROD.
26. The State Water Board's authorization for releases and dedication of SJRRP flows at Friant Dam and the conditions specified thereof, including authorized releases for dedication of flows at Friant Dam and levels and timing of flows in reaches of the San Joaquin River and Bypass System, are provided solely for the purpose of implementing the Settlement and Settlement Act. The State Water Board has not imposed any water quality flow standards on the upper mainstem San Joaquin River in the stream reach covered by the SJRRP petitions; any future adoption of such standards would have to be accomplished in compliance with all applicable laws. Nothing in this order determines or predetermines whether or not the Board would find the SJRRP Flows sufficient to satisfy potential future water quality standards or any other instream beneficial use requirement.

27. Nothing in this water right authorizes the use of, or access to, any lands or facilities not owned by Reclamation. Reclamation is solely responsible for obtaining any necessary access agreements.
28. Reclamation shall comply with the Steelhead Monitoring Plan in Appendix B to the Final PEIS/R.
29. Reclamation shall continue to implement the recreation outreach plan developed for the water year 2012 Interim Flows Project.
30. To the extent practicable, given operational constraints and other factors, Reclamation shall provide notice to Paramount of determination of the expected presence of flows in Reach 2B below the Chowchilla Bifurcation Structure in excess of flows needed to satisfy CVP purposes within 24 hours of determining that such flows are: (a) present at Friant Dam, and (b) no longer present at Friant Dam. Flows at Friant Dam are subject to conveyance and other losses prior to entering Reach 2B. For description and location of Reach 2B, see Fig. 1-2 of DPEIS/R; Fig. ES-2 and p. 17 of DPEIS/R Executive Summary.

CVP purposes shall include, but are not limited to, uses (including instream flow dedication pursuant to the Settlement and State Water Board order) authorized by License 1986, Permit 11885, Permit 11886, and Permit 11887 and by any licenses issued pursuant to these Permits, certain contracts known as Holding Contracts and the maintenance of a 5 cubic feet per second flow requirement at Gravelly Ford; and the San Joaquin River Exchange Contract, Ilr-1144, as amended February 14, 1968.

Reclamation shall not object to the diversion of flows from the San Joaquin River for reasonable use at the New Columbia Ranch, located on the east side of Reach 2B of the San Joaquin River and just upstream of the Mendota Pool, to the extent that there are flows present in Reach 2B below the Chowchilla Bifurcation Structure in excess of flows needed to satisfy CVP purposes, provided such reasonable diversion and use are conducted pursuant to and to the extent of any valid water right. This condition is for notification purposes only, and shall not be used as the basis for determining the quantities available for diversion by Paramount. Diversions by others under valid basis of right and conveyance losses may affect water availability.

STATE WATER RESOURCES CONTROL BOARD



*Barbara Evoy, Deputy Director  
Division of Water Rights*

Dated: **OCT 21 2009**

Attachment 1: State Water Board Certification, Findings of Fact and Statement of Overriding Consideration for the SJRRP PEIS/R.

Attachment 2: DWR Certification, Findings of Fact and Statement of Overriding Considerations for the SJRRP, PEIS/R

Attachment 3: State Water Board Mitigation Monitoring and Reporting Program.