

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF LICENSE 1986 AND PERMITS 11885, 11886, AND 11887
OF THE U.S. BUREAU OF RECLAMATION**

**PETITIONS FOR TEMPORARY CHANGE INVOLVING THE
TEMPORARY TRANSFER OR EXCHANGE OF UP TO 56,758 ACRE-FEET OF WATER
FOR INSTREAM FLOW DEDICATION**

SOURCES: San Joaquin River

COUNTIES: Fresno, Merced, Kings, Tulare, and Kern

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1. OVERVIEW

On February 2, 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)¹ of dedicated instream flows (Restoration Flows) previously stored in Millerton Reservoir and/or taken under control at Friant Dam pursuant to direct diversion rights. If approved, Restoration Flows could 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 petitions include a request to modify Delta Inflow and Net Delta Outflow Index (NDOI) as currently defined by D-1641, consistent with the purpose of the transfer.

In 2013, to facilitate implementation of the San Joaquin River Restoration Program (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. (See Order Approving Change and Instream Flow Dedication, October 21, 2013 [hereinafter referred to as "2013 Order"].) The 2013 Order anticipated that recapture and recirculation of flows may occur in the future at PID and BCID facilities. The temporary change petitions before the Division now relate to the new points of rediversion not previously authorized in 2013. Approval of the petitions would provide a means to supply water to the Friant Division CVP contractors at times when there is limited or no capacity at the Jones Pumping Plant and Banks Pumping Plant (Delta Pumps) in the Delta.

The proposed transfer would assist Reclamation in meeting the two primary goals of the San Joaquin River Settlement Act (Public Law 111-11 Title X § 10001 et seq., 123 Stat 991.1349 (2009)) 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. The transfer

¹ 76,069 af was the petitioned amount which was reduced to 56,758 af per agreement with Reclamation and a reduced transfer period ending on February 28, 2018.

period for a temporary change per Water Code section 1725 is up to one year. However, Reclamation agreed to a reduced transfer period as explained in Section 6 below. The transfer period may begin seven (7) days after Friant Dam operations have ceased uncontrolled excess flows and flood control release operations, or April 1, 2017, whichever is later, and continue through February 28, 2018 which is the end of Reclamation's CVP contract year. 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).

2. CRITERIA FOR APPROVING THE TEMPORARY CHANGE

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 involve only 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.)

Pursuant to Water Code section 1707, a permittee or licensee may petition the board for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water. (Wat. Code § 1707, subd. (a)(1).) The petition may be submitted for any of the purposes described above and may, but is not required to, be submitted in combination with a petition to make any other change authorized pursuant to this part. (Wat. Code § 1707, subd. (a)(2).)

The board may approve the petition filed pursuant to [Water Code section 1707] subdivision (a), subject to any terms and conditions which, in the board's judgment, will best develop, conserve, and utilize, in the public interest, the water proposed to be used as part of the change, whether or not the proposed use involves a diversion of water, if the board determines that the proposed change meets all of the following requirements: (1) Will not increase the amount of water the person is entitled to use; (2) Will not unreasonably affect any legal user of water; and (3) Otherwise meets the requirements of this division. (Wat. Code, § 1707, subd. (b))

3. PROCEDURE

On February 13, 2017, the Division posted public notice of the Change Petitions on the Division's website and sent notice through the State Water Board's LYRIS e-mail notification system. In addition, on February 13, 2017, Reclamation noticed the Change Petitions via publication in the Fresno Bee newspaper and mailed the notice via first class mail to interested parties. The comment deadline was March 1, 2017. The San Joaquin Tributaries Authority (SJTA) submitted comments that are addressed below. Friant North Authority (FNA), Friant Water Authority (FWA), and South Valley Water Association (SVWA) all submitted comments in support of the transfer.

Reclamation's water rights subject to the Change Petitions include License 1986, and Permits 11885, 11886, and 11887, and are available online through the Division's eWRIMS electronic database. The present place of use of water diverted under Reclamation's license and permits is the entire consolidated CVP place of use shown on maps on file with the State Water Board. Under Reclamation's rights, water may be used for irrigation, domestic, municipal, and industrial

use, salinity control, water quality control, fish and wildlife enhancement, stockwatering, recreation, and incidental power. The transfer has been reviewed by Division staff to ensure that the transfer quantities and season are within the scope of the existing rights and that the source of transfer water is an authorized source under the water rights. The Change Petitions request the temporary addition of the points of rediversion below:

Intake facility for PID, Located N 2,004,071 ft and E 6,392,268 ft California Coordinate System, Zone 3, NAD 83, being within the SW ¼ of Section 15, T5S, R8E, M.D.B.&M.

Intake facility for BCID, Located N 2,083,018 ft and E 6,327,281 ft California Coordinate System, Zone 3, NAD83, being within the SE ¼ of Section 33, T2S, R6E, M.D.B.&M.

A total maximum rediversion rate of 40 cubic feet per second (cfs) is proposed for transfer of water at the PID facility. A total maximum rediversion rate of 65 cfs is proposed for transfer of water at the BCID facility.

4. THE CHANGE INVOLVES WATER THAT WOULD HAVE BEEN CONSUMPTIVELY USED OR STORED

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 through 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 or licensee in the absence of the proposed temporary change. (Wat. Code, § 1725; see also § 1726 [proposed change must be submitted to Board]; §1011 [conserved water may be transferred].) 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.”

Restoration Flows that are released from Millerton Reservoir (behind Friant Dam) in accordance with the terms and conditions of the 2013 Order approving the SJRRP’s dedication of Restoration Flows would have either remained in storage or have been directly diverted at Friant Dam for delivery and consumptive use by the Friant Division CVP contractors, or used in the CVP service area. Further, in the absence of this temporary change, the Restoration Flows, as authorized in the 2013 Order, would continue to remain under the dominion and control of Reclamation as currently authorized under the subject permits and license. Reclamation included Water Code section 1707 to its Change Petitions to make patently clear that the transfer operates in conjunction with and for the purpose of facilitating the dedication of instream flows. The current Change Petitions, by virtue of being filed under sections 1707 and 1725 function as a modification of the 2013 Order. The water subject to the Change Petitions is not water that would be available for use in the downstream water supply. Reclamation has indicated that all of the flows subject to the Change Petitions would be water that is released from storage in Millerton Reservoir, and a term is included in the Order that reflects this commitment.

In its comment letter, SJTA argues that the State Water Board may not consider the temporary change petition and the instream flow dedication together. “As the SJTA asserted in 2016, the Restoration Flows will not be consumptively used in the absence of the temporary change; rather, the flows will remain instream past the PID and BCID facilities for the further protection and enhancement of instream beneficial uses.” (SJTA Petition, p.3.)

SJTA's interpretation of the statute is needlessly constrained and inconsistent with public policies in favor of encouraging transfers and protection of instream beneficial uses. (See Wat. Code, §§ 109, 1243, 85023.) As the State Water Board explained in 2016, 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 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. 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.

5. THE CHANGE INVOLVES A TRANSFER OR EXCHANGE OF WATER OR WATER RIGHTS

SJTA argues that the procedure under Water Code section 1725 is not appropriate because the proposed change is not a water transfer but rather a different and more indirect way for Reclamation to satisfy its contractual obligations to CVP contractors. Although the transfer does not reduce water deliveries to CVP contractors, it expands public trust resources, and thus amounts to a transfer to the public. As such, Reclamation has included new users of the water as follows: 1) the public, through the protection and enhancement of instream beneficial uses held in the public trust, and 2) the California Department of Fish and Wildlife (CDFW), whose mission is to manage California's diverse fish, wildlife, and plant resources, and habitats upon which they depend, for their ecological values and for their use and enjoyment by the public.

The additional points of rediversion at PID and BCID will provide water for instream beneficial uses in the San Joaquin River downstream of the confluence with the Merced River and enable flows to be captured and recirculated to CVP contractors including times when there is limited or no available capacity at the Delta pumps. The instream flows would remain protected and removed from use in the downstream water supply. Regardless of whether the transfer is characterized as a transfer to instream use, or a transfer back to Reclamation from instream uses, this operation can be properly accommodated under Water Code sections 1725 and 1707.

6. NO INJURY TO OTHER LEGAL USERS OF THE WATER

Before approving a petition for temporary change, the State Water Board must find that the temporary change would not injure any legal user of the water during any potential hydrologic condition that the Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows. (Wat Code, § 1727, subd. (b)(1).) As explained above, in the absence of the Change Petitions, Reclamation would continue to retain dominion and control of all instream flows downstream of the PID and BCID facilities for consumptive use as currently authorized under the subject permits and license and the 2013 Order. The instream flows would remain protected and removed from use in the downstream water supply. Water released from storage is not available to downstream users. (See e.g. *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 570 [When the stored water is released for use, it is not part of the river's natural flow and rediversion of this water does not count toward the appropriator's current allocation of river water]; see *State Water Resources Control Bd.*

Cases (2006) 136 Cal.App.4th 674, 737–745 [a riparian or appropriator has no legally protected interest in other appropriators' stored water or in the continuation of releases of stored water].)

Existing Water Right Requirements

The 2013 Order includes a condition specifically stating that the approved change in no way modifies the obligations and rights under the San Joaquin River Exchange Contract and other contracts. The conditions of that Order remain in force and effect.

Delta Flow Requirements

SJTA argues that in low flow years, Reclamation has had difficulties meeting D-1641 requirements that puts a disproportionate burden on New Melones Reservoir to satisfy Reclamation's water quality requirements at Vernalis. The hydrologic conditions have changed significantly from 2016 to 2017, and it appears that Reclamation should not have any difficulty meeting its water quality and contractual obligations this year. Further, the net effect of the release of the Restoration Flows is an increase in flows (not a reduction) along the lower San Joaquin River and into the Delta. In the absence of any Restoration Flows, no Friant water would be potentially available to contribute to Delta obligations. Finally, although the transfer flows recaptured above Vernalis would be small, the conditions of the 2013 Order remain in force and effect, which include compliance with D-1641 as it might be modified subject to approval by the State Water Board.

Transfer Time Period and Amount

Some modifications to the requested transfer time period and maximum amount of the transfer are required due to the very wet hydrologic conditions this year, and the current status of uncontrolled excess flows and flood control release operations at Friant Dam, as well as uncertainty of Restoration Flow conditions in the next CVP contract year. Reclamation's permits and license do not include rights to divert uncontrolled excess flows or flood control releases, therefore Reclamation may only begin any transfer of Restoration Flows seven (7) days after uncontrolled excess flows and flood control release operations at Friant Dam cease. Furthermore, the transfer amount has been adjusted from the requested 76,069 af to a maximum of 56,758 af, based on Reclamation's reported limitations on Restoration Flow releases in the summertime past Sack Dam, and a reduction in the actual available transfer window from the date commencing with the execution of the Order through February 28, 2018 (end of Reclamation's CVP contract year).

7. NO UNREASONABLE EFFECT ON FISH, WILDLIFE, OR OTHER INSTREAM BENEFICIAL USES

Before approving a temporary change due to a transfer of water, the State Water Board must find that the proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) Reclamation provided CDFW and the Central Valley Regional Water Quality Control Board (Regional Board) with copies of the petitions in accordance with California Code of Regulations, title 23, section 794, subdivision (c). CDFW and the Regional Board did not provide any information regarding potential effects of the proposed changes on water quality, fish, wildlife, and other instream beneficial uses.

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 Biological Opinions (BOs)

issued by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) under the federal ESA.

8. WATER CODE SECTION 1707 FINDINGS

For the reasons already explained above, and further articulated in the 2013 Order, the proposed change meets all of the requirements under Water Code section 1707, subdivision (b).

9. PROPOSED TERM

The NDOI is a water balance equation used for implementation of certain D-1641 provisions. Net Delta outflow is determined using measured inflows of major rivers and streams, exports by the major water projects, and estimates of other water agencies' diversions, channel depletions and precipitation. Without the proposed term, Restoration Flows measured at Vernalis would be included as inflow but not subtracted as export, even though it is subsequently rediverted at BCID. This would incorrectly increase the calculated Delta outflow. This can be resolved by subtracting BCID flows from the inflow part of the D-1641 equation. Accordingly, the following term has been added to the Order to reflect the modification to the NDOI calculation for this transfer:

During the times that water is being rediverted at the BCID facility pursuant to this temporary transfer order, San Joaquin River flows used to inform NDOI conditions in D-1641 will be reduced by the quantity of water rediverted by the BCID facility pursuant to this temporary transfer order.

10. COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Reclamation filed the current Change Petitions under Water Code sections 1707 and 1725 et seq. Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of CEQA. (Pub. Resources Code, § 21000, et seq.) The State Water Board will issue a Notice of Exemption for this project.

The 2013 Order approved instream flow dedication for the SJRRP under Water Code section 1707. Terms and conditions addressing the availability, modification, and recapture of instream flows for implementation of the SJRRP are currently contained in the subject permits and license. The proposed action only involves the addition of two points of diversion at PID and BCID involving a transfer, to the ongoing implementation of the SJRRP pursuant to those permits and license.

Reclamation has prepared a Final Environmental Assessment (FEA), dated July, 2016, covering the recapture of Restoration Flows at PID and/or BCID from March 23, 2016 through March 22, 2017 (*One Year Recapture of San Joaquin River Restoration Flows at Patterson Irrigation District and/or Banta-Carbona Irrigation District*) and issued a Finding of No Significant Impact (FONSI) (Number 16-03-SJRRP) on July 29, 2016. The FEA incorporates the affected environment and the environmental analysis in the SJRRP Programmatic Environmental Impact Statement/Environmental Impact Report (PEIS/R) finalized in July 2012 and for which a corresponding Record of Decision was issued on September 28, 2012. The recapture of Restoration Flows at existing facilities on the lower San Joaquin River is included among actions analyzed at the program-level in the PEIS/R. The recirculation of recaptured water at existing facilities back to Friant Division contractors, using Central Valley Project, Department of Water Resources, and private facilities, was covered in the Recirculation of Recaptured Water Year 2013-

2017 SJRRP Flows Environmental Assessment (Recirculation EA) which, along with its corresponding Recirculation FONSI, is dated April, 2013. Reclamation is currently preparing the long-term Recapture and Recirculation of Restoration Flows EIS for the SJRRP. In July 2015, Reclamation published a Notice of Intent to prepare an EIS to identify a set of alternatives for the recapture and recirculation of Restoration Flows to long-term contractors of the Friant Division of the CVP.

Reclamation has determined that at this time none of the conditions underlying the FEA has changed, and therefore it intends to utilize the existing FEA and to issue a new FONSI for recapture commencing after March 22, 2017.

In addition to any obligation the State Water Board may have under CEQA, the Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The State Water Board may approve a temporary change due to a transfer of water only if it determines that the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) The independent evaluation of impacts to public trust resources was conducted concurrent with the Water Code section 1727 evaluation.

11. STATE WATER BOARD'S DELEGATION OF AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to the Deputy Director for Water Rights the authority to act on petitions for temporary change if the State Water Board does not hold a hearing. This Order is adopted pursuant to the delegation of authority in Section 4.4.2 of Resolution 2012-0029.

12. CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code sections 1707 and 1727, and, therefore, I find as follows:

I conclude that, based on the available evidence:

1. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.
2. The proposed temporary change will not increase the amount of water Reclamation is entitled to use.
3. The proposed temporary change will not injure any legal user of the water.
4. The proposed temporary change will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.
5. The proposed temporary change otherwise meets the requirements of Division 2 of the Water Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petitions filed for temporary change for the transfer and instream flow dedication of up to 56,758 af of water under License 1986 and Permits 11885, 11886, and 11887 are approved.

All existing terms and conditions of the water rights remain in effect, including the terms and conditions of the 2013 Order, except as temporarily amended by the following provisions:

1. The transfer shall not commence until seven (7) days after Friant Dam operations have ceased uncontrolled excess flows and flood control release operations at Friant Dam, or April 1, 2017, whichever is later, and shall immediately cease anytime such conditions commence. The transfer shall end on February 28, 2018.
2. The points of diversion under Reclamation's License 1986 and Permits 11885, 11886, and 11887 et al. are temporarily amended to add:
 - Intake Facility for PID, located N 2,004,071 ft and E 6,392,678 ft California Coordinate System, Zone 3, NAD 83, being within the SW $\frac{1}{4}$ of Section 15, T5S, R8E, M.D.B.&M.
 - Intake Facility for BCID, Located N 2,083,018 ft and E 6,327,281 ft California Coordinate System, Zone 3, NAD 83, being within the SE $\frac{1}{4}$ of Section 33, T2S, R6E, M.D.B.&M.
3. The maximum diversion rate at PID will be 40 cfs and the maximum diversion rate at BCID will be 65 cfs.
4. The totality of the transferred water will be limited to storage releases from Millerton Reservoir for the entire authorized transfer period.
5. Diversion of water is subject to compliance by Reclamation with all applicable BOs and court orders and any other conditions imposed by other regulatory agencies applicable to these operations.
6. During the times that water is being diverted at the BCID facility pursuant to this temporary transfer order, San Joaquin River flows used to inform NDOI conditions in D-1641 will be reduced by the quantity of water diverted at the BCID facility pursuant to this temporary transfer order.
7. Reclamation is responsible for providing the Deputy Director for Water Rights a monthly report describing the transfer of water pursuant to this Order until such time as the transfer has been completed. The report shall include the daily average rate of water diverted and daily volume of water diverted at BCID and PID facilities pursuant to this Order.

If the above required information is in the possession of BCID and PID and has not been provided to Reclamation in time for inclusion in a monthly or annual report, Reclamation shall provide the information to the Deputy Director for Water Rights within 30 days of receipt.

8. Pursuant to Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change Order, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board also may be exercised by imposing specific requirements over and above those contained in this Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.

9. This Order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531 to 1544). If a “take” will result from any act authorized under this temporary transfer, Reclamation shall obtain authorization for an incidental “take” permit prior to construction or operation. Reclamation shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.
10. The State Water Board reserves jurisdiction to supervise the transfer, exchange, and use of water under this Order, and to coordinate or modify terms and conditions for the protection of vested rights, fish, wildlife, instream beneficial uses, and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:
JOHN O’HAGAN, FOR

*Leslie F. Grober, Deputy Director
Division of Water Rights*

Dated: APR 03 2017