

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 12721, 12722, and 12723  
OF THE U.S. BUREAU OF RECLAMATION**

**PETITIONS FOR TEMPORARY CHANGE INVOLVING THE  
TEMPORARY TRANSFER OF UP TO 14,354 ACRE-FEET OF WATER  
FROM THE U.S. BUREAU OF RECLAMATION  
TO U.S. FISH AND WILDLIFE SERVICE - SUTTER NATIONAL WILDLIFE REFUGE**

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SOURCES: Sacramento River

COUNTY: Contra Costa, Glenn, Sacramento, Tehama, Shasta, and Sutter

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**BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:**

**1. SUBSTANCE OF PETITIONS**

On August 23, 2017, the U.S. Bureau of Reclamation (Reclamation) submitted three petitions for temporary change pursuant to 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) to transfer up to 14,354 acre-feet (af) of Central Valley Project (CVP) water from the Sacramento River to the United States Fish and Wildlife Service's (USFWS), Sutter National Wildlife Refuge (SNWR) near Red Bluff, CA. The transfer would begin upon approval of this order and extend through January 31, 2018, within the one year period allowed for temporary changes under Water Code section 1725.

**1.1 Description of the Transfer**

The CVP water would be diverted from the Sacramento River at the existing Princeton Pumping Plant, through the Reclamation District No. 1004 (RD 1004) conveyance system, thence Butte Creek and Butte Slough, thence the East Borrow Ditch (EBD) (Sutter Bypass) to the points of delivery. Reclamation has entered into a separate agreement with RD 1004 to use their conveyance facilities. Due to an estimated 17 percent combined conveyance losses in the RD 1004 system and in Butte Creek, up to 12,000 af of water would be available at the intake facilities for SNWR, shown in Table 5-11 and Section 5.5 of the Sutter National Wildlife Refuge Water Supply Conveyance Study, January 2015.

This transfer will be for the first year of a two-year pilot project to identify a viable conveyance route to meet SNWR's water scheduling requirements. Reclamation is obligated to deliver suitable quantities of water supply to 19 federal wildlife refuges, including Sutter National Wildlife Refuge, in accordance with the Central Valley Project Improvement Act. Reclamation has completed an alternatives analysis of various means to convey CVP water to SNWR and has identified the proposed conveyance as the preferred method, subject to confirmation of the suitability of the method for long term use. The Memorandum of Understanding (Memorandum) between Reclamation and the USFWS provides, among other things, that Reclamation shall convey CVP

water in quantities required to provide SNWR and other refuges with Level 2 CVP supplies as set forth in Exhibit B to that Memorandum. Reclamation has not historically been able to provide the refuges with their required Level 2 supplies per the Memorandum. USFWS has only been able to provide limited water supplies from the East and West Borrow Pits of the Sutter Bypass to the SNWR under its own Licenses 3149 and 4590.

## **2. BACKGROUND**

### **2.1 Substance of Reclamation's Permits 12721, 12722, and 12723**

Reclamation's water rights Permits 12721, 12722, and 12723 are the subject of the Change Petitions; these water right permits are available for review online through the Division's eWRIMS electronic database

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/ewrims/index.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/index.html)

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, which boundaries include the Sutter National Wildlife Refuge. Under Reclamation's rights, water may be used for irrigation, domestic, municipal and industrial, salinity control, fish and wildlife preservation and enhancement, stockwatering, incidental power, water quality control, and recreation purposes.

Reclamation has filed information with the Division requesting addition of the Princeton Pumping Plant as a point of rediversion under Permit Nos. 12721, 12722 and 12723, consistent with State Water Board Decision 990, Term 14. (Reclamation email correspondence dated 10-27-2017) Reclamation has also provided the State Water Board with the Sacramento River Settlement Contract between RD 1004 and Reclamation describing diversions at Princeton Pumping Plant. The proposed temporary changes would constitute a change from the existing activity on file for the Princeton Pumping Plant point of rediversion.

### **2.2 Proposed Temporary Changes**

With the petitions, Reclamation requests changes to Permits 12721, 12722, and 12723 to temporarily add two points of rediversion at the existing intakes on the East Borrow Ditch to SNWR to Reclamation's water rights. Reclamation also requested to include Water Code section 1707 to its Change Petitions in a reach of Butte Creek from the confluence of Dredger Cut and Butte Creek to Weir #2 on the East Borrow Ditch. The Change Petitions request the temporary addition of the points of rediversion below:

Intake facility at SNWR, Located N 2,165,336 ft and E 6,628,641 ft California Coordinate System, Zone 2, NAD 83, being within the NE  $\frac{1}{4}$  of Section 32, T15N, R2E, M.D.B.&M.

Intake facility at SNWR, Located N 2,146,337 ft and E 6,636,302 ft California Coordinate System, Zone 2, NAD 83, being within the NW  $\frac{1}{4}$  of Section 22, T14N, R2E, M.D.B.&M.

### **3. CRITERIA FOR APPROVING THE TEMPORARY CHANGES**

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 water right holder “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, 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 State Water Board may approve the petition “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).)

### **4. PUBLIC NOTICE AND COMMENTS ON THE PROPOSED TRANSFER**

On September 5, 2017, the Division posted public notice of the Change Petitions on the Division’s website and sent notice to the water right transfers distribution list through the State Water Board’s LYRIS e-mail notification system. In addition, on September 5, 2017, Reclamation noticed the Change Petitions via publication in the Sacramento Bee and Appeal Democrat newspapers and mailed the notice via first class mail to interested parties, including water right holders with the potential to be affected by the transfer. The comment deadline was October 5, 2017. Richard Morat and a group consisting of W.A. Yerxa Family Revocable Trust, Virginia Yerxa Revocable Living Trust, and Charles T. Yerxa Farms, Inc. submitted comments that are addressed below.

#### **4.1 Comments from Richard Morat**

Mr. Morat commented on the proposed transfer via email dated September 7, 2017. Mr. Morat protested the proposed transfer and expressed concerns about Sacramento River temperature effects on anadromous fish with the transfer, whether the requirements of Water Code section 1725 were being met (particularly the source of water being proposed for the transfer), and whether the 17 percent conveyance loss was realistic for the September through January timeframe.

#### **State Water Board Response**

The temporary transfer during the first year of the pilot project is proposed to occur from the approval date to the end of January 2018. The amount of flow due to the temporary transfer is small compared to the overall flow in the Sacramento River, especially given the previously wet winter. Per clarifying email correspondence from Reclamation on October 5, 2017, the water proposed for the transfer is from storage releases. Therefore, in light of the storage release and

relative size of the transfer, temperature changes in the Sacramento River due to the release and redirection of the additional water, if any, should be minimal and should not unreasonably affect fish, wildlife, or other instream beneficial uses. The pilot project would only minimally alter CVP operations or release patterns from CVP facilities to facilitate the release of an additional 14,354 af of water from storage, and would be implemented in accordance with the USFWS 2008 Biological Opinion (BO) and NMFS 2009 BO (and 2011 amendment). The BOs address general operations of the CVP (and State Water Project), with which the Level 2 water delivery will be consistent. Also, Reclamation's Environmental Analysis (EA) under the National Environmental Policy Act and its Finding of No Significant Impact (FONSI) for the pilot project found that the proposed action will not significantly affect listed or proposed threatened or endangered species and will not significantly impact natural resources.

Reclamation has indicated that the conveyance losses through RD 1004's system are estimated at 12 percent as identified in the Sutter National Wildlife Refuge Water Supply Conveyance Study and confirmed by discussion with the RD 1004 manager. The conveyance losses through the Butte Creek conveyance reach (from the confluence of Dredger Cut and Butte Creek, through Butte Creek, Butte Slough and East Borrow Ditch to the SNWR point of diversion) are currently estimated at 5 percent as identified in Appendix G of the Sutter National Wildlife Refuge Water Supply Conveyance Study, Technical Memorandum by RMC (Consulting Firm) titled "Evaluation of SNWR water conveyance losses in Butte Creek". These combined losses total 17 percent which results in approximately 12,000 af of water delivery to SNWR. Mr. Morat's submittal did not recommend or support alternative conveyance losses, or provide further grounds to find that the proposed losses are incorrect.

Mr. Morat's request to confirm that the transfer petition comports with the requirements of Water Code section 1725 are addressed in section 5 below.

Reclamation's response to comments and the transfer petition materials document that the transfer will not result in foreseeable negative temperature impacts to the Sacramento River, and that the estimate of conveyance losses is reasonable in light of available information.

#### **4.2 Comments from W.A. Yerxa Family Revocable Trust, Virginia Yerxa Revocable Living Trust, and Charles T. Yerxa Farms, Inc.**

Three letters dated September 13, 2015, were received on September 25, 2017 from Charles T. Yerxa Farms, Inc., Virginia Yerxa Revocable Living Trust, and W. A. Yerxa Revocable Trust (Yerxa et al.), respectively. Yerxa et al. expressed that the proposed transfer was acceptable given that it was a one-year project and that the past winter was a very wet season in Northern California. They also stated that they would be opposed to any transfer beyond the immediate term and were concerned about oversubscribing California's water sources. They stated that an ongoing transfer of the given amount of water would jeopardize many individual farms in their area [of the Sacramento Valley].

#### **State Water Board Response**

The proposed transfer is for up to a one-year period. Reclamation would be required to submit another transfer petition for the second year of the pilot project to the State Water Board for review and approval. The State Water Board would evaluate that temporary transfer at the time it is submitted for compliance with applicable Water Code sections, and would separately evaluate any application for long-term transfer, should one be filed. Please also see sections 5 and 6 below on the potential for injury to other legal users of water and the finding that the change involves water

that otherwise would have been consumptively used or stored.

## **5. REQUIRED FINDINGS OF FACT**

The State Water Board's analysis of the required findings under Water Code, section 1725 are below.

### **5.1 The Change Only Involves Water That Would Have Been Consumptively Used Or Stored, and Does Not Increase the Amount of Water Reclamation is Entitled to Use**

When reviewing a petition for temporary change, Water Code section 1725 provides that a permittee or licensee 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. 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." This serves to ensure that the change does not result in an increase in use of water, and addresses the potential for injury for other legal users of water by ensuring that the amount of water available for diversion downstream is not affected.

Reclamation has affirmed that, in the absence of this temporary change, the water subject to the Change Petitions would continue to remain under the dominion and control of Reclamation through storage as currently authorized under the subject permits and would not be available for use in the downstream water supply. The delivery of water previously stored from Shasta Reservoir is confirmed on page 14 of the SNWR Reclamation District No. 1004 Refuge Level 2 Water Conveyance Pilot Project Environmental Assessment (EA). Reclamation further provided information on the storage amount in Shasta Reservoir, indicating that the volume of the proposed transfer constitutes approximately 0.4% of the current storage. Condition 6 of this order requires Reclamation to submit a monthly report indicating the releases from storage for the purposes of this transfer, in order to monitor compliance with this requirement.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the water proposed for transfer pursuant to this Order would be stored in Shasta Reservoir in the absence of the proposed temporary change.

### **5.2. 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 store the water as currently authorized under the subject permits, and it would be unavailable for use. Furthermore, storage releases by Reclamation are legally protected from use until they reach the place of use, unless they are abandoned. A downstream diverter has no legally protected interest in another's storage releases. (*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].) Water released from storage for use downstream is not available to intervening downstream users. Therefore, it is unclear how any user could have a legally cognizable injury from this change.

The State Water Board received no comments alleging that the proposed transfer would injure other legal users of water.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(1) that the proposed temporary change will not injure any legal user of water.

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

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.) 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 raise concerns regarding potential effects of the proposed changes on water quality, fish, wildlife, and other instream beneficial uses.

Reclamation has stated that the transfer pilot study will occur from the approval date to the end of January 2018. Although the transfer will re-divert flow from the Sacramento River, the flow of transfer water is small in comparison to the overall flow of the Sacramento River, and the water would otherwise have been stored. Therefore, any water temperature fluctuations in the Sacramento River due to the transfer should be minimal.

The Princeton Pumping Plant, where the transfer water will be rediverted, is a screened facility to prevent adverse impacts to fisheries. In addition, the transfer will be subject to provisions of Reclamation's Permits 12721, 12722, and 12723, and applicable BOs. Also, as previously mentioned, Reclamation prepared and the Board has reviewed the EA and FONSI for the pilot project, both of which indicate that the proposed action will not significantly affect listed or proposed threatened or endangered species and will not significantly impact natural resources.

The transfer will provide additional water to the SNWR for habitat enhancement, including providing additional habitat for migrating waterfowl.

Thus, the proposed transfer will not unreasonably affect fish, wildlife or other instream beneficial uses.

## **6. WATER CODE SECTION 1707 PETITION**

Reclamation has indicated that the intent behind its 1707 petition was protection of transferred water from the point of diversion to the place of use at the SNWR. As explained to Reclamation on September 14, 2017, this stored water release is already unavailable for appropriation or use by others; therefore, such perceived legal protection is unnecessary. Reclamation's permits already include fish and wildlife enhancement as a purpose of use, so the addition is not necessary for the

use to which the U.S. Fish and Wildlife Service will put the water. Reclamation has not indicated that the Butte Creek ecosystem benefits from the addition of foreign water at this time and in these amounts, and that therefore an instream beneficial use is possible.

In light of the lack of clarity that the water would actually be used for instream beneficial purposes in Butte Creek, I find that the requested 1707 petition is not consistent with the Water Code requirements and decline to approve the proposed instream flow dedication.

## **7. 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.

## **8. 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.

## **9. 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 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.

## ORDER

**NOW, THEREFORE, IT IS ORDERED** that the petitions filed for temporary change for the transfer of up to 14,354 af of water under Permits 12721, 12722, and 12723 are approved under the below conditions, and the petitions for instream flow dedications are denied.

All existing terms and conditions of the water rights remain in effect, except as temporarily amended under the below conditions:

1. The transfer is limited to the period commencing on the date of the Order and continuing through January 31, 2018.
2. The points of diversion under Reclamation's Permits 12721, 12722, and 12723 are temporarily amended to add:
  - Intake facility at SNWR, Located N 2,165,336 ft. and E 6,628,641 ft. California Coordinate System, Zone 2, NAD 83, being within the NE ¼ of Section 32, T15N, R2E, M.D.B.&M.
  - Intake facility at SNWR, Located N 2,146,337 ft. and E 6,636,302 ft. California Coordinate System, Zone 2, NAD 83, being within the NW ¼ of Section 22, T14N, R2E, M.D.B.&M.
3. During the period of transfer, the petitioner shall comply with all applicable Biological Opinions including any court orders regarding such Biological Opinions.
4. The maximum diversion rate at Princeton Pumping Plant shall be 75 cubic feet per second (cfs) and the combined maximum diversion rate at the points of diversion at SNWR intake facilities shall be 75 cfs. Up to 12,000 af of water may be diverted at the SNWR intake facilities.
5. The totality of the transferred water is limited to storage releases from Shasta Reservoir for the entire authorized transfer period.
6. 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 and daily volume of water diverted at the Princeton Pumping Plant and diverted at SNWR intake facilities, and the daily average rate and daily storage volume released from Shasta Reservoir pursuant to this Order.

If the above required information is in the possession of SNWR and has not been provided to Reclamation in time for inclusion in a monthly report, Reclamation shall provide the information to the Deputy Director for Water Rights by March 30, 2018.
7. Pursuant to Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change Order, including method of 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.

8. This Order does not authorize any act which results in the taking of a candidate, 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.
9. 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:

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

Dated: OCT 30 2017