

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

DIVISION OF WATER RIGHTS

**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**

SOURCE: Sacramento River

COUNTY: Sutter

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITIONS

On June 20, 2018, the U.S. Bureau of Reclamation (Reclamation) submitted three petitions for temporary change pursuant to Water Code section 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 Sutter, CA. The transfer would begin upon approval of this order and extend through January 31, 2019, 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 loss 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 second year of a two-year pilot project to identify a viable conveyance route to meet SNWR's water scheduling requirements. For the 2017 transfer, Reclamation reported transferring a total volume of 3,825 af between November 1, 2017 and January 13, 2018 of the maximum 12,000 af that was authorized to be rediverted at SNWR. 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 (L2) CVP supplies as set forth in Exhibit B to that Memorandum. Reclamation has not historically been able to provide the refuges with their required L2 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.

2.0 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

The present place of use of water diverted under Reclamation's 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, incidental 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. 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 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.

3.0 PUBLIC NOTICE AND COMMENTS ON THE PROPOSED TEMPORARY CHANGE

On July 2, 2018, 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 July 2, 2018, 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 July 31, 2018. Richard Morat and Loren Bottorff submitted timely comments that are addressed below.

3.1 Comments of Richard Morat

Mr. Morat commented on the proposed transfer via email dated July 10, 2018. Mr. Morat asked Reclamation about the county of the source of stored water for the transfer, how the water was moved from storage or exchanges with third parties facilitate the supply to Sutter NWR, and how the storage water arrives at the storage sites initially. He also asked about the ability of the State Water Board to manage statewide protection of beneficial uses and the petitioner's compliance with the State Water Board's Order WR 90-5.

State Water Board and Reclamation Response:

The water available for rediversion at Princeton Pumping Plant will only be stored in Shasta Reservoir in Shasta County. The other counties listed on the petitions apply to the water rights applicable to the

submitted permitted applications as listed in the State Water Board's eWRIMS database system. The water for the transfer is stored water from Shasta Reservoir. Water would be conveyed from the Princeton Pumping Plant on the Sacramento River to the SNWR for delivery. There are no exchanges with third parties; however, there is an exchange component to the proposed action in that the USFWS will be taking delivery of Reclamation's CVP water rights in lieu of exercising its own water rights for diversion at the SNWR.

Water proposed to be transferred and subsequently rediverted at the Princeton Pumping Plant was initially collected to storage at Shasta Reservoir as authorized by the subject permits. The Central Valley Project Improvement Act (P.L. 102-575) obligates Reclamation to provide L2 refuge water quantities into its annual operations plan, including the L2 water for SNWR during the Pilot Project. Initial storage and refill storage collection at Shasta Reservoir will occur as authorized by the subject permits.

Regarding impacts on threatened or endangered species and Water Rights Order 90-5, Reclamation has taken steps to develop a 2018 Sacramento River Temperature Management Plan (TMP). The TMP was approved by the Division by letter dated June 7, 2018, with additional conditions for monitoring and coordination with the Sacramento River Temperature Task Group if operations (cold water pool volumes, release schedules or any other controllable factors) change in a manner that could affect temperature control this season. The Division expects Reclamation will incorporate any necessary operational changes pursuant to this transfer and any other transfers into the 2018 TMP and subsequent updates.

The Supplement to Reclamation's Petitions page 7 has additional information on environmental compliance measures taken in support of the Change Petitions; also see section 3.8.2.2 (Preferred Action Sacramento River, RD 1004, Butte Creek, and SNWR) and Appendix B – Endangered Species Act Compliance Technical Memorandum, both within the Environmental Assessment (Pilot EA) Sutter National Wildlife Refuge Reclamation District No. 1004 Refuge Level 2 Water Conveyance Pilot Project, 17-16-MP. The temporary transfer during the second year of the pilot project is proposed to occur from the approval date to the end of January 2019. The amount of flow due to the temporary transfer is small compared to the overall flow in the Sacramento River. The water proposed for the transfer is from storage releases. Therefore, in light of the storage release and relative size of the transfer, Reclamation indicated temperature changes in the Sacramento River due to the release and rediversion 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 L2 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.

3.2 Comments of Loren Bottorff

A letter dated July 19, 2018 was received from Loren Bottorff of Helen M. Davis, Inc. Mr. Bottorff, a landowner adjacent to the Sutter Bypass EBD, expressed concerns that water levels in the ditch could have a direct impact on his farming operations and was concerned about being able to drain the fields for harvest, which varies from September to December each year. He expressed the importance that the EBD be lowered as much as possible, which the Department of Water Resources (DWR) typically accomplishes with the operation of Weir No. 2.

State Water Board and Reclamation Response:

Management of water levels in the EBD will not change from historical practices as a result of the proposed transfer/exchange. The SNWR will continue to divert water in a similar fashion as in past years. The text below from the Environmental Assessment (Pilot EA), Sutter National Wildlife Refuge Reclamation District No. 1004 Refuge Level 2 Water Conveyance Pilot Project, 17-16 MP, describes the management of the water levels in the EBD:

The USFWS diverts their water rights water from the EBD usually through a gravity feed channel, but this is limited to when the EBD water level is high enough for diversion into the gravity channel. Alternatively, the USFWS utilizes temporary crisafulli pumps (usually in the fall), positioned on the EBD, to augment limited gravity flows when EBD water levels are lower, to increase water deliveries for fall flood up needs to provide additional habitat for migrating waterfowl. However, water obtained through the USFWS's water rights is limited by timing, availability, volume and EBD water levels, and is not a substitute for the reliable water supplies mandated by the Central Valley Improvement Act.

Rice production on lands adjacent to Butte Creek, Butte Slough, and the EBD, between the Dredger Cut Point of Diversion and the Points of Diversion (at SNWR) usually includes flooding of fields in the spring time, and during September farmers are usually dewatering their fields in preparation for harvest. Weir No. 2 is a water control structure located on the EBD near the northern end of the SNWR, owned and operated by DWR.

To facilitate dewatering of fields, DWR generally manages Weir No. 2 to maintain an upstream water surface elevation of 18.5 feet. This allows farmers to drain their fields and prevent seepage back into their fields. DWR has indicated that Weir No. 2 will be operated in the same manner this year with or without the transfer.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of the California Environmental Quality Act. The State Water Board will issue a Notice of Exemption for this project.

5.0 CRITERIA FOR APPROVING THE PROPOSED 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.)

The State Water Board shall approve a temporary change involving the transfer of water under Water Code section 1725 et seq., if it determines that a preponderance of the evidence shows both of the following:

- a. The proposed change would not injure any legal user of the water, during any potential hydrologic condition that the State Water 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 water, or return flows.
- b. The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(Wat. Code, § 1727, subd. (b).)

In addition, the proposed change must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary change. (*Id.*, § 1726, subd.(e).)

Temporary changes pursuant to Water Code section 1725 may be effective for a period of up to one year from the date of approval. (Wat. Code, § 1728.) The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out.” (*Ibid.*)

The State Water Board also 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 considers the evaluation of public trust resources as part of its evaluation of impacts to fish, wildlife, or other instream beneficial uses under Water Code section 1727, subdivision (b)(2).

6.0 REQUIRED FINDINGS OF FACT

6.1 Availability of Water for Transfer

Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Section 1011. (Wat. Code, §§ 1725, 1726.) Water Code section 1725 defines “consumptively used” to mean “the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.” 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 L2 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 would be stored in Shasta Reservoir in the absence of the proposed temporary change.

6.2. 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 and protected from use in the downstream water supply 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 the 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 the water.

6.3 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 the California Department of Fish and Wildlife (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 2019. Although the transfer will 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 diverted, 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 has 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.

7.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to the Deputy Director for Water Rights the authority to act on petitions for temporary change if the State Water Board does not hold a hearing.

8.0 CONCLUSIONS

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

1. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.
2. The proposed temporary change will not injure any legal user of the water.
3. The proposed temporary change will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

ORDER

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

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

1. The transfer is limited to the period commencing on the date of the Order and continuing through January 31, 2019.
2. The points of redirection 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 redirection rate at Princeton Pumping Plant shall be 75 cubic feet per second (cfs) and the combined maximum redirection rate at the points of redirection at SNWR shall be 75 cfs. Up to 12,000 af of water may be redirected 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, daily volume and monthly volume of water redirected at the Princeton Pumping Plant and of water redirected at SNWR intake facilities, and the daily average rate, and daily and monthly 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, 2019.

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:

*Erik Ekdahl, Deputy Director
Division of Water Rights*

Dated: AUG 27 2018