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

DIVISION OF WATER RIGHTS

IN THE MATTER OF LICENSE 2840 (APPLICATION 10030) PETITION FOR TEMPORARY CHANGE INVOLVING THE TRANSFER OF UP TO 3,520 ACRE-FEET OF WATER FROM TULE BASIN FARMS, LLC TO STATE WATER CONTRACTOR AGENCIES

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

Description of the Transfer

On May 2, 2013, Tule Basin Farms (TBF) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), a Petition for Temporary Change under Water Code section 1725, et seq. TBF petitions to transfer of up to 3,520 acre-feet (af) of water to participating State Water Contractor Agencies. Temporary changes approved pursuant to Water Code section 1725 may be effective for up to one year from the date of approval.

TBF proposes to transfer up to 3,520 af of water under License 2840 (Application 10030) to participating State Water Contractor (SWC) agencies in order to provide additional water for irrigation. The participating SWC agencies are Kern County Water Agency, Dudley Ridge Water District, and Empire-West Side Irrigation District (hereinafter collectively referred to as SWC Agencies). To facilitate this transfer, TBF is requesting the following changes to its License 2840: (1) the temporary addition of the State Water Project's (SWP) Harvey O. Banks Pumping Plant (Banks Pumping Plant) as a point of diversion; and (2) the temporary addition of the service area of the SWP as an additional place of use. TBF will make surface water available for transfer via groundwater substitution. The groundwater substitution will involve the use of groundwater pumped to produce crops within TBF in exchange for up to 21.05 cubic feet per second (cfs) of surface water that will remain instream for diversion at the proposed additional point of diversion (Banks Pumping Plant). Absent the proposed temporary transfer TBF would divert the entire quantity of surface water proposed for transfer from the West Borrow Pit of the Sutter Bypass pursuant to License 2840 to meet its irrigation demands.

1.2 Groundwater Substitution

TBF proposes to transfer water to the SWC Agencies through groundwater substitution. TBF indicates in its petitions that their groundwater substitution program is consistent with the Draft Technical Information for Preparing Water Transfer Proposals, dated February 2013 published by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation). Only wells which have been approved by DWR and Reclamation for use will be used for the proposed transfer. DWR and Reclamation well criteria used to evaluate groundwater substitution transfers is intended to minimize impacts to streamflow during balanced conditions and potential impacts to the SWP and CVP. DWR and Reclamation have estimated streamflow impacts resulting from TBF's pumping to replace transferred water to be 12%. To account for those impacts, TBF will only transfer 88% of the total quantity pumped in exchange for the

surface water released. The conditions identified in item 3.3 require compliance with DWR's and Reclamation's well construction, location and monitoring requirements as well as the application of the streamflow depletion factor, which are intended to ensure that the groundwater substitution transfer will not unreasonably affect the surface streamflow.

The boundaries of TBF are within Sutter County, which adopted a groundwater management plan (GMP) in March 2012 pursuant to Water Code section 10753. The March 2012 GMP relies on data from an extensive network of DWR and water purveyor production and monitoring wells. The GMP identifies that DWR does not currently consider any of the groundwater sub-basins underlying Sutter County to be in an overdraft state.

2.0 BACKGROUND

2.1 Substance of TBF's License

License 2840 authorizes the direct diversion of up to 21.05 cfs of water from the West Borrow Pit of the Sutter Bypass between April 1 and November 1 of each year for irrigation purposes. The authorized point of diversion for License 2840 is located on the West Borrow Pit of the Sutter Bypass, North 950 feet and West 275 feet from the Southeast corner of Section 5, T14N, R2E, MDB&M. The authorized place of use consists of 842.13 acres within the North Basin Tract.

2.2 Proposed Temporary Changes

The proposed transfer would temporarily add the SWP's Banks Pumping Plant as a point of diversion under License 2840. A portion of the service area of the SWP would be temporarily added to the place of use of License 2840 to facilitate the temporary water transfer to the participating SWC Agencies. This portion of the service area of the SWP is shown on Maps 1878-2 and 1878-3 on file with the Division under Application 5630.

2.3 Governor's 2013 Executive Order to Streamline Approvals for Water Transfers

On May 20, 2013, Governor Edmund G. Brown Jr. issued Executive Order B-21-13 to streamline approvals for water transfers to address the dry conditions and water delivery limitations in 2013 to protect California's agriculture. The Governor's Order directs the State Water Board and DWR to expedite the review and processing of temporary transfers for 2013 (in accordance with the Water Code) and to assist water transfer proponents and suppliers, as necessary, provided that the transfers will not harm other legal users of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. The State Water Board and DWR were also directed to make all efforts to coordinate with relevant federal agencies, water districts, and water agencies to expedite the review and approval of water transfers in California.

3.0 PUBLIC NOTICE AND COMMENT TO THE PROPOSED TEMPORARY CHANGE

On May 7, 2013, public notice of the petition for temporary change was provided as follows: 1) via first class mail to interested parties; 2) by posting on the Division's website; 3) via the State Water Board's Lyris email notification program; and 4) by publication in the Appeal Democrat on May 7, 2013.

The State Water Board received timely comments regarding the proposed temporary change from the following: 1) a joint comment by California Water Impact Network (C-WIN), California Sportfishing Protection Alliance (CSPA) and AquAlliance; 2) Richard Morat; 3) Reclamation; and 4) DWR. The State Water Board received late comments from Department of Fish and Wildlife (DFW). These comments and the State Water Board's responses are summarized below.

3.1 Joint Comments by C-WIN, CSPA, and AquAlliance (Environmental Commenters)

On June 3, 2013, the environmental commenters indicated their concerns regarding the transfer proposal. The concerns extend beyond the scope of the current transfer, and encompass all pending 2013 water transfers being processed by the State Water Board. To expedite transfer processing, the concerns are not repeated herein; however, the State Water Board response letter dated June 27, 2013 is incorporated by reference. The response letter details the issues raised by the environmental commenters. On June 17, 2013, TBF also provided a response to the environmental commenters as discussed below.

State Water Board Response:

The State Water Board response letter identifies a need to evaluate the following issues in the present order: (a) whether there is a change in return flow associated solely with the transfer, and (b) whether the transfer would only involve the amount of water that would have been consumptively used or stored by the licensee in the absence of the proposed temporary change or conserved pursuant to Water Code section 1011.

In addition, the response letter indicates that use of the Banks Pumping Plant for transfer purposes should be conditioned on compliance by DWR with Decision 1641, all applicable biological opinions and court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.

The objection is addressed upon a finding that: (a) no change in return flows is occurring, and (b) the transfer only involves water that would have been consumptively used or stored. Approval of the petition is also contingent on inclusion of condition 6 of this order. The required evaluations are found in Section 5 of this order.

TBF Response:

On June 14, 2013, TBF submitted a joint response by all petitioners to address the issues raised by the environmental commenters. By letter dated June 17, 2013, TBF also independently provided to the State Water Board details of its compliance with the applicable GMP.

3.2 Comments of Richard Morat

On May 7, 2013, Richard Morat commented on the proposed transfer. The Morat comments were similar to, but not as extensive as, the environmental commenters concerns.

State Water Board Response:

The State Water Board response letter, dated June 27, 2013, refers Mr. Morat to the more extensive responses provided to the environmental commenters. The information identified in item 3.1 also addresses the Morat objection.

3.3 Comments of Reclamation

By letter dated June 3, 2013, Reclamation commented on the proposed transfer. To protect Reclamation's water rights and operations at the Jones Pumping Plant, Reclamation requested that the transfer be conditioned as follows:

- Only wells approved by Reclamation and DWR for suitability and acceptability may be used for groundwater substitution.

- The amount of transferable water credited to Petitioner's groundwater substitution water transfer operation is subject to the determination of Reclamation and DWR.

- Before commencing the groundwater substitution operation, Petitioner shall submit a Monitoring

Program Plan and Mitigation Program Plan to DWR and Reclamation for evaluation and prior approval.

- Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.

State Water Board Response:

In order to avoid injury to Reclamation's water rights, the transfer is conditioned based on the criteria listed above.

3.4 Comments of DWR

By letter dated June 6, 2013, DWR objected to the proposed transfer based on potential injury to its permitted water rights. DWR's comments were similar to Reclamation's concerns. DWR requested that conditions similar to the Reclamation conditions listed above be included in any approval of the transfer.

State Water Board Response:

In order to avoid injury to DWR's water rights, the transfer is conditioned based on the criteria listed in item 3.3.

3.5 Comments of DFW

By letter dated June 27, 2013, DFW provided comments. DFW's comments were received after the 30-day deadline.

State Water Board Response:

The State Water Board is not required to evaluate or take into consideration comments that were not timely filed. Moreover, DFW has not presented any information to demonstrate that this particular transfer will have an unreasonable impact on fish and wildlife. Instead, the DFW comments express concern that there will be a cumulative impact of this and other transfers. That issue is addressed in the Division's June 27, 2013 response to the environmental commenters.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Petitioner filed the petitions for temporary transfer of water pursuant to Water Code section 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 the transfer.

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.

5.0 REQUIRED FINDINGS OF FACT

5.1 Transfer Only Involves Water That Would Have Been Consumptively Used or Stored

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 right holders 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." The water proposed for transfer consists of surface water made available through increased groundwater pumping. To the extent that the additional groundwater pumped does not affect streamflow, this water represents water which would not be available for use in the downstream water supply. DWR and Reclamation have reviewed the proposed groundwater pumping and determined that 12% of the additional groundwater pumping will affect streamflow. This Order limits the amount of water available for transfer to 88% of the groundwater pumped.

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 consumptively used in the absence of the proposed temporary change.

5.2 No Injury to Other Legal Users of Water

Before approving a temporary change due to a transfer or exchange of water pursuant to article 1 of Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer 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).)

TBF may not transfer water through Banks Pumping Plant prior to obtaining approval from DWR and Reclamation for its groundwater substitution operation. Compliance with well construction, location and monitoring requirements as well as the application of the streamflow depletion factor are intended to ensure that the groundwater substitution transfer will not unreasonably affect the surface stream. DWR and Reclamation have reviewed the proposed transfer and determined that, with inclusion of the 12% depletion factor described in Section 1.2 of this Order, the SWP and CVP will not be injured by impacts resulting from the additional groundwater pumping associated with the transfer. Under this operating scenario, the transfer will not result in increased diversion of stream flow or reduction in return flows. Since there will be no increase in diversion of stream flow, there will be no injury to 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 transfer will not injure any legal user of the water. I also find that the transfer of surface water that is replaced with groundwater pursuant to this Order meets the requirement of Water Code section 1745.10 subdivision (a). That section requires that the groundwater substitution transfer be consistent with a groundwater management plan adopted pursuant to state law for the affected area.

5.3 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).) The petition states that the flow downstream of the Petitioner's current point of diversion may increase by up to 3,520 af during the period of the transfer due to the temporary change. The increased flows may provide benefits to fisheries, wildlife or other instream beneficial uses.

Diversion of water at Banks Pumping Plant pursuant to this Order is subject to compliance by the SWP project operator with the objectives set forth in Tables 1, 2 and 3 on page 181 to 187 of Decision 1641 (D-1641), including compliance with the various plans required under D-1641. Diversion at these facilities pursuant to this Order is also subject to compliance by the operator with all applicable biological opinions and any court orders applicable to these operations.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(2) that the proposed transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

6.0 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. This order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2012-0029.

7.0 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:

I conclude that, based on the available evidence:

1. The proposed temporary changes will not injure any legal user of the water.

2. The proposed temporary changes will not unreasonably affect fish, wildlife, or other instream beneficial uses.

3. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.

4. An increase in groundwater pumping associated with this transfer (i.e., groundwater substitution) will be performed in compliance with Water Code section 1745.10.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for transfer of up to 3,520 acre-feet of water is approved.

All existing terms and conditions of License 2840 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing on the date of this order and continuing for one year.

2. The maximum transfer quantity authorized under License 2840 is 3,520 af.

3. The petitioner shall reduce its diversion rate at the original point of diversion authorized under License 2840 by an amount equal to the rate of additional groundwater pumped in order to make water available for transfer pursuant to this Order (both measured as a daily average). The amount of water transferred pursuant to this Order shall not exceed 88% of the rate of additional groundwater pumping, and shall in no case exceed 21.05 cfs.

4. The place of use under License 2840 is temporarily expanded to include a portion of the service area of the SWP as shown on Maps 1878 - 2 and 1878 - 3 on file with the Division under Application 5630.

5. The Banks Pumping Plant is temporarily added as an authorized point of diversion under License 2840.

6. Diversion of water at Banks Pumping Plant pursuant to this Order is subject to compliance by the SWP project operator with the objectives set forth in Tables 1, 2 and 3 on page 181 to 187 of State Water Board's Revised Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at the point of diversion, including compliance with the various plans required under D-1641 as prerequisites for the use of the Banks Pumping Plant by DWR. Diversion of water at the Banks Pumping Plant pursuant to this Order is subject to compliance by the pumping plant operator with all applicable biological opinions, court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.

7. Water may not be transferred through the Banks Pumping Plant until Petitioner has obtained the approval of Reclamation and DWR for its groundwater substitution operation. Such approval shall include the following elements:

   a. Only wells approved by Reclamation and DWR for suitability and acceptability may be used for groundwater substitution.

   b. The amount of transferable water credited to Petitioner's groundwater substitution water transfer operation is subject to the determination of Reclamation and DWR.

   c. Before commencing the groundwater substitution operation, Petitioner shall submit a Monitoring Program Plan and Mitigation Program Plan to DWR and Reclamation for evaluation and prior approval.

   d. Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.

   Documentation that an acceptable groundwater substitution operation has been approved by Reclamation and DWR shall be submitted to the Division within 15 days of the date such approval is granted by those entities.

8. During the period of transfer, petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies. This Order shall not be construed as authorizing the violation of any agreement entered into by the petitioner.

9. Within 90 days of the completion of the transfer, but no later than October 1, 2014, Licensee shall provide to the Deputy Director for Water Rights a report describing the transfer authorized by this Order. The report shall include the following information.

    a. General locations where the transferred water was used;

    b. The daily average rate water is made available for transfer pursuant to this Order;

    c. The daily average diversion rate for water diverted pursuant to License 2840 during the transfer period;

    d. The average daily streamflow measured at the nearest representative gaging station on the Sacramento River;

    e. The daily average pumping rate of groundwater pumped by Licensee in excess of that which would have been pumped in the absence of this transfer; and

    f. Groundwater elevations within the vicinity of the TBF prior to the proposed transfer.

    Licensee shall also develop and submit to the Deputy Director for Water Rights, by July 1 of each year following 2014, a map defining the groundwater elevations within the vicinity of TBF, until such time as these elevations correspond to pre-transfer levels.

10. 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.

11. 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 and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a “take” will result from any act authorized under this temporary transfer, the Petitioner shall obtain authorization for an incidental take permit prior to construction or operation. The Petitioner shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.

12. I reserve 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:
JAMES W. KASSEL FOR

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: JUL 01 2013