

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2000 - 14 DWR

IN THE MATTER OF LICENSE 11395 (APPLICATION 16186)
TEMPORARY CHANGE IN PLACE OF USE,
INVOLVING THE TRANSFER OF UP TO 25,000 ACRE-FEET OF WATER
FOR USE BY THE UNITED STATES BUREAU OF RECLAMATION'S
CENTRAL VALLEY PROJECT IMPROVEMENT ACT
WATER ACQUISITION PROGRAM,
UNDER MERCED IRRIGATION DISTRICT'S LICENSE

ORDER AUTHORIZING TEMPORARY CHANGE IN PLACE OF USE
BY THE CHIEF OF THE DIVISION OF WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On August 18, 2000,

Merced Irrigation District
c/o Ross Rogers
P.O. Box 2288
Merced, CA 95344

filed with the State Water Resources Control Board (SWRCB), a Petition for Temporary Change under Water Code section 1725 et seq. If approved, the Merced Irrigation District (MID) would transfer up to 25,000 acre-feet (af) of water to the United States Bureau of Reclamation's (USBR) Central Valley Project Improvement Act (CVPIA) Water Acquisition Program (WAP). The water would be used in wildlife refuges and areas within the service area of the Central Valley Project (CVP) and the State Water Project (SWP). Additionally, the proposed place of use would include the Merced River, the San Joaquin River to Vernalis, and the San Francisco Bay/Sacramento-San Joaquin Delta (Delta) for the purpose of preservation and enhancement of fish and wildlife resources in accordance with Water Code section 1707. If approved, the temporary change would be effective for a period of not to exceed one year.

1.1 Description of the Transfer MID proposes to transfer up to 25,000 af of water under License 11395 (Application 16186) to the USBR for use within CVP and SWP wildlife refuges within the San Joaquin Valley. The 25,000 af of water would be released from Lake McClure (between October 2000 and December 2000) and flow down the Merced River to the San Joaquin River and into the Delta. The water would be pumped from the Delta at the Banks Pumping Plant and wheeled via the California Aqueduct to the O'Neil Forebay, where it would be available for delivery to the wildlife refuges. The release pattern of water from Lake McClure for this proposed transfer will be developed in coordination with the California Department of Fish and Game, National Marine Fisheries Service, Fish and Wildlife Service, MID, CALFED, and SWP and CVP Operations. This coordination is intended to provide additional flows in the Merced River and San Joaquin River to benefit fisheries. Export pumping from the Delta for this proposed transfer will be performed in compliance with all applicable laws, regulations, and agreements.

USBR has prepared an Administrative Draft Environmental Assessment (EA) dated August 2000 for the proposed transfer which was submitted with the petition for temporary change. The EA identifies all the wildlife refuges within the San Joaquin Valley supported by the CVPIA WAP. The specific wildlife refuges intended to receive water from this proposed transfer include the Grasslands State Wildlife Area, the San Luis National Wildlife Refuge, the Kern National Wildlife Refuge, the Los Banos State Wildlife Area, and the North Grasslands State Wildlife Area.

2.0 BACKGROUND

2.1 Substance of the MID License MID holds License 11395 (Application 16186) which authorizes the diversion to storage of up to 605,000 af of water per annum from the Merced River between October 1 and July 1. The maximum withdrawal from Lake McClure and Lake McSwain under License 11395, as well as Licenses 2684, 2685, and 11396 (Applications 1222, 1224, and 16187) is 516,110 af per annum. The points of diversion for License 11395 are located at the New Exchequer Dam and the McSwain Dam. The water is used for irrigation, domestic, recreational, fish culture, and wildlife enhancement purposes within the authorized place of use identified by the "Official map of MID-1973" on file with the State Water Resources Control Board.

2.2 Purpose of Use and Place of Use of the Proposed Transfer The water would be transferred to the aforementioned wildlife refuges and the Merced River, the San Joaquin River to Vernalis, and the Delta for the purpose of fish and wildlife enhancement, which is a beneficial use of water.

2.3 Point of Rediversion for the Proposed Transfer The proposed transfer would temporarily add the Banks Pumping Plant as a point of rediversion for License 11395.

3.0 AVAILABILITY OF WATER FOR TRANSFER

The water proposed for transfer was stored under provisions of License 11395. In the absence of this transfer, the subject 25,000 af of water would remain in storage within Lake McClure for future marketing to other buyers or use by MID.

In light of the above, I find in accordance with Water Code section 1727(b)(1) that the proposed transfer would not injure any legal user of the water and that the proposed temporary change of water rights involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change. However, approval of the petition will include conditions to ensure that no legal user of water is injured during future refill of Lake McClure resulting from this transfer.

4.0 ENVIRONMENTAL CONSIDERATIONS

In accordance with Water Code section 1729, temporary changes involving transfer of water are exempt from the requirements of the California Environmental Quality Act (Public Resources Code section 21000 et seq). However, the SWRCB must consider potential impacts on fish,

Code section 21000 et seq). However, the SWRCB must consider potential impacts on fish, wildlife and other instream beneficial uses in accordance with Water Code section 1727(b)(2).

The proposed temporary change in place of use and point of redirection involves water that was previously stored. The subject 25,000 af will be released at rates agreed upon by the California Department of Fish and Game, National Marine Fisheries Service, and Fish and Wildlife Service to enhance fish, wildlife or other instream beneficial uses of water within the Merced River, the San Joaquin River, and the Delta. However, the approval of the petition will include conditions to ensure that no unreasonable effects on fish, wildlife or other instream beneficial uses are caused by future refill of Lake McClure resulting from this transfer.

In light of the above, I find that in accordance with Water Code section 1727(b)(2) that the proposed transfer would have no unreasonable effects on fish, wildlife or other instream beneficial uses.

5.0 COMMENTS RECEIVED ON THE PROPOSED TRANSFER/EXCHANGE

The SWRCB received timely comments on the proposed change in water rights from the Pacific Gas and Electric Company (PG&E), the San Joaquin Farm Bureau Federation (SJFBF), and the South Delta Water Agency (SDWA) and Central Delta Water Agency (CDWA). Comments were also received from the Stockton East Water District (SEWD) after the comment period had expired and were generally similar to those of SJFBF and SDWA.

1. PG&E asserts that proposed temporary change in water rights will affect its prior downstream rights and contractual rights with MID. The affected prior rights specified by PG&E are Pre-1914 direct diversion and storage rights (claimed under Statements of Diversion and Water Use 10405 and 4705) and direct diversion rights under License 1911 (Application 6470), all located at the Merced Falls Dam and Powerhouse. By letter dated October 18, 2000, PG&E informed the SWRCB that it had reached an agreement with MID which provides compensation for any injury as a result of this temporary change. This Order will be conditioned to such that MID will be required to abide by this agreement.
2. SJFBF asserts that since MID has indicated that it will not reduce its consumptive use as a result of this temporary change, the amount of water transferred under this petition would be taken from other users of the water. SJFBF also asserts that over a period of years, MID can not cumulatively store more water than consumes. SJFBF argues that water within the Merced River watershed which is not consumed by MID is either beneficially used by other users, provides groundwater recharge, or is released for flood control. Thus, according to SJFBF, any stored surface water which is sold by MID and any groundwater that is pumped to facilitate the sale will at some point in time be taken from other water users and will not be taken from the needs of the district.
3. SDWA indicated they (joined by CDWA) object to the petition for temporary change based on two arguments:

- (1) MID has not accurately explained its underlying water rights. SDWA asserts that though the EA (prepared by USBR) indicates that the 25,000 af of water involved in this temporary change is in excess of MID's needs, the petition notice indicates that in a scenario of consecutive critical dry years, MID will pump an additional 25,000 af of groundwater more than it would have absent the proposed action. SDWA contends that this would be in violation of Water Code section 1725. SDWA also questions the ability of MID to store water in excess of its needs. Finally, SDWA notes that the EA indicates the 25,000 af of water will be supplied by shifting power generation from summer to fall, however, power generation is not an authorized use under License 11395 (Application 16186).
- (2) MID can not satisfy the relevant criteria. SDWA states that no information has been given regarding the effects of pumping additional groundwater and potential changes of return flow patterns on downstream legal users of water in violation of Water Code section 1727(b)(1). Finally, SDWA asserts (based on testimony and documents presented at recent SWRCB Bay-Delta hearings) that sales of water from MID, such as the one proposed under this petition, cause elevated salinity concentrations in the San Joaquin River and increased releases by the USBR from New Melones Reservoir.

SWRCB Response:

1. Since the 25,000 af of water proposed to be transferred under this petition for temporary change was previously stored, the transfer of this water to the USBR WAP wildlife refuges will not cause injury to any legal user of water. However, refill of Lake McClure under License 11395 in excess of that which would have occurred absent this transfer will not be allowed when modified Water Rights Terms 91 or 93 are in effect. Thus, no injury to the CVP or SWP, or elevated salinity concentrations in the San Joaquin River at Vernalis and additional releases from New Melones Reservoir will result from this transfer. Further, based on information contained in the Final Environmental Assessment prepared by the USBR for the acquisition of this water, the release of most of the water from the wetland areas in winter and early spring months in general did not cause electrical conductivity to exceed standards and did not increase the potential for exceeding salinity standards in the San Joaquin River at Vernalis.
2. Prior to groundwater pumping from the Merced Groundwater Basin in excess of that which would have occurred absent this transfer, MID will be required to submit a plan specifying the amount of groundwater to be pumped, the location of the pumping, and the location and method of recharge that will be undertaken to balance the groundwater pumping. The plan shall contain an analysis of how the recharge program will prevent overdraft or a decrease in flow in the Merced River due to the groundwater pumping. Upon approval of the plan by the Chief of the Division of Water Rights, MID shall be required to implement the plan.

6.0 SWRCB'S DELEGATION OF AUTHORITY

On April 29, 1999, the SWRCB adopted Resolution 99-031, continuing the delegation of authority to approve petitions for temporary changes to the Chief of the Division of Water Rights, provided the necessary statutory findings can be made.

7.0 CONCLUSIONS

The SWRCB 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 change will not injure any legal user of the water.
2. The proposed temporary change 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.

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ORDER

NOW, THEREFORE, IT IS ORDERED that the filed petition for temporary change in the places of use under the Merced Irrigation District's Licensed Application 16186 of up to 25,000 af of water is approved.

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

1. The transfer/exchange is limited to the period commencing on the date of this Order and continues for one year.
2. Prior to commencing the transfer, MID shall provide the Chief of the Division of Water Rights a copy of the agreement indicating the flow release schedule from Lake McClure and a list of the concurring agencies consulted with regard to the schedule.
3. The place of use of MID's Licensed Application 16186 is temporarily changed as follows:

The authorized place of use is expanded to include the Grasslands Resource Conservation District, Kern National Wildlife Refuge, San Luis National Wildlife Refuge, Los Banos Wildlife Area, and North Grasslands Wildlife Area as shown on map submitted with the petition for temporary change. Additionally, the expanded place of use includes the Merced River, the San Joaquin River to Vernalis, and the San Francisco Bay/Sacramento-San Joaquin Delta for the purpose of preservation and enhancement of fish and wildlife resources in accordance with Water Code section 1707.
4. The Banks Pumping Plant is temporarily added as a point of rediversion to MID's Licensed Application 16186. Water diverted at this location in accordance with this order shall comply with the applicable terms and conditions of Water Right Decision 1641.
5. MID shall abide by its agreement with PG&E dated October 17, 2000 with respect to compensation for any injury as a result of this temporary change.
6. The refill agreement between MID and USBR (dated October 19, 2000) shall govern the conditions under which refill occurs for the transferred storage allowed in this order, except that Projects Owed Water (POW), as defined in the agreement, is not allowed to accrue whenever Water Right Terms 91 or 93 (as modified below) are in effect. MID shall be responsible for knowing when these terms are in effect.

Water Right Term 91:

No refill of storage resulting from this change order is authorized by this license when satisfaction of inbasin entitlements requires release of supplemental Project water by the Central Valley Project or the State Water Project.

- a. Inbasin entitlements are defined as all rights to divert water from streams tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses, and flows required by the State Water Resources Control Board for maintenance of water quality and fish and wildlife. Export diversions and Project carriage water are specifically excluded from the definition of inbasin entitlements.
- b. Supplemental Project water is defined as that water imported to the basin by the projects plus water released from Project storage which is in excess of export diversions, Project carriage water, and Project inbasin deliveries.

Water Right Term 93:

No refill of storage resulting from this change order is authorized by this license under the following conditions:

- (1) when in order to maintain water quality in the San Joaquin River at Vernalis as set forth in Table 2 of SWRCB Decision 1641, the Bureau of Reclamation is releasing stored water from New Melones Reservoir or is curtailing the collection of water to storage, or
- (2) during any time of low flows when salinity levels at Vernalis exceed those set forth in Table 2 of SWRCB Decision 1641.

7. Licensee shall prepare a monthly accounting of groundwater pumped from the Merced Groundwater Basin in excess of that which would have been pumped in the absence of this transfer. Prior to pumping groundwater as a result of this temporary transfer, Licensee shall provide to the Chief of the Division of Water Rights a plan specifying the amount of groundwater to be pumped, the location of the pumping, and the location and method of recharge that will be undertaken to balance the groundwater pumping. The plan shall contain an analysis of how the recharge program will prevent overdraft or a decrease in flow in the Merced River due to the groundwater pumping. Upon approval of the plan by the Chief of the Division of Water Rights, Licensee shall implement the plan.
8. Within 60 days of the completion of the transfer/exchange, but no later than January 1, 2002, the licensee shall provide the Chief of the Division of Water Rights a report describing the use of the water transferred pursuant to this Order and refill of storage resulting from this Order.

The report shall include the following information:

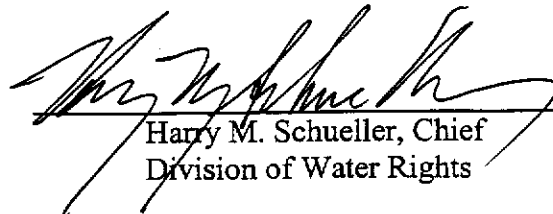
1. General locations where the transferred water was used;
2. The monthly amounts of water each location received;
3. The average application rate of water in the locations;
4. The daily release rates of the transferred water from Lake McClure;
5. The daily values of the Fall 2000 Transfer Water Balance, as defined in the refill agreement between MID and USBR dated October 19, 2000; and
6. The monthly amounts (if any) of groundwater pumped from the Merced Groundwater Basin in excess of that which would have been pumped in the absence of this transfer.

Should the amount of the Fall 2000 Transfer Water Balance exceed zero at the time of this report, the licensee shall submit subsequent annual reports until the Fall 2000 Water Transfer Balance reaches zero. These reports shall contain:

1. The daily values of the Fall 2000 Transfer Water Balance; and
 2. The monthly amounts (if any) of groundwater pumped from the Merced Groundwater Basin in excess of that which would have been pumped in the absence of this transfer.
9. 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 SWRCB 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 SWRCB 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.

10. 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 licensee shall obtain authorization for an incidental take permit prior to construction or operation. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this order.
11. 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.


Harry M. Schueller, Chief
Division of Water Rights

Dated: **OCT 19 2000**