

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
WR ORDER 2001-03-DWR

IN THE MATTER OF PERMIT 15026 (APPLICATION 5632)
TEMPORARY CHANGE INVOLVING THE TRANSFER OF
UP TO 50,000 ACRE-FEET OF WATER
TO THE DEPARTMENT OF WATER RESOURCES FOR
USE BY THE ENVIRONMENTAL WATER ACCOUNT, UNDER
YUBA COUNTY WATER AGENCY'S PERMIT 15026

ORDER AUTHORIZING TEMPORARY CHANGE IN PLACE OF USE,
PURPOSE OF USE, AND POINT OF REDIVERSION
BY THE CHIEF OF THE DIVISION OF WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On January 3, 2001,

Yuba County Water Agency
c/o Paul M. Bartkiewicz
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1011 22nd Street
Sacramento, CA 95816-4907

filed with the State Water Resources Control Board (SWRCB), a Petition for Temporary Change under Water Code section 1725 et seq. If approved, the Yuba County Water Agency (YCWA) would transfer up to 50,000 acre-feet (af) of water to the Department of Water Resources (DWR) for the CALFED Environmental Water Account (EWA). The water would be released from New Bullards Bar Reservoir for use within the Central Valley Project (CVP) and the State Water Project (SWP) service areas or storage in groundwater banks located south and west of the San Francisco Bay/Sacramento-San Joaquin Delta (Delta). If approved, the temporary change would be effective for a period not to exceed one year.

1.1 Description of the Transfer YCWA proposes to transfer up to 50,000 af of water under Permit 15026 (Application 5632) to the EWA. To facilitate the transfer, YCWA proposes to release 50,000 af of water currently stored in the New Bullards Bar Reservoir between June 15, and August 31, 2001. Release rates from New Bullards Bar Reservoir for the transfer water would be between 320 and 840 cubic feet per second (cfs). This water would then flow down the Yuba River to the Feather River thence the Sacramento River and into the Delta. Flow at the Marysville Gage is projected to average between 820 cfs and 1,340 cfs during the transfer period.

Based on carriage water and through Delta losses, a reduced amount of water (about 80% or 40,000 af of subject transfer water) would be pumped from the Delta at the Clifton Court Forebay and transported to the San Luis Reservoir for short-term storage. Once in storage within San Luis Reservoir, the transfer water would be available for either use within the CVP and SWP service areas or delivery to storage in groundwater banks located south of the Delta (if long-term storage

2.0 BACKGROUND

2.1 Substance of YCWA's Permit Permit 15026 (Application 5632) authorizes the diversion to storage of up to 490,000 af of water per annum from the North Yuba River between October 1 and June 30. Permit 15026 also authorizes the direct diversion from the North Yuba and Yuba Rivers of up to 1593 cfs between April 1 and July 1. The points of diversion to storage/rediversion for Permit 15026 are located at the New Bullards Bar Dam and the Daguerre Dam. The water is used for irrigation, industrial, recreational, fish mitigation and enhancement, and domestic purposes within the authorized place of use as shown on map EJ-05-08-R3 on file with the SWRCB under Application 5632.

Permit 15026 previously required YCWA to adhere to an agreement between itself and the Department of Fish and Game regarding required minimum instream flow releases within the Yuba River measured at the United States Geological Services Marysville Gage (located about 6 miles upstream of the confluence of the Feather and Yuba Rivers). On March 2, 2001, the SWRCB adopted Decision 1644 (D-1644), which, in part, establishes new flow requirements measured at the Marysville Gage and the Smartville Gage (located just below the Englebright Reservoir). YCWA has stated that the amount of the transfer water will be defined as the flow measured at the Marysville Gage minus the minimum required instream flow at the time of the transfer (plus an operational buffer of 7 cfs).

2.2 Place of Use and Purposes of Use under the Proposed Transfer The service areas of the SWP (as shown on map 1878-1, 2, 3, & 4 on file with Application 5629) and CVP (as shown on map 214-208-12581 on file with Application 5626) would be temporarily added to the place of use of Permit 15026. Municipal, salinity control, stockwatering, and water quality control would be temporarily added as additional purposes of use under Permit 15026.

2.3 Points of Rediversion under the Proposed Transfer The proposed temporary change would add the Clifton Court Forebay as a point of rediversion for Permit 15026.

3.0 AVAILABILITY OF WATER FOR TRANSFER

The water proposed for transfer was stored under provisions of Permit 15026. In the absence of this transfer, the subject 50,000 af of water would remain in storage within the New Bullards Bar Reservoir for future marketing to other buyers or use by YCWA. This order includes terms and conditions to ensure that no legal user of water is injured by the proposed temporary change due to the following factors:

- a. Potential lowering of water levels in southern Delta Channels associated with the addition of Clifton Court Forebay as a point of rediversion to Permit 15026; and
- b. Future refill of New Bullards Bar Reservoir resulting from this temporary change.

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 the amount of water that would have been consumptively used or stored in the absence of the temporary change.

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, wildlife and other instream beneficial uses in accordance with Water Code section 1727(b)(2).

The proposed temporary change in place of use, purpose of use, and point of redirection involves water that was previously stored. Based on evidentiary hearings held in 1992 and 2000 regarding fishery resources and water right issues in the Lower Yuba River, the SWRCB has adopted D-1644, which includes instream flow requirements and provisions to reduce water temperature impacts for the protection of fish and other public trust resources. The approval of this petition will be conditioned consistent with SWRCB Decision 1641 (D-1641), Tables 1, 2, and 3, and D-1644 to ensure that no unreasonable effects on fish, wildlife or other instream beneficial uses are caused by the proposed temporary change.

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 (listed by receipt date) on the proposed change in water rights from Reclamation District No. 784 (RD784), the South Delta Water Agency (SDWA), the U.S. Fish & Wildlife Service (USFWS), the U.S. Bureau of Reclamation (USBR), Bob Baiocchi, Walter Cook, the California Department of Fish and Game (DFG), and the California Sportfishing Protection Alliance (CSPA). These comments and the SWRCB's responses are summarized below.

Reclamation District 784

RD784 recommended approval of the proposed temporary change.

South Delta Water Agency

Comment: SDWA stated that, in general, it opposes transfers such as the proposed temporary change. SDWA asserted that the subject transfer is a form of the "joint point of use", defined in D-1641 as JPOD, whereby DWR and USBR are allowed to use each other's points of diversion in the Delta (the Harvey O. Banks Pumping Plant and the Tracy Pumping Plant). SDWA contended that, since this transfer involves water to be pumped from the Banks Pumping Plant for use within the CVP service area, it is a JPOD operation and should be subject to the requirements delineated in D-1641 governing such operations. According to SDWA, JPOD operations are limited to specific purposes (D-1641 pages 151-152), unless a response plan is in place which includes notice (to affected parties), modeling of expected water levels, and cessation of operations if water levels decrease to a point which interfere with local diversions. SDWA cited a recent cross-Delta water transfer from the Merced Irrigation District to the USBR Water Acquisition Program for use

within several wildlife refuges (this temporary change was approved by SWRCB Order DWR 2000-14) as the basis for its concerns.

SDWA asserted that transfers which result in water being transferred to the CVP using DWR's point of diversion but are not technically considered JPOD operations circumvent the protections regarding JPOD operations contained in D-1641. Accordingly, SDWA recommended that even if cross-Delta water transfers (such as the Merced transfer and the proposed temporary change) are not technically JPOD operations, they should be conditioned so that the DWR and USBR are required to follow all requirements delineated in D-1641 for JPOD operations.

Additionally, SDWA indicated it opposed the petition on the grounds that groundwater pumping caused by the proposed temporary change, possible in the event of a critically dry year in 2001, may result in injury during that potential hydrologic condition. This injury would be contrary to the requirements of Water Code section 1727(b)(1). SDWA also asserted that groundwater pumping as a result of a temporary transfer causes an increase in consumptive use, contrary to the intent of Water Code sections 1707, 1725, and 1727, as well as CVPIA Section 3405(a)(1)(I).

SWRCB Response: YCWA has petitioned for a temporary change in place and purpose of use and point of rediversion under its Permit 15026 (Application 5632) for use by DWR under the EWA. Since this water is accounted for as DWR water, this temporary change it is not a JPOD operation as defined in D-1641.

Division of Water Rights staff responded to SDWA's concerns regarding lowering of water levels in southern Delta channels in a letter dated January 30, 2001. As stated in that letter, there is not a direct causal relationship between cross-Delta transfers (in that specific case, the Merced transfer) and alleged "harm" to Delta diverters. Water level problems in the southern Delta are caused by a combination of 1) adverse tidal conditions, 2) siltation of channels, 3) local diversions, and 4) project operations. Therefore, it can not be concluded that cross-Delta transfers (such as the proposed temporary change) are solely responsible for lowering of water levels in southern Delta channels and associated injury to legal users of water. However, in order to ensure that no legal user of water is injured by potential lowering of water levels in southern Delta channels due to this proposed temporary change, DWR will be required to comply with the Water Level Response Plan submitted by DWR and USBR and approved for a period of one year by the Executive Director of the SWRCB on October 6, 2000.

Since water year 2001 does not appear to be a critically dry year based on recent rainfall, additionally groundwater pumping appears unlikely.

U.S. Fish & Wildlife Service

Comment: The USFWS indicated its support for the proposed temporary change. USFWS stated that the acquisition of water for EWA will provide water for the protection and recovery of fish and benefit water users by providing additional water for fish without the need to reduce project deliveries. USFWS also urged the SWRCB to adopt its November 7, 2000 draft decision regarding fishery resources and water rights issues of the Lower Yuba River.

SWRCB Response: After considering all the evidence presented, the SWRCB has adopted D-1644 regarding fishery resources and water right issues in the Lower Yuba River. The subject transfer shall be conditioned accordingly.

U.S. Bureau of Reclamation

Comment: USBR indicated that it had reviewed the transfer agreement between DWR and YCWA and noted that it includes refill criteria intended to ensure that the proposed temporary change does not adversely affect the CVP or SWP. USBR stated that with the inclusion of refill criteria in the transfer agreement, the proposed temporary change will not adversely affect the operation or water rights of the CVP. USBR requested that the SWRCB note that the transferor (YCWA) had agreed to the refill criteria.

SWRCB Response: This order includes conditions intended to ensure that no legal user of water is injured during future refill of New Bullards Bar Reservoir resulting from this transfer.

Bob Baiocchi and the California Sportfishing Protection Alliance

Comment: Bob Baiocchi, interested party, and CSPA submitted similar comments regarding the proposed temporary change and fishery resources and water right issues in the Lower Yuba River in general. Comments pertinent to the proposed temporary change and SWRCB responses are summarized below.

The Commentors indicated that ramping flows and temperature variations associated with this temporary change have the potential to adversely affect chinook salmon and steelhead trout and their habitat in the Lower Yuba River. They recommended that YCWA consult with National Marine Fisheries Service (NMFS) to mitigate effects to protected and listed species and their habitat as a result of the proposed temporary change and that any conditions recommended by NMFS should be included in this order.

The Commentors recommended that during the term of the proposed transfer, cold water should be released to protect chinook salmon and steelhead trout. They also requested that the SWRCB ensure that sufficient cold water storage is retained in New Bullards Bar Reservoir so that in the event of a dry water year in 2002, future adverse impacts (beyond the period of the proposed temporary change) to chinook salmon and steelhead trout are avoided. Finally, they recommended that YCWA be required to monitor daily flow conditions in the Lower Yuba River and study the effects of the proposed temporary change to chinook salmon and steelhead trout and their habitat. They recommended that in the event of any "taking" of federally listed and protected species occurs, the proposed temporary change cease.

SWRCB Response: With respect to potential adverse effects of ramping flows and temperature variations, this order will be conditioned consistent with provisions of D-1644 and is intended to protect fish and other public trust resources in the Lower Yuba River. This order will also contain an endangered species term which states that if a "take" will result from any act authorized under this order, YCWA will be required to obtain authorization for an incidental take prior to implementing this temporary change.

Walter Cook

Comment: Walter Cook, interested party, submitted comments regarding the proposed temporary change and regarding fishery resources and water right issues in the Lower Yuba River in general. Mr. Cook indicated that he fully supported the comments of Mr. Bob Baiocchi, and wished to include them as part of his comments. Mr. Cook also asserted that evidence presented in the hearing record (regarding fishery resources and water right issues in the Lower Yuba River) established the need for additional flow over Daguerre Point Dam. Mr. Cook indicated that on occasion, the River below the dam is virtually dry and that flows at the Marysville Gage consisted of polluted waters flowing into the river from the Yuba Goldfields.

SWRCB Response: This proposed temporary change will be conditioned with the same instream flow requirements as D-1644 (measured at the Marysville and the Smartville Gages). Thus, the action associated with the proposed temporary change will have no effect on the flows below Daguerre Point Dam. With respect to "polluted waters" flowing in to the Lower Yuba River from the Yuba Goldfields, both Western Water Company and Western Aggregates (operators of the Yuba Goldfields) are operating under Waste Discharge Requirements from the Central Valley Regional Water Quality Control Board (Order 5-00-107).

California Department of Fish and Game

Comment: DFG indicated that it had been involved with CALFED agencies regarding the acquisition of water for EWA. DFG stated that the acquisition of water for EWA will benefit water users by providing additional water for fish without the need to reduce project deliveries. DFG also urged the SWRCB to adopt its November 7, 2000 draft decision regarding fishery resources and water rights issues of the Lower Yuba River.

SWRCB Response: After considering all the evidence presented, the SWRCB has adopted D-1644 regarding fishery resources and water right issues in the Lower Yuba River. The subject temporary change and transfer shall be conditioned accordingly.

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 change 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 petition filed for temporary change in the place of use, purpose of use, and point of redirection under Yuba County Water Agency's Permitted Application 5632 for the transfer of up to 50,000 af of water is approved.

All existing terms and conditions of the subject permit including those ordered by SWRCB Decision 1644 (or as may be subsequently amended by further order of the SWRCB) 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. The place of use of YCWA's Permitted Application 5632 is temporarily changed as follows:

The authorized place of use is expanded to include the service areas of the SWP (as shown on map 1878-1, 2, 3, & 4 on file with Application 5629) and CVP (as shown on map 214-208-12581 on file with Application 5626).

3. The Clifton Court Forebay is temporarily added as a point of redirection to YCWA's Permitted Application 5632. Water redirected at the Clifton Court Forebay pursuant to this order shall comply with the standards set forth in Table 1, 2, and 3 of Water Right Decision 1641. Additionally, redirection of water pursuant to this order shall comply with the current Water Level Response Plan submitted by DWR and USBR and approved by the Executive Director of the SWRCB. Since the current Water Level Response Plan expires on October 6, 2001, no redirection of water pursuant to this order shall be allowed after October 6, 2001 unless a subsequent Water Level Response Plan has been approved by the Executive Director of the SWRCB.
4. Municipal, salinity control, stockwatering, and water quality are temporarily added as purposes of use under YCWA's Permitted Application 5632.
5. During the period of actual transfer of water approved under this order, YCWA shall specifically comply with the following requirements ordered by D-1644 (or as may be subsequently amended by further order of the SWRCB):
 - a. Maintain minimum instream flows at the USGS gaging installations at Marysville and Smartville as specified in Term 1 for YCWA.
 - b. Minimize water temperature impacts on anadromous fish and other public trust resources as specified in Term 2 for YCWA.
 - c. Perform ramping of flow releases from New Bullards Bar Reservoir as specified in Term 3 for YCWA.

6. The refill criteria delineated in Appendices D and E of the Initial Study and Negative Declaration (ISND), prepared for the project by DWR and dated January 6, 2000, shall govern the conditions under which refill occurs for the transferred storage allowed in this order.
7. Within 60 days of the completion of the transfer/exchange, but no later than June 1, 2002, the permittee 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:
 - a. General locations where the transferred water was used and or stored;
 - b. The daily release rates of the transferred water from New Bullards Bar Reservoir;
 - c. The average daily streamflow measured at the USGS gaging stations located at Marysville and Smartville;
 - d. The hourly temperature readings at the Smartville Gage, Daguerre Point Dam, and the Marysville Gage as required of YCWA in Term 2(d) of D-1644;
 - e. The daily values of the Transfer Amount Account, as defined in the refill criteria contained in Appendix E of the ISND dated December 6, 2000; and
 - f. The monthly amounts (if any) of groundwater pumped to meet the needs of users within the YCWA service area in excess of that which would have been pumped in the absence of this transfer.

Should the amount of the Transfer Amount Account exceed zero at the time of this report, the permittee shall submit subsequent annual reports until the Transfer Amount Account reaches zero. These reports shall contain the daily values of the Transfer Amount Account and the monthly amounts (if any) of groundwater pumped to meet the needs of users within the YCWA service area in excess of that which would have been pumped in the absence of this transfer.

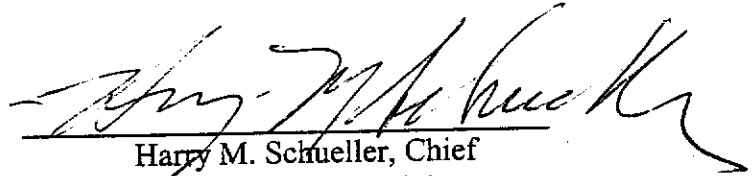
8. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change Order, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the SWRCB in accordance 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.

9. This order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish 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 permittee shall obtain authorization for an incidental take prior to commencing transfer of water or water rights. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this order.

10. 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: **MAR 09 2001**