

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF LICENSE 5940 (APPLICATION 5724) PETITION FOR
LONG-TERM TRANSFER INVOLVING UP TO 5,000 ACRE-FEET OF WATER
PER YEAR FROM STEVINSON WATER DISTRICT AND EAST SIDE CANAL &
IRRIGATION COMPANY TO SAN LUIS CANAL COMPANY**

SOURCE: Bear Creek and Owens Creek tributary to the San Joaquin River

COUNTY: Merced

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 INTRODUCTION

On April 14, 2021, Stevinson Water District (Stevinson) and East Side Canal & Irrigation Company (ESCC), (collectively Petitioners or Licensees), filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), a Petition for Long-Term Transfer under Water Code section 1735, et seq. Pursuant to the petition, Petitioners seek to transfer up to 5,000 acre-feet (af) of water to the San Luis Canal Company (SLCC) under water right License 5940 (Application 5724). The proposed long-term transfer would be a continuation of a long-term transfer under water right License 5940, using the same point of diversion and conveyance facilities, for irrigation in the same place of use, approved by the State Water Board in a 2012 Order. That approved transfer expired on January 1, 2022. Due to the need for additional time to address issues related to protest resolution and review of the long-term transfer petition, a temporary transfer order was issued on May 6, 2022. The temporary transfer order effectively covered the first year of the proposed ten-year term of the long-term transfer, and 5,000 af of water was transferred in 2022. Therefore, the proposed long-term transfer will be effective on the date of this Order through December 31, 2031. Transfers of up to 5,000 af may occur between March 1 and November 1 of each year commencing in 2023.

1.1 Description of the Transfer

The Petitioners propose to transfer up to 5,000 af of water under water right License 5940 to SLCC. Water will be diverted from Bear Creek into the East Side Canal, the main conveyance facility for Stevinson. Once diverted into the East Side

Canal, the water will be conveyed to the proposed place of use through existing conveyance facilities that were constructed as part of the Eastside Conveyance Project. Petitioners have transferred 5,000 af or nearly 5,000 af annually to SLCC since 2012, except for 2015 when no transfer occurred and 2014, 2017 and 2021 when lesser amounts were transferred as shown in the table below.

The Petitioners currently deliver water to the Merquin County Water District (Merquin), which is within the place of use of License 5940. The Petitioners completed piping 46,150 linear feet of canals within Merquin, which has resulted in the conservation of the amounts shown in the table below (2012 to 2021) of water previously lost to evaporation and deep percolation. In previous years, the Petitioners provided Merquin with 18,211 af of water; however because of conservation from the piping project, this amount was reduced. Per Section 2.4.2 of the January 9, 2007 Agreement between Stevinson and Merquin, the delivery of water to Merquin is limited to 14,211 af. Additionally, 14,250 linear feet of canals have been piped within Stevinson, which has resulted in the conservation of the amounts shown in the table below (2012 to 2021) of water previously lost to evaporation and deep percolation. The conservation of this amount of water resulted in a reduction of water delivered into certain fields within Stevinson's licensed place of use which include: Field ID's 801, 802, 89 (Highline No. 1 and Rice Field laterals); Field ID's 52, 53, 54, 55, 56, 64 (Turner Slough, Pump No. 1 and No. 2); Field ID's 16, 17, 25 (Sprole Ditch, Second Avenue Ditch, Home Ranch Lateral). All of the locations are metered.

Year	Amount conserved			Amount Transferred to SLCC (af)
	Merquin County Water District (af)	Stevinson Water District (af)	Total (af)	
2012	4,637	2,065	6,702	5,000
2013	4,081	2,308	6,389	5,000
2014	6,852	3,180	10,032	3,089
2015	0	0	0	0
2016	7,505	3,666	11,171	4,993
2017	7,259	2,076	9,335	2,197
2018	8,431	2,238	10,669	5,000
2019	4,344	2,116	6,460	5,000
2020	3,386	4,440	7,826	4,995
2021	4,452	4,681	9,133	1,086

A total of up to 5,000 af of the yearly conserved amount (up to 4,000 af of the amount delivered to Merquin and up to 1,000 af of the amount delivered to Stevinson) is proposed to be delivered to SLCC under the transfer.

2.0 BACKGROUND

2.1 Substance of License 5940

License 5940 was issued on February 9, 1960, pursuant to Application 5724, for direct diversion of up to 163 cubic feet per second (cfs) from Bear Creek and Owens Creek combined. There are two points of diversion under the license, one on Bear Creek and one on Owens Creek. The season of diversion is from March 1 to November 1 of each year. The purpose of use under the license is irrigation within the service area of the Stevinson and ESCC, which comprises a net area of 7,336.08 acres within a gross area of 18,347 acres within T6-8S, R9-10E, MDB&M.

2.2 Proposed Temporary Changes

The proposed transfer would temporarily add SLCC's service area as a place of use under License 5940. SLCC is a private mutual water company that holds historic water rights from the San Joaquín River system. From its inception until 2000, SLCC provided water to its shareholders, and was also responsible for providing its facilities with operations and maintenance services. In 2000, Henry Miller Reclamation District No. 2131 (HMRD) was formed to work with SLCC to better manage the day-to-day functions of delivering water and providing drainage within SLCC's boundary. HMRD now either owns or has acquired easements on all water delivery infrastructure within SLCC's boundary. HMRD also operates and maintains all such facilities to ensure delivery of SLCC contract water to all shareholders/water users within SLCC's service area. Therefore, the temporary addition in place of use requested with this petition is the service area of SLCC, operated and maintained by HMRD.

Petitioners have requested the following:

- 1) the temporary addition of the SLCC service area, comprising a gross area of 47,350 acres in Merced County within T9S, R10E-13E; T10S, R11E-13E; and T11S, R12E-13E, MDB&M.

The area requested to be temporarily added to the place of use under License 5940 is shown on the map titled Stevinson/ESCC 10-Year Transfer Program, dated March 2021, submitted with the Petition.

3.0 REQUIRED FINDINGS OF FACT

3.1 Transfer Would Not Result in Substantial Injury to Any Legal User of Water

Before approving a petition for long-term transfer, pursuant to Article 2 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 result in substantial injury to any legal user of water (Wat. Code § 1736). The controlling consideration in the State Water Board's inquiry is the effect of the change on the rights of others. (State Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 743, 805.) A person who claims injury from a proposed change "must show the change will interfere with his or her *right* to use the water, whatever the source of that right may be." (*Id.* at p. 805, italics in original.) It is not enough for a water user to show that it will receive less water as a result of the change. Instead, a water user claiming injury must demonstrate that it has a right to the greater amount of water claimed and that the proposed change will interfere with that right. (*Id.*) Water is made available for the proposed long-term transfer by the conservation measures implemented by the Petitioners. But for the proposed long-term transfer, the water would be consumptively used for irrigation within the Petitioners' existing place of use. Condition 5 of this Order requires the Petitioners to document that water deliveries within their licensed place of use have been reduced by the amount transferred pursuant to this Order.

In light of the above, the State Water Board finds in accordance with Water Code section 1736 that the proposed long-term transfer will not result in substantial injury to any legal user of water.

3.2 No Unreasonable Effect on Fish, Wildlife, or Other Instream Beneficial Uses

Before approving a petition for long-term transfer, pursuant to Article 2 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 unreasonably affect fish, wildlife, or other instream beneficial uses (Wat. Code, § 1736). There are no changes to physical conditions in Bear Creek within the existing or proposed place of use. There are no return flows and no change in timing of diversion or use. Petitioners indicate the surface water provided per this transfer will be higher quality than other water supplies available to SLCC and will provide water quality benefits within SLCC, thus assisting with achievement of sustainable groundwater management. In accordance with California Code of Regulations, title 23, section 794 (c), Petitioners provided California Department of Fish and Wildlife (CDFW) and the Central Valley Water Quality Control Board (Central Valley Board) with a copy of the Petition. CDFW and the Central Valley Board did not respond with any information regarding potential effects of the proposed transfer on water quality, fish, wildlife, and other instream beneficial uses.

In light of the above, the State Water Board finds in accordance with Water Code section 1736 that the proposed long-term transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

For the previous long-term transfer petition, approved by the State Water Board in a 2012 Order, HMRD prepared and certified an Initial Study (IS)/Mitigated Negative Declaration (MND) which addressed potential impacts of the construction of conveyance facilities to implement the existing long-term transfer (Existing Transfer Program). The IS/MND did not identify any significant environmental impacts from the project. The construction of conveyance facilities has been completed and all required mitigation has been fully implemented. Pursuant to CEQA, Stevinson filed a Notice of Exemption (NOE) on March 17, 2021 for the proposed long-term transfer. Stevinson determined that the proposed long-term transfer is categorically exempt under the Class 1 exemption for existing facilities (Cal. Code Regs., tit. 14, § 15301), Class 4 exemption for minor alterations to land (Cal. Code Regs., tit. 14, § 15304), and under the common sense exemption for activities that will not have a significant effect on the environment (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3).) The proposed long-term transfer will use existing diversion and conveyance facilities and mechanical equipment for ongoing irrigation of agricultural lands and water quality improvements within SLCC's service area, with no new construction or change in land use. The proposed long-term transfer of conserved water will continue in the same amount, timing, and terms and using the same facilities as the Existing Transfer Program. There are no proposed changes to physical conditions in Bear Creek, and any physical changes to the environment would be consistent with ongoing agricultural practices within the existing or proposed place of use. Any impacts associated with the Existing Transfer Program were due to construction of facilities that have now been completed. No potential significant impacts were identified for the transfer under the Existing Transfer Program. For all these reasons, the Petitioners concluded it can be seen with certainty that the proposed long-term transfer will not result in adverse effects on the environment and is exempt from CEQA.

The State Water Board is a responsible agency for purposes of considering whether to approve the transfer petition. As a responsible agency, the State Water Board must consider the environmental documentation prepared by the lead agency, and any other relevant evidence in the record, and reach its own conclusions on whether and how to approve the transfer. (Cal. Code Regs. tit. 14, § 15096, subd. (a).) The State Water Board has considered the NOE in deciding whether to approve the petition. The State Water Board will file a NOE within five days of the date of this Order.

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.) There is no evidence that approval of the transfer petition will have any adverse impacts on public trust resources.

5.0 PUBLIC NOTICE AND PROTESTS

On October 22, 2021, a 30-day public notice of the petition for long-term transfer was provided as follows: 1) by posting on the Division's website; and 2) via the State Water Board's electronic subscription mailing list. Protests were due by November 22, 2021. Timely protests were received from the U.S. Bureau of Reclamation (Reclamation) and Merquin.

5.1 Protest from Reclamation

Reclamation protested the long-term transfer based on potential impact to the Central Valley Project (CVP) water users. In its protest, Reclamation misquoted language in Condition 5 of the February 8, 2012 Corrected Order (2012 Corrected Order). In a subsequent email, Reclamation acknowledged that it misquoted Condition 5 of the 2012 Corrected Order in its protest letter. Reclamation stated it would dismiss the protest if the State Water Board retained a term (Condition 5) from the 2012 Corrected Order to require annual reporting by the Petitioners of the amount of water transferred to SLCC and the amount of water conserved by Merquin and Stevinson, and thus available for transfer.

State Water Board's Response

Stevinson and ESCC are not CVP contractors and thus there should be no impact to the downstream CVP water users from the proposed long-term transfer. The water for the proposed long-term transfer will be used in the SLCC service area and will not flow to the San Joaquin River. In the absence of the long-term transfer, the water would be consumptively used in Merquin's and Stevinson's service areas. Thus, there should be no impact on CVP water users. In addition, Reclamation has prepared a Draft Environmental Assessment/Initial Study and Finding of No Significant Impact (EA/IS and FONSI) for the proposed continuation of a ten-year transfer program (as one part of a possible two-way transfer involving an equivalent transfer by SLCC to other CVP contract holders) that does not identify any possible impacts to the CVP.

The State Water Board will retain the requested Condition 5 term requiring annual reporting by the Petitioners. Therefore, Reclamation's protest is dismissed.

5.2 Protest from Merquin County Water District

Merquin expressed concern about the effects of the transfer on the groundwater levels in the Merced Groundwater Basin. Merquin stated that the continued transfer of 5,000 af of surface water would compromise the ability to achieve sustainability under the Sustainable Groundwater Management Act (SGMA) and injure existing legal users of groundwater within Merquin's service area. In addition, Merquin stated it would dismiss its protest if certain conditions, shown below, were met:

1. Merquin requested that the transfer extend through December 31, 2026, unless sooner modified or terminated.
2. Merquin requested a study of the impacts of the transfer on the Merced Subbasin at Stevinson's sole expense. The report shall be provided to Merquin and the State Water Board by January 1, 2024.
3. The transfer shall not adversely impact or reduce the delivery of water by Stevinson to Merquin of 14,211 af per annum pursuant to the January 9, 2007 Agreement and particularly Section 2.4, Stevinson's Delivery Obligation.
4. Stevinson shall provide meter diversions to SLCC and provide real-time metered data to Merquin. This metering flow shall occur at an existing siphon under the Eastside Bypass for conveyance onto Turner Island Farms, and eventual conveyance to SLCC, or at another agreed upon location.
5. Modify Term 5.b of the 2012 Order as follows:
 - a. Documentation that Merquin received its baseline contract supply of 14,211 af and, as specified in Section 2.4.2 of its January 9, 2007 Agreement between Stevinson and Merquin, that Merquin received the required acre-feet per month and within the applicable "Minimum to Maximum Continuous Flow Range."

Petitioners' Response

Impacts to Groundwater in Merced Subbasin

Petitioners state there is insufficient evidence linking the long-term transfer program to either declining groundwater levels or increased salinity in groundwater. Declining groundwater levels in the vicinity of the Eastside Canal could likely be the result of pumping from numerous wells in the vicinity and/or long-term drought conditions.

Petitioners state that Merquin cannot demonstrate injury as a legal user of water because the transfer does not impact Merquin's water rights. Petitioners indicate that the water proposed for the transfer is not native water, but rather is imported and developed by Stevinson pursuant to its water right license. Merquin has only rights to pump native water within the groundwater basin and can assert no legal right to use the water flowing through Petitioners' delivery system, nor any seepage that would have recharged the groundwater basin. Petitioners state that the Merced Subbasin Groundwater Sustainability Plan (GSP) treats groundwater originating from imported surface water as developed supply held under the rights of the importers, and does not include it in the sustainable yield estimate of native groundwater for SGMA purposes. Therefore, Petitioners conclude there is no basis for Merquin's argument that a study is needed to determine the effects of the proposed transfer program on groundwater conditions within the Merced Subbasin, or its proposed Conditions 1 or 2.

Failure to meet obligations to Merquin per 2007 Agreement

Petitioners argue that they have performed under the terms of the 2007 Agreement and it is inappropriate to involve the State Water Board in what is a private contractual dispute. Petitioners assert that the 2007 Agreement provides for water to be delivered to Merquin based on orders by Merquin. Petitioners state there may be times when the deliveries to Merquin under the 2007 Agreement are less than contract maximums because Merquin does not have demand for the water and does not request it. For example, in 2018, the delivery of less than contract maximum was due to lack of demand by Merquin because of significant rainfall. There was a dip below the minimum flow of 45 cfs delivery to Merquin (42 cfs on July 24, 2022) but additional water was provided to Merquin two days later.

Reporting Issue

Petitioners offered to provide Merquin with a summary of current monthly water deliveries under the 2007 Agreement by the end of the third week of each month, but have received no response on resolution. Petitioners may continue to resolve concerns related to the 2007 Agreement, including additional reporting by Petitioners to Merquin. Petitioners state that any revisions to contractual agreements between Petitioners and Merquin should be outside the purview of the State Water Board.

Additional Information

The State Water Board sent a letter dated October 31, 2022 to Merquin requesting additional information regarding the impacts of the proposed long-term transfer on Merquin's water rights. Merquin responded by letter dated November 29, 2022. Petitioners sent a letter of response dated December 2, 2022 to the State Water Board in response to Merquin's letter.

In its November 29, 2022 letter, Merquin revised the conditions for withdrawal of its protest. Merquin stated that Stevinson shall provide supervisory control and data acquisition (SCADA) data of the measured flow between Stevinson and SLCC by weekly email reporting of daily transfer flows in cubic feet per second and the total amount transferred in acre-feet each day. In addition, Merquin requested other specific documentation, reporting, and restrictions regarding the delivery of continuous minimum flows to Merquin.

In its December 2, 2022 letter, Petitioners restated the contractual obligation for Stevinson to provide flows to Merquin should not be impacted by this transfer and that issues regarding meeting this contractual obligation should not be addressed by this order.

On February 28, 2023 Merquin provided a status update to the State Water Board on efforts to resolve its protest. Merquin revised its proposed conditions for resolution of its

protest by removing a requirement that Stevinson suspend deliveries in certain circumstances. Merquin also raised a new argument that Stevinson cannot rely on previous environmental conditions to determine water availability in the future, because of the impacts of climate change, implementation of SGMA, and updates to the State Water Board's Bay-Delta Plan.

Petitioners were notified of Merquin's status update.

State Water Board's Response

The additional information provided by Merquin does not provide sufficient evidence that the transfer will injure Merquin as a legal user of water, and therefore, the protest is dismissed. Merquin has not provided sufficient evidence to show that the transfer will cause Stevinson to fail to deliver the contractually obligated quantities of surface water to Merquin. In its November 20, 2021 protest, Merquin relies only on the location of the proposed point of diversion for the transfer up-canal of Merquin's service area for its claim that Stevinson may not meet its contractual obligations. The additional information provided by Merquin on November 29, 2022 describes in more detail the water conveyance infrastructure used to deliver water from Stevinson to Merquin, stating that Stevinson is operating its infrastructure to force water toward SLCC and away from Stevinson and Merquin during low flows, specifically via the overpour weir on the Eastside Canal forcing water to flow south toward SLCC at times of low flows. In its February 28, 2023 status update Merquin stated that Stevinson represented it removed the weir boards in 2022.

The Existing Transfer Program has been ongoing since 2012. Merquin describes one instance in which Stevinson failed to deliver the minimum flows required under the 2007 Agreement, but does not explain how Stevinson's failure to meet its contractual obligation is linked to the Existing Transfer Program or the proposed long-term transfer. Contractual disputes unrelated to this transfer do not raise an issue of injury for the Board to decide. To the extent that Merquin's concern is based on whether Petitioners' conservation efforts will in fact make water available or on the impacts of climate change and regulatory changes to water availability, Condition 5 of this Order requires Petitioners to show that water is made available for the transfer by reducing water supplied to Merquin and Stevinson.

Merquin also has not provided sufficient evidence to show that the transfer will impact groundwater levels or quality within the Merquin District boundary. Well hydrographs within Stevinson and Merquin's service area submitted by the Petitioners and Merquin generally show that groundwater levels decline during dry periods and rebound during wet periods.

The transfer end date will be December 31, 2031, as requested in the petition. The State Water Board reserves authority 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.

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 long-term transfers 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 and the Deputy Director for Water Rights redelegation of authority dated June 6, 2022.

7.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1736, and therefore finds as follows regarding Petitioners' License 5940 for the transfer proposed in the Petition of up to 5,000 af of water annually to SLCC.

The State Water Board concludes that, based on the available information:

1. The proposed long-term transfer will not result in substantial injury to any legal user of water.
2. The proposed long-term transfer will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed by Petitioners for long-term transfer of up to 5,000 af of water per year to SLCC, is approved. The protests brought by Reclamation and Merquin are dismissed.

All existing terms and conditions of License 5940 remain in effect, except as temporarily amended by the following provisions:

1. The long-term transfer of water is effective from the date of this Order through December 31, 2031.
2. The maximum amount of water that may be diverted to SLCC pursuant to this Order is 5,000 af per year. The transfer in combination with all other diversions pursuant to License 5940 shall not exceed a rate of 163 cfs from all sources combined. The

transfer is further limited to the quantities made available annually as a result of water conservation.

3. For the purposes of the transfer of up to 5,000 af of water per year, the place of use of License 5940 is expanded to include the service area of the San Luis Canal Company as shown in the legal description in the "Property Transfer Documentation" filed with the State Water Board.
4. On January 1, 2032, the change in place of use of License 5940 shall automatically expire, and the water rights subject to the change shall revert to its Licensees without any action by the State Water Board.
5. No later than January 31 of each calendar year covered by this Order, Petitioners shall provide the Deputy Director for Water Rights a report describing the water transferred as authorized by this Order during the preceding year. The report shall include the following information:
 - a. The total quantity of water (in af) delivered to SLCC during the preceding year.
 - b. Documentation that Merquin received 4,000 af (or whatever lesser amount was transferred under the Order that year) less water under its contract during the one-year period covered by the report than its baseline contract supply of 18,211 af.
 - c. Documentation that the Stevinson's service area received 1,000 af (or whatever lesser amount was transferred under this Order that year) less water during the one-year period covered by the report than from historic deliveries that preceded the conservation improvements.
6. The first 5,000 af of any water conservation credit claimed under License 5940 shall be applied to this transfer during the period of this Order. This conservation credit shall not be applied to any other project during the transfer period.
7. Pursuant to Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this long-term transfer Order, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board 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 that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (ESA) (Fish & G. Code, §§ 2050-2097) or the federal ESA (16 U.S.C.A. §§ 1531-1544). If a "take" will result from any action authorized under this Order, the Petitioners shall first obtain authorization for an incidental take permit prior to undertaking that action.

Petitioners shall be responsible for meeting all applicable California ESA and federal ESA requirements for the long-term transfer authorized under this Order.

9. The State Water Board reserves authority 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: MAR 02 2023