

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF LICENSE 2685 (APPLICATION 1224)
MERCED IRRIGATION DISTRICT
ORDER APPROVING TEMPORARY CHANGE
IN PLACE OF USE AND TRANSFER OF 6,000 ACRE-FEET OF WATER**

SOURCE: Merced River
COUNTY: Mariposa and Merced

ORDER APPROVING TEMPORARY CHANGE IN PLACE OF USE AND TRANSFER OF 6,000
ACRE-FEET OF WATER BY THE DEPUTY DIRECTOR FOR THE DIVISION OF WATER RIGHTS

1.0 SUBSTANCE OF PETITION

On June 10, 2011,

Merced Irrigation District
744 West 20th Street
Merced, CA 95344-0288

filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a Petition for Temporary Change pursuant to Water Code Sections 1725 through 1732. Pursuant to the petition, the Merced Irrigation District (MID) seeks to transfer up to 6,000 acre-feet (af) of water for use upon lands within the Merced County SOI Water Users Association (SOI Water Users). The SOI Water Users are all located within an area known as MID's Sphere of Influence Lands (SOI Lands), within Merced County. Temporary changes under Water Code section 1725 may be effective for a period of up to one year.

1.1 Description of the Transfer. MID proposes to transfer up to 6,000 af of stored water under its License 2685 to irrigate land that is currently not included as a place of use under the license. MID is petitioning to increase the place of use covered by License 2685 (Application 1224) in order to supply previously stored surface water for use on land of the SOI Water Users. The majority of the SOI Water Users have historically received surface water from MID during years that MID's Board of Directors determines water is available under MID's pre-1914 appropriative right claims provided that adequate natural flow is available from the Merced River. During months when surface water is not available under the pre-1914 appropriative right claims for delivery to the SOI Water Users, the individual landowners meet their demands through alternate supplies, such as groundwater.

In the absence of the proposed temporary change, the 6,000 af of water would either remain in storage within Lake McClure or be used on land within MID boundaries.

1.2 Place of Use Under the Proposed Transfer. The SOI Lands (as shown on a map submitted with the petition titled *Merced Irrigation District - Proposed Addition to Place of Use*, dated June 8, 2011) will be temporarily added to the place of use of License 2685. The SOI Lands encompass

individual parcels, the boundaries of Le Grand-Athlone Water District, and the portion of Chowchilla Water District (collectively referred to as Districts) located within Merced County. In total, the SOI Lands include a net area of 40,447 acres within a gross area of 71,540 acres.

1.3 Water Available for Transfer. MID proposes to deliver previously stored surface water to the Districts for distribution to participating SOI Water Users. The quantity of surface water proposed to be released by MID for delivery to the SOI Water Users will be made available by releases of up to 6,000 af from reservoir storage. Releases of previously stored surface water involve the delivery of water to SOI Lands and refill of the reservoir, which normally occurs during periods of high runoff. The release of stored water would be increased as compared with the condition absent the proposed temporary transfer.

1.4 Refill Criteria. The transfer consists of water currently stored in Lake McClure. Refill criteria developed in coordination with the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation) are required to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the State Water Project (SWP) or the Central Valley Project (CVP). The refill criteria provide for an accounting of refill of Lake McClure resulting from the proposed transfer. Pursuant to the criteria, any refill occurring during balanced conditions in the Delta is subject to repayment to DWR and Reclamation according to a schedule agreed to by MID, DWR, and Reclamation.

2.0 BACKGROUND

2.1 Substance of MID's License.

Original Water Rights under License 2685

License 2685 was issued to MID on August 11, 1944, pursuant to Application 1224. License 2685 allows the direct diversion of 1,500 cubic feet per second (cfs) of water from the Merced River from about March 1 through about October 31 of each year. License 2685 also allows the diversion from the Merced River to storage of 266,400 af per annum (afa) from about October 1 of each year to about July 1 of the succeeding year.

The point of diversion is at the New Exchequer Dam on Lake McClure. There are also two points of rediversion downstream of New Exchequer Dam – Merced Falls Diversion Dam for the North Side Canal and Crocker-Huffman Diversion Dam for the Main Canal. Water rediverted through the North Side Canal and the Main Canal is used for irrigation and domestic purposes on 164,395 gross acres within the boundaries of MID.

Modified Water Rights under License 2685

Effective February 16, 1995, License 2685 was modified from its original conditions to allow the direct diversion of 5,000 afa of water from the Merced River at a rate not to exceed 7 cfs from November 1 of each year to February 29 of the following year for municipal use in the Mariposa Town Planning Area. Storage under License 2685 is reduced in the amount of water diverted to the Mariposa Town Planning Area, up to 1,667 afa. Combined maximum direct diversion and storage under License 2685 cannot exceed 345,440 afa. The point of diversion for the water delivered to the Mariposa Town Planning Area is located approximately 40 miles upstream of New Exchequer Dam.

License 2685 was further amended effective June 20, 2003 to include an additional point of rediversion and modify the place of use resulting from MID's consolidation with the El Nido Irrigation District. The new point of rediversion downstream of New Exchequer Dam is on Duck Slough. Water rediverted through Duck Slough is used for irrigation purposes on 9,418.6 acres within the boundaries of El Nido Irrigation District.

3.0 PUBLIC NOTICE AND COMMENT ON THE PROPOSED TRANSFER

Public notice of the petition for temporary change was provided June 10, 2011 on the Division's internet site and via regular mail and email to interested parties and by publication in the Merced Sun-Star on June 20, 2011. Timely comments regarding the proposed temporary change were submitted by DWR and Reclamation. These comments and the State Water Board's responses are briefly summarized below.

3.1 Comments from DWR. DWR objects to the proposed temporary change based on potential injury to its water rights. The proposed temporary change involves the transfer of stored water and has the potential to adversely impact DWR's water rights if refill of the vacated storage space occurs when the Delta is in balanced conditions. DWR indicates that MID must work with DWR and Reclamation to develop acceptable refill criteria. DWR also states that the petitioner must allow DWR to review and approve operations accounting from 2010 or an operation schedule for 2011 as required by the DWR/MID/Kern County Water Agency Conveyance Agreement for MID's 2010 transfer pursuant to Division Order WR 2010-0027-DWR.

On August 16, 2011, DWR further commented that it would like MID to provide advance notice to both DWR and Reclamation of the release of transfer water to ensure that there are no changes in flow downstream of MID.

State Water Board Response: As stated in Section 1.4 of this Order, refill criteria are needed to ensure that the refill of Lake McClure resulting from the proposed temporary change does not adversely impact operations and/or water rights of the SWP or CVP. This Order requires MID to comply with the refill criteria. This Order does not require advance notice of release of previously stored water. Stored water transferred to the SOI Water Users will be rediverted upstream of the point of measurement for MID's required bypass flows. Thus, there will be no change in flows available for downstream instream flow requirements or downstream water users.

3.2 Comments from Reclamation. Reclamation states that a refill agreement is necessary in order for the proposed temporary change to not adversely impact the water rights or operations of the CVP. Reclamation requests the Petitioner enter into a reservoir refill agreement containing conditions, criteria and procedures that ensure that CVP operations and water rights are not adversely impacted by future refill following the release of transfer water. The agreement must protect CVP water rights and operations from injury regarding Reclamation's ability to meet all applicable water quality standards cited in Permits 16597, 20245, and 16600 (Applications 14858A, 14858B, and 19304, respectively) for New Melones Reservoir pertaining to the San Joaquin River and Sacramento-San Joaquin Delta Estuary. The agreement will also protect Reclamation's water right Permits 11315, 11316, 11967, 11969, 11971, 11973, 12364, 12721, 12722, 12723, 12727, 12860, and 15149 (Applications 13370, 13371, 5628, 15374, 15375, 16767, 17374, 5626, 9363, 9364, 15764, 9368, and 21542) and operations for the Jones Pumping Plant.

State Water Board Response: As stated in Section 1.4 of this Order, refill criteria are needed to ensure that the refill of Lake McClure resulting from the proposed temporary change does not adversely impact operations and/or water rights of the SWP or CVP. This Order requires MID to comply with the refill criteria.

The Petitioner contacted the Division on August 10, 2011, and indicated it is in negotiations with DWR and Reclamation regarding utilizing the same refill criteria from MID's 2010 transfer for the transfer proposed with this order. DWR and Reclamation are currently reviewing refill accounting from MID's 2010 transfer, and if it is determined to be acceptable, that criteria will also be applied to this transfer, if not the criteria will be refined by the Petitioner, DWR and Reclamation in consultation with the State Water Board. DWR and Reclamation have not yet completed review of the 2010 refill accounting. Therefore, in order to proceed with the transfer in a timely fashion, the Petitioner has proposed and DWR and Reclamation have agreed that the following term be included in this Order to satisfy the two agencies' concerns:

Refill criteria shall be developed for the 2011 water transfer between MID and the SOI Water Users by October 15, 2011, subject to approval by DWR and Reclamation. The refill criteria shall govern the conditions under which refill of the water released pursuant to this Order occurs, including the conditions under which refill impacts may accrue. At the conclusion of refilling water in Lake McClure for the water released pursuant to this Order, if a refill impact has accrued, MID is required to release that amount of water to DWR and Reclamation on a schedule agreed to between MID, DWR, and Reclamation. In the event that refill criteria for this transfer is not approved by DWR and Reclamation, then the refill criteria referenced in WR Order 2010-0027-DWR will be used for this transfer.

4.0 REQUIRED FINDINGS OF FACT

4.1 Availability of Water for Transfer. Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Section 1011. (Wat. Code, §§ 1725, 1726.) Water Code section 1725 defines "consumptively used" to mean "the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion." The water proposed for transfer is currently stored in Lake McClure pursuant to the terms of License 2685. The petition states that in the absence of the proposed change, the 6,000 af of water proposed for transfer would remain in storage in Lake McClure and this quantity would be pumped at individual groundwater wells for use within the SOI Lands. Under License 2685, MID can both directly divert and collect water to storage. MID will not provide water by direct diversion under License 2685 to the SOI Water Users.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the proposed transfer involves only an amount of water that would have been stored in the absence of the proposed temporary change.

4.2 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).) This Order requires MID to comply with refill criteria to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the SWP or CVP.

MID will continue the same surface water deliveries to its existing customers with or without the proposed temporary water transfer. In addition, MID is required to release water to meet its other existing downstream commitments and requirements below the inlet to its Main Canal. Therefore, there will be no downstream change of the streamflow, water quality, timing of diversion, return flows, effects on legal users of water, or change in the purposes of use authorized by License 2685 during the period of the proposed temporary transfer.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(1) that the proposed temporary transfer will not injure any legal user of the water.

4.3 No Unreasonable Effect on Fish, Wildlife, or Other Instream Beneficial Uses. Water Code section 1729 exempts temporary changes involving transfer of water from the requirements of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000, et seq.). However, 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 water available for transfer was previously stored in Lake McClure under the provisions of License 2685. MID states that the SOI Water Users currently and historically have received surface water from MID during years the Board of Directors of MID determine water is available under its pre-1914 claims, provided adequate natural flow is available from the Merced River. The SOI Water Users historically received surface water from MID (the project) prior to the effective date of CEQA, and the project has not changed since the effective date of CEQA. On March 20, 2007 MID adopted Resolution No. 2007-11, which determined that this project is an existing facility and categorically exempt from CEQA under Title 14, California Code of Regulations section 15301, Class 1. According to MID, since the public project approval in 1929 there has been negligible, if any, expansion of place of use.

MID is required to maintain specified instream flows pursuant to State Water Board Water Right Decision 1641 and Federal Energy Regulatory Commission License No. 2179 for the Exchequer Merced River Project. The flow requirements are set forth in License 2685. MID will be required to comply with the License 2685 instream flow requirements at all times while transferring water pursuant to this Order.

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.

5.0 STATE WATER BOARD DELEGATION OF AUTHORITY

On September 18, 2007, the State Water Board adopted Resolution 2007-0057, 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 2007-0057.

6.0 CONCLUSIONS

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

1. The proposed 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.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change in the place of use under License 2685 (Application 1224) of MID for the transfer of 6,000 af of water to the SOI Water Users is approved.


All existing terms and conditions of License 2685 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. Only water previously stored in Lake McClure may be transferred. Water shall not be provided to the SOI Water Users by direct diversion.

3. The place of use under License 2685 is temporarily expanded to include the SOI Lands as follows: Irrigation of a net area of 40,447 acres within a gross area of 71,540 acres as shown on a map entitled "Merced Irrigation District – Proposed Addition to Place of Use" dated June 8, 2011, filed with the Division.
4. Refill criteria shall be developed for the 2011 water transfer between MID and the SOI Water Users by October 15, 2011, subject to approval by DWR and Reclamation. The refill criteria shall govern the conditions under which refill of the water released pursuant to this Order occurs, including the conditions under which refill impacts may accrue. At the conclusion of refilling water in Lake McClure for the water released pursuant to this Order, if a refill impact has accrued, MID is required to release that amount of water to DWR and Reclamation on a schedule agreed to between MID, DWR, and Reclamation. In the event that refill criteria for this transfer is not approved by DWR and Reclamation, then the refill criteria referenced in WR Order 2010-0027-DWR will be used for this transfer.
5. Within 90 days of completion of the transfer, but not later than January 31, 2013, the 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. The quantity of water (in af) delivered to the SOI Lands pursuant to Condition 2 of this Order; and
 - b. The daily average rate of water that is released from Lake McClure pursuant to this Order.
6. Licensee shall provide a report to the Deputy Director for Water Rights by July 1, 2012 describing its refill of the transferred amount of water pursuant to this Order. For periods of refill or refill impacts, including any releases made by the Licensee to address a refill impact, the report shall include the daily values for these periods. If reservoir refill or releases for refill impacts are not complete by July 1, 2012, subsequent reports shall be submitted by July 1 of each year until completion.
7. MID shall comply with the License 2685 instream flow requirements at all times while transferring water pursuant to this Order.
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 State Water Board in accordance with law and in the interest of 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 the 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 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 (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 any incidental take prior to commencing transfer of water. Licensee 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.

STATE WATER RESOURCES CONTROL BOARD


for *Barbara Evoy, Deputy Director*
Division of Water Rights

Dated: **AUG 22 2011**