

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

ORDER WR 2021-___

In the matter of the pending petitions of

~~The~~the County of Sacramento and the Sacramento County Water Agency

to change water-right Licenses 1062 and 4060 (Applications A001061 and A014494),
which authorize diversions of water from the Sacramento River
in Sacramento County,
and related issues regarding whether these licenses should be revoked.

SOURCE: Sacramento River

COUNTY: Sacramento

**ORDER ON CHANGE PETITIONS AND RELATED
LICENSE REVOCATION ISSUES**

BY THE BOARD:

1.0 INTRODUCTION

This matter came to the State Water Resources Control Board (State Water Board or Board) as a proposed order prepared by the Presiding Hearing Officer of the Board's Administrative Hearings Office (AHO), pursuant to Water Code section 1114, subdivision (c)(1). Pursuant to Water Code section 1114, subdivision (c)(2)(A), the Board adopts the AHO's proposed order in its entirety.

As described in this order, we conclude that we should exercise our discretion under Water Code sections 1241 and 1675 not to completely revoke water-right Licenses 1062 and 4060 despite periods of more than five years of nonuse when water was

available and conflicting claims were being exercised. We grant Sacramento County's petitions to change these licenses. We add new conditions to these licenses to prevent injury to other legal users of water.

2.0 LEGAL AND PROCEDURAL BACKGROUND

2.1 Geographical Setting

This action concerns petitions to change two appropriative water-right licenses held by the Sacramento County Department of Airports (County Airports) and the Sacramento County Water Agency (Water Agency).¹ County Airports manages approximately 800 acres of land near the Sacramento International Airport that are within the licenses' authorized places of use. (Exh. Sacramento County (Sac County) 54², p. 2³.) These lands are south of the airport, between Interstate 5 and the Garden Highway. (See exh. Sac County 54, p. 32 & Figures 1 & 2 attached to this order.) The northern parcel contains 306.75 acres and now is managed exclusively for aircraft approaches and departures. (Exh. Sac County 54, p. 2.) The southern portion of these lands contains eight parcels totaling 496.36 acres, which are managed for Swainson's hawk foraging habitat. (*Id.*)

¹ The Water Agency was formed by special legislation in 1952. (1952 Cal. Stats. c. 10, pp. 315-338.) The current version of the Sacramento County Water Agency Act is codified in West's Water Code App., §§ 66-1 – 66-55.) The Water Agency's territory includes all of Sacramento County (West's Water Code App., § 66-1), and the County Board of Supervisors is the Water Agency's *ex officio* board of directors (*id.*, § 66-7). The Water Agency and Sacramento County are separate legal entities. (See *Vanoni v. County of Sonoma* (1974) 40 Cal.App.3d 743, 748-749 [where Legislature creates entity, that entity is separate from county]; exh. Sac County 25, p. 1.)

Where appropriate, this order refers separately to the Water Agency and County Airports. Unless the context indicates otherwise, the terms "Sacramento County" and "the County" in this order refer collectively to the County of Sacramento, County Airports and the Water Agency.

² Electronic copies of the parties' exhibits are saved in a subfolder for each party (e.g., "Sacramento County exhibits") in the "Hearing Documents" folder in the administrative record for this matter. The AHO has posted this administrative record on the AHO-FTP site.

³ Unless otherwise noted, references to page numbers in pdf files of documents, including parties' exhibits, correspond to the page numbers provided at the top of the screen reading software used to view the pdf files.

2.2 History of Water-Right License 1062 (Application A001061)

On August 4, 1918, the Natomas Company of California filed water-right Application A001061 with the State Water Commission, a predecessor of the State Water Board. (1918-08-28 A001061 Application, pp. 2-4.⁴) On November 27, 1918, the Commission issued water-right Permit 513 on this application. (*Id.*, p. 1.) A condition in this permit stated that “the amount of water diverted shall be on the basis of one cubic foot per second continuous flow to 80 acres of irrigated land.” (*Id.*) On June 6, 1931, the Department of Public Works, Division of Water Resources, a successor to the Water Commission and another predecessor to the Board, issued water-right License 1062. (1931-06-06 Water-Right License 1062.) This license confirmed an appropriative right to divert a total of 7.44 cubic feet per second (cfs) of water from the Sacramento River in Sacramento County at three points of diversion from about April 1 to about October 1 each year to irrigate 715.56 acres of land. (*Id.*)⁵

On June 12, 1931, the Division of Water Resources issued an order correcting the description of the authorized place of use. (1931-06-12 Order Allowing Correction of Description of Place of Use.) In 1954, the Department of Public Works, Division of Water Resources, State Engineer (State Engineer), issued an order changing the authorized points of diversion and correcting the authorized place of use. (1954-05-24 Order Allowing Change in Points of Diversion.)

⁴ Copies of some of the documents in the Board’s Division of Water Rights Records Unit files for these licenses are in the administrative record for this matter. These documents are in files with filenames that contain the dates of the documents, followed by brief descriptions. Some of the files in this folder also may be in one of the parties’ exhibits. The parties’ exhibits are in subfolders within the administrative record’s “Hearing Documents” folder.

⁵ After the Board issues a water-right permit and the permittee has constructed the necessary works and used them to divert and beneficially use water under the permit, the Board determines the amount of water that has been diverted and applied to beneficial use. (Wat. Code, §1605.) If the Board’s determination is favorable, then the Board issues a water-right license, which confirms the appropriative water right to this amount of water. (Wat. Code, § 1610; see *People v. Shirokow* (1980) 26 Cal.3d 301, 306.)

The Board's records indicate that License 1062 was assigned on July 2, 1998 to "Sacramento County Public Works Agency – Real Estate Division." (1931-06-06 Water-Right License 1062, p. 2, hand-written notes, initial capitalization added.)

2.3 History of Water-Right License 4060 (Application A014494)

On September 20, 1951, Fong Quock Yen filed water-right Application A014494 with the State Engineer. (1951-09-20 Application to Appropriate Unappropriated Water.) On March 14, 1952, the State Engineer issued water-right Permit 8921 on this application. (*Id.*) On January 26, 1955, the State Engineer issued water-right License 4060. (1955-01-26 Water-Right License 4060.) This license confirmed an appropriative right to divert 1.57 cfs of water from the Sacramento River in Sacramento County from about May 1 to about October 1 each year to irrigate 123.32 acres of land. (*Id.*) The maximum authorized diversion rate in this license corresponds to a rate of approximately 1 cfs per 80 acres. (123.32 acres \div 1.57 cfs = 78.5 acres \div cfs.)

2.4 Sacramento County's Land-Acquisition and Land-Management Actions from 1981 through 2007

Between 1981 and 1986, County Airports purchased various parcels south of the airport to protect aircraft approaches and departures. (Exh. Sac County 3; exh. Sac County 24, p. 2, ¶ 4; 2020-08-13 Sacramento County Hearing Recording (audio+video) (Hearing Recording) 31:00-32:00.⁶) In 1998 and in 2003, County Airports leased the lands comprising the authorized places of use for Licenses 1062 and 4060 to tenants for agricultural purposes.⁷ (Exhs. Sac County 4-6.) The leases were for four-year terms. (Exh. Sac County 4, p. 7; exh. Sac County 5, p. 3; exh. Sac County 6, p. 7.)

After the September 11, 2001 terrorist attacks in the eastern United States, County Airports became increasingly concerned about the risks of unmarked farm vehicles

⁶ The file of the audio+video recording of the hearing is in the administrative record in the "Hearing Documents" folder. There also is an "audio only" file of this hearing in this folder, but the citations in this order to the Hearing Recording are to the audio+video file.

⁷ As shown in Exhibit Sac County 2, Sacramento County owns all parcels in the authorized places of use for Licenses 1062 and 4060 except for Parcel 61. The Sacramento Area Flood Control Agency owns Parcel 61. (Exh. Sac County 2; see also exh. Sac County 24, p. 2, ¶ 4.)

entering the Airport Operating Area and “farm implements . . . and irrigated crops [as] hazardous wildlife attractants” at the airport. (Exh. Sac. County 24, p. 3, ¶ 5; Hearing Recording 32:05-34:41.) Also, the airport reported a high rate of “bird strikes” due to the presence of wildlife around the runways. (*Id.*) To comply with Federal Aviation Authority (FAA) regulations and an FAA advisory circular, County Airports decided not to renew the agricultural leases when the leases expired at the end of 2007. (*Id.*; exh. Sac County 24, p. 3, ¶¶ 5-6; exhs. Sac County 4-6.) Consistent with the County’s decision not to renew these leases, diversions and use of water under Licenses 1062 and 4060 declined and then stopped during this period. No water was diverted under either license after 2006. (Exh. Sac County 10, p. 1; exh. Sac County 48, p. 5.)

2.5 Sacramento County’s 2008-2012 Actions Regarding Land Use Plans and Diversion Facilities

As part of its investigation into possible irrigation of the License 1062 and 4060 place-of-use lands to provide Swainson’s hawk mitigation habitat, Sacramento County contracted with a pump inspector in late 2008 to inspect and test the pumps for the License 1062 and 4060 diversion facilities. (Exh. Sac County 10; exh. Sac County 24, p. 4, ¶¶ 7-8.) This inspector determined that it would cost approximately \$100,000 to repair the pumps. (Exh. Sac County 10, pp. 2-3; exh. Sac County 24, p. 4, ¶ 8.) Considering this high cost and the fact that a resumption of irrigation could attract birds that would be hazardous to aircraft, the County decided not to repair the pumps and that only non-irrigated crops would be grown on these lands. (Exh. Sac County 24, pp. 4-5, ¶ 9.) Consistent with this decision, the County’s 2011 General Plan Update removed agricultural land use from the designations for these lands and added a description of the FAA requirements that these lands be managed exclusively for protection of aircraft approaches and departures. (*Id.*, p. 5, ¶ 10; exhs. Sac County 11 & 13.)

There is no evidence in the record that Sacramento County took any actions between 2007 and 2011 to attempt to preserve the License 1062 and 4060 water rights or to change these licenses’ authorized points of diversion, places of use or purposes of use.

On May 23, 2012, the State Water Board’s Division of Water Rights sent transmittal letters and draft cease and desist orders (Draft CDOs) to Sacramento County based on

the County's failure to file the required annual licensee reports for Licenses 1062 and 4060 for 2010. (2012-05-23 J. Kassel ltr. & A001061 Draft CDO; 2012-05-23 J. Kassel ltr. & A014494 Draft CDO.) In response, Greg Rowe, a Senior Environmental Analyst with Sacramento County, filed the County's licensee reports for these licenses for 2008-2011 on June 5, 2012. (Exh. Sac. County 24, p. 5, ¶ 11; see exhs. Sac. County 14-21.) These reports listed zero diversions and use during 2008-2011. (Exhs. Sac County 14-21.) The reports stated that the project covered by these licenses had not been abandoned, but also that, because no agricultural use will ever occur again in the properties covered by the licenses, "[i]t is unlikely that water diversions will ever occur again." (*Id.*) On June 5, 2012, Mr. Rowe also filed a change-in-ownership request to delete a prior licensee's name from the License 1062 licensees. (Exh. Sac County 24, p. 5, ¶ 11.) The Division of Water Rights made this change on June 26, 2012. (Exh. Sac County 22.)

On June 15, 2012, Mr. Rowe sent a letter to the Division of Water Rights, which discussed the County's prior failures to file the licensee reports for 2008-2011. (Exh. Sac County 23; exh. Sac County 24, p. 5, ¶ 12.) Mr. Rowe's letter confirmed that no water was used under the licenses during 2008-2011, that the land leases had expired at the end of 2007, that the land is "now managed exclusively to reduce bird attraction, and we have no intention of reinstating tenant agriculture," and that "[c]alendar years 2005 and 2006 were the last years during which crops were grown on airport land near the licensed diversions." (Exh. Sac County 23, p. 2.) Neither the County's June 2012 licensee reports for 2008-2011 nor Mr. Rowe's June 2012 letter discussed any possible changes in the licenses' authorized points of diversion, places of use or purpose of use. (Exhs. Sac County 14-21 & 23.)

On June 22, 2012, Mr. Rowe received a telephone call from a Division of Water Rights staff member. (Exh. Sac County 24, p. 6, ¶ 14.) Based on that call, Mr. Rowe learned that the "water rights are extremely valuable, and that County Airports could transfer the

place of use to the Freeport treatment plant.” (*Id.*)⁸ During the hearing, Mr. Rowe testified that he previously was not aware of the water rights, the need to file licensee reports or the value of the rights. (Hearing Recording 1:54:40-1:56:27.) He also testified that he was not aware of anyone else at the County who was aware of the value of the rights. (*Id.* 1:56:28-1:56:46.)

2.6 Sacramento County 2013-2015 Actions Regarding Licenses 1062 and 4060

In 2013, County Airports notified the FAA of the County’s proposed transfer of the License 1062 and 4060 water rights, and the FAA responded with several questions. (Exh. Sac County 24, p. 6, ¶ 15.) Based on these questions, Mr. Rowe became aware of the complexities of transferring the License 1062 and 4060 water rights, which were associated with lands for which the purchases had been partially funded by FAA grants. (*Id.*) After additional communications and analyses, County Airports ultimately determined in June 2014 that it could transfer the License 1062 and 4060 water rights so long as County Airports retained title to the lands. (*Id.*, pp. 6-8, ¶¶ 18-19, 21-22.)

On February 24, 2014, Sacramento County’s attorney⁹ wrote a letter to the Division of Water Rights, which stated that County Airports intended to transfer the License 1062 and 4060 water rights to the Water Agency, that the Water Agency was seeking to comply with various FAA requirements, and that the County would be “putting the water subject to these water rights to full reasonable beneficial use as early as possible.” (Exh. Sac County 28.)

⁸ In 2011, the Freeport Regional Water Authority, a joint-powers authority of the Water Agency and East Bay Municipal Utility District, completed construction of the Freeport Regional Water Project’s diversion facility and water treatment plant. These facilities are located near the community of Freeport in ~~central~~ Sacramento County at the Proposed Point of Diversion depicted in the attached Figure 2. (Exh. Sac County 54, pp. 2, 9; ~~see attached Figure 2.~~)

⁹ This letter did not state which client the attorney represented. We presume from the context of the letter that this attorney represented County Airports, the Water Agency, and the County of Sacramento.

The licensee reports for 2013 that the County filed in May 2014 similarly stated that Sacramento County was in the process of appraising the values of the licenses so the County could sell them to the Water Agency. (Exhs. Sac County 29-30.)

In July 2014, representatives of County Airports and the Water Agency discussed options for adding the Water Agency as a co-owner of the licenses. As a co-owner, the Water Agency then could petition the State Water Board to change the licenses so the Water Agency would be authorized to divert water under the licenses at the Freeport Regional Water Project for deliveries to the Water Agency's customers in its Zone 40. (Exh. Sac County 24, p. 8, ¶ 23.) Zone 40 consists of 86,000 acres of agricultural, residential, and industrial land in central Sacramento County, including parts of the ~~cities~~Cities of Elk Grove and Rancho Cordova. (Exh. Sac County 54, p. 7.) The Water Agency formed this zone in 1985 "for the purpose of constructing facilities for the production, conservation, transmittal, distribution, and sale of surface water and groundwater for conjunctive use in the Zone 40 area." (*Id.*)

On February 23, 2015, the Division of Water Rights sent a letter to the County, which discussed the June 23, 2014 site inspection by a Division of Water Rights Water Resources Control Engineer. (Exh. Sac County 32.) The Division's letter stated that this engineer had noted during the inspection that "the four points of diversions (PODs) under said License 1062 have been abandoned and have not been used since 2006." (*Id.*) The letter advised the County that the County had the option to voluntarily revoke the license. (*Id.*)

In a letter dated February 27, 2015, Sacramento County's attorney rejected this option and explained that the County was in the process of preparing a change petition. (Exh. Sac County 41.) The Division of Water Rights did not take any further actions regarding potential revocation of this license.

In June 2015, Sacramento County filed its annual licensee reports for 2014. These reports listed zero diversions and use under the two licenses and stated that the licenses were "in the process of being modified for additional water use type, additional place of use, and additional diversion point." (Exh. Sac. County 44, pp. 2, 20.) The

County's annual licensee reports for 2015-2019 contain similar information and statements. (*Id.*, pp. 5, 23 [2015 reports], 8, 26 [2016 reports], 11, 29 [2017 reports], 14, 32 [2018 reports] & 17, 36 [2019 reports].)

2.7 Sacramento County Petitions to Change Licenses 1062 and 4060

On March 10, 2015, the County's Board of Supervisors and the Water Agency's Board of Directors approved resolutions authorizing the Director of the County's Department of Water Resources to add the Water Agency as a co-owner of Licenses 1062 and 4060, and to file petitions to change the licenses to add the Freeport Regional Water Project to the authorized points of diversion, to add the Water Agency's Zone 40 service area to the authorized places of use, and to add municipal and industrial to the authorized purposes of use. (Exh. Sac County 34, pp. 5-9; exh. Sac County 70, p. 3, ¶ 10.)

On March 10, 2015, Sacramento County filed change-of-ownership forms to add the Water Agency as a co-owner of the licenses. (Exhs. Sac County 42; Sac County 70, pp. 3-4, ¶ 11.) On March 12, 2015, Sacramento County filed the change petitions. (Exhs. Sac County 45-46; exh. Sac County 70, p. 4, ¶ 13.) Exhibit B to the County's transmittal letter for each petition contains detailed information about the proposed changes and analyses of the potential effects on fish and wildlife and other legal users of water. (Exh. Sac County 45, pp. 26-39; exh. Sac County 46, pp. 25-38.)

After Sacramento County filed these petitions, Water Agency staff met with Division of Water Rights staff to discuss the County's petitions. (Exh. Sac County 70, p. 4, ¶ 14.) Following these meetings, Water Agency staff researched the amounts of historical water use on the airport properties to consider modifying the petitions so they would be consistent with the amounts of recent historical use under the licenses, rather than based on the licenses' face values. (*Id.*, pp. 4-5, ¶ 15.) The Water Agency developed historical-use estimates using County Agricultural Commissioner and Farm Services Agency data from 2001 and 2003 and [the Department of Water Resources \(DWR\) Land and Water Use data](#). (*Id.*) Water Agency staff then met with Division of Water Rights staff to discuss the Water Agency's analysis and proposed revisions to the change petitions. (*Id.*, p. 5, ¶ 16.)

On November 6, 2017, Sacramento County filed revisions to Exhibits B to its March 12, 2015 transmittal letters. (Exh. Sac County 48; exh. Sac County 70, p. 5, ¶ 16.) These revisions state that the Water Agency's new analysis uses a gross acreage of 408 acres for License 1062 and 123 acres for License 4060. (Exh. Sac County 48, pp. 4-5.) Using the applied-water values in DWR Land and Water Use estimates, the County estimated that 735 acre-feet (af) of water were used to irrigate 28 acres of wheat and 180 acres of processing tomatoes in 2001 on parts of the License 1062 lands, and that 232 af were used to irrigate 130 acres of safflower and 133.9 acres of wheat in 2003 on some of the remaining License 1062 lands and the License 4060 lands. (*Id.*, pp. 6-7.) Using these estimates, the County concluded that the maximum recent annual use under License 1062 was 859 af and the maximum recent annual use under License 4060 was 108 af. (*Id.*, p. 8.) The County concluded the estimated total maximum recent annual use under both licenses was 967 af per year (af/yr). (859 af/yr + 108 af/yr = 967 af/yr.)

The County estimated that, on average, 6.4 percent of the Sacramento River flow is lost between the authorized points of diversion in the licenses and the proposed point of diversion at the Freeport Regional Water Project. (*Id.*, pp. 8-9.) Applying this 6.4 percent loss rate to the estimated total maximum recent historical water use of 967 af/yr, the County proposed an overall new cap of 905 af/yr on total diversions under both licenses. (*Id.*, p. 9.) The County proposed that the maximum authorized instantaneous diversion rates of 7.44 cfs in License 1062 and 1.57 cfs in License 4060 not be changed. (*Id.*, pp. 9, 43.)

The 2017 revisions to the County's petitions discuss the proposed project's potential effects on fish and wildlife. (*Id.*, pp. 9-13.) Relying on the analyses in the Freeport Regional Water Project EIR, the County concluded that the proposed project "would not adversely affect fish and wildlife." (*Id.*, p. 13.)

Applying an estimated 75 percent irrigation efficiency to the maximum authorized diversion rate of 7.44 cfs under License 1062, the 2017 revisions estimated return flows associated with historic agricultural practices at the existing place of use for License

1062 at 1.86 cfs and the return flow for License 4060 at 0.39 cfs, for a total return flow of 2.25 cfs. (*Id.*, p. 16.)

The 2017 revisions also discuss the estimated return flows that would occur if the Board were to approve the County's petitions and the County were to divert the water for municipal and industrial uses. (*Id.*, pp. 17-19.) The County estimated that 20 percent of the amounts of water diverted at the new point of diversion would return to the Sacramento River. (*Id.*, p. 18.) Applying this factor to the licenses' maximum authorized diversion rates, the County estimated that the return flows associated with diversions under License 1062 would be 1.49 cfs and the return flows associated with diversions under License 4060 would be 0.31 cfs, for total return flows of 1.8 cfs. (*Id.*, p. 19.) This would be a reduction of 0.45 cfs from the total return flows of 2.25 cfs for recent historical irrigation. (*Id.*) The 2017 revisions concluded that this change would be "almost imperceptible relative to the average mean flows in the Sacramento River of 16,500 cfs between June and September," and therefore that "it is reasonably likely the proposed addition of municipal use" to the licenses would "not injure any other legal user of water downstream of the [Freeport Regional Water Project's] point of diversion." (*Id.*)

The 2017 revisions discuss the benefits that would result from Board approval of the petitions. (*Id.*, p. 22.) The revisions state that such approval would allow the Water Agency to maximize use of the Freeport Regional Water Project and further the Water Agency's conjunctive-use program. (*Id.*) The revisions state that approval of the petitions would allow the Water Agency to be able to divert water at the Freeport facility when diversions under its more-junior appropriative right or less-reliable contract rights might be curtailed. (*Id.*)

2.8 California Environmental Quality Act Documents

In July 2003, the Freeport Regional Water Authority and the Bureau of Reclamation (Reclamation) prepared a joint Draft Environmental Impact Report/Environmental Impact Statement (Draft EIR/EIS) for the Freeport Regional Water Project under the National Environmental Policy Act and the California Environmental Quality Act (CEQA).

(Exhs. Sac County 57-59.) In March 2004, the Water Authority prepared the Final Environmental Impact Report (EIR) under CEQA for this project. (Exh. Sac County 60.) The Water Authority certified the Final EIR on April 15, 2004. (Exh. Sac. County 71, p. 2, fn.1.)

In 2015, the Water Agency prepared and circulated a CEQA Initial Study and Proposed Negative Declaration for Sacramento County's water-right change petitions that tiered from the 2004 EIR. (Exh. Sac County 54, pp. 9-10; exh. Sac County 70, p. 7, ¶¶ 25-26, p. 8, ¶ 28.) After reviewing and responding to comments, the Water Agency adopted this Negative Declaration in July 2015. (Exh. Sac County 70, p. 7, ¶ 27.) In July 2020, Sacramento County prepared an addendum to the 2015 Negative Declaration for the 2017 modifications to the Petitions. (Exh. Sac County 56; exh. Sac County 70, pp. 8-9, ¶ 30.)

2.9 Division of Water Rights Notice of Change Petitions; Protests to Petitions

In March 2018, Division of Water Rights staff advised Water Agency staff that the maps the County filed with the petitions in 2015 did not comply with the Board's regulations. (Exh. Sac County 70, p. 5, ¶ 17.) Water Agency staff worked with Division staff to prepare a new map, which the Water Agency filed on November 13, 2018. (*Id.*; exh. Sac County 50.) On November 20, 2018, Sacramento County's attorney made some minor revisions to the change petitions. (Exh. Sac County 51.)

The Division of Water Rights issued its public notice of the petitions on November 28, 2018. (2018-11-28 Notice of Petitions to Change; exh. Sac County 70, p. 5, ¶ 18; see exhs. Sac County 65-66 [final petitions].)

The California Department of Fish and Wildlife (CDFW) filed comments on the County's petitions; ~~the Department of Water Resources (DWR)~~DWR and Reclamation filed protests.

CDFW's December 31, 2018 e-mail to the Division of Water Rights asked about the Water Agency's analysis of conveyance losses between the existing points of diversion

in License 1062 and 4060 and the proposed new point of diversion at the Freeport Regional Water Project. (2018-12-31 L. Mulloy e-mail to K. Gaffney.)

DWR's January 2, 2019 protest made three general arguments: (a) the County had not presented sufficient data to demonstrate that the proposed changes would not injure downstream water users; (b) the analyses in the County's petitions were based on outdated information and models and did not consider new regulations and water projects; and (c) because the County's water rights had not been used for over 10 years, the State Water Board should consider use under these rights "as abandoned water, potentially subject to forfeiture," and should treat the County's petitions as applications for new rights. (2019-01-02 E. Soderlund e-mail to K. Gaffney (with DWR protest).)

In its January 2, 2019 protest, Reclamation argued that, because of the long period of nonuse, "water under the licenses has been potentially subject to reversion to the public, along with loss of those water rights." (2019-01-02 R. Woodley ltr. to E. Ekdahl (Reclamation protest), p. 2.) Reclamation also argued that granting the County's petitions would cause legal injury to Central Valley Project (CVP) water rights and operations, and that the baseline period for determining such impacts should be a recent five-year period and not the "most recent years of maximum use" used in the County petitions' impact analysis. (*Id.*, p. 3.) Reclamation's protest referred to the Sacramento River water-rights settlement contract that applies to the lands within the existing authorized place of use in License 4060 and stated that the County would need Reclamation's written consent to amend the service area in this contract. (*Id.*, pp. 2-3.)

2.10 Sacramento County's Responses to Protests; Settlement Discussions

On February 26, 2019, the Division of Water Rights sent a letter to the County's attorney listing the protests and comments received and directing the County to file answers to the protests and to meet with the protestants to make good faith efforts to try to resolve the protests. (2019-02-26 S. McFarland ltr to A. Ferguson.) On April 24, 2019, Sacramento County filed a response to CDFW's comments (2019-04-24 Petitioners' response to

CDFW comments) and answers to Reclamation's and DWR's protests (2019-04-24 Petitioners' answers to Reclamation and DWR protests).

The parties engaged in discussions during the summer and fall of 2019. (2019-10-02 A. Ferguson ltr to K. Gaffney.) On October 7, 2019, CDFW's representative notified the County's attorney that CDFW's comments had been adequately addressed. (Exh. Sac County 52.) On January 16, 2020, the County's attorney advised the Division of Water Rights that the County and Reclamation and DWR were not able to resolve their protests. (2020-01-16 A. Ferguson ltr to K. Gaffney.)

2.11 AHO Proceedings

On February 10, 2020, the Division of Water Rights Deputy Director sent a memorandum to the Board's Executive Director, recommending that she assign Sacramento County's change petitions to the AHO. (2020-02-10 E. Ekdahl memo to E. Sobeck re transfer of A001061 and A014494 petitions.) The Executive Director then assigned the petitions to the AHO. (2020-02-10 E. Sobeck memo to A. Lilly re transfer of A001061 and A014494 petitions.)

On March 17, 2020, the AHO issued its notice of public hearing and pre-hearing conference. The notice stated that the purpose of the hearing was to receive evidence regarding the following three issues (and related sub-issues not listed here): (1) ~~Should~~should Licenses 1062 and 4060 be revoked? (2) ~~If~~if Licenses 1062 and 4060 are not revoked, then should Sacramento County's change petitions be granted? and (3) ~~If~~if these change petitions should be granted, then what new terms and conditions, if any, should be added to Licenses 1062 and 4060 when the petitions are granted? (2020-03-17 Notice of Pre-hearing Conference and Hearing for Sacramento County, p. 7.)

The hearing notice included a section called "Notice of Potential Revocation of Licenses." (*Id.*, p. 4.) This section discussed the applicable provisions of Water Code sections 1240, 1241 and 1675, and California Code of Regulations, title 23, section 850. (*Id.*, pp. 4-5.) The notice stated that Sacramento County's change petition documents and DWR's and Reclamation's protests to the change petitions discuss the fact that no water had been diverted or used under either of the licenses since 2006, and that the

protests stated that the Board should consider whether these licenses have been abandoned, the water authorized to be diverted and used under them should revert to the public, or the water rights should be lost. The notice then stated:

Considering that no water has been diverted or used under either of these licenses since 2006 and these statements in DWR's and Reclamation's protests, the AHO has determined it should consider during this hearing the issue of whether or not these licenses should be revoked.

(*Id.*, p. 5)

The notice stated that the State Water Board typically addresses potential license-revocation issues by having the Division of Water Rights Enforcement Section prepare a notice of proposed license revocation and serve it upon the licensee, who then may request a hearing. (*Id.*) The notice stated that, to avoid the delay that would be associated with using that process for potential revocations of Licenses 1062 and 4060, the AHO was proposing that its hearing notice would be the notice that would satisfy the requirements underin Water Code section 1675.1 and California Code of Regulations, title 23, section 851. (*Id.*, p. 6.) The notice explained that, if Sacramento County filed a Notice of Intent (NOI), the AHO would deem the NOI to be a request for hearing on these issues. (*Id.*) Sacramento County filed its NOI on April 6, 2020.¹⁰

The notice stated that the AHO was sending copies of the notice to the Division of Water Rights Enforcement Section to advise it of the hearing issues and to give it an opportunity to participate as a party in the hearing, and, if it decided to participate, to state during the status conference if it had any objections to this process. (*Id.*, p. 6.) The Division of Water Rights Enforcement Section did not participate in the hearing, and no party that participated in the hearing objected to this process.

On May 20, 2020, the hearing officer issued a supplemental hearing notice and pre-hearing conference order. (2020-05-20 Supp. Hrg. Notice and Pre-Hearing Conf. Order.) This notice and order confirmed that, pursuant to Water Code sections 1675 and 1675.1 and California Code of Regulations sections 850 and 851, the AHO would

¹⁰ DWR and Reclamation also filed NOIs on April 6, 2020.

consider during the hearing the issue of whether water-right Licenses 1062 and 4060 should be revoked. (*Id.*, p. 2.)

On August 13, 2020, the AHO held the hearing ~~on~~in this matter by Zoom teleconference. On September 2, 2020, the AHO issued a post-hearing order, which listed the refined hearing issues the parties should address in their closing briefs. On September 28, 2020, the parties filed their closing briefs.

On December 21, 2020, the AHO notified the parties that the AHO was extending the 90-day deadline in Water Code section 1114, subdivision (c)(1), for preparation of the proposed order in this matter by 30 days-(as authorized by this statute). On January 22, 2021, the AHO circulated a draft of its proposed order (with figures and appendices) to the parties for their review and comments and advised them that the AHO had vacated the prior submission of the matter to give them time to submit their comments. ~~[The AHO will add a citation to administrative record here after the draft proposed order is circulated. The AHO may add text here regarding parties' Sacramento County and DWR filed~~ comments on the draft proposed order on March 1. (Reclamation did not file any comments.) The AHO amended the draft proposed order and AHO's follow-up actions.]added a new part 5.0 to address these comments.

3.0 HISTORICAL DIVERSIONS AND USE UNDER LICENSES 1062 AND 4060

This part discusses the historical diversions and use under water-right License 1062 and 4060.¹¹ This historical use is relevant to both the abandonment and forfeiture issues discussed in sections 4.1 and 4.2 and the change-petition issues discussed in section 4.3.

There are two primary sources of information about the historical diversions and use under water-right Licenses 1062 and 4060: (a) information in the Division of Water Rights Records Unit files for these licenses and the related applications, and (b) evidence Sacramento County presented during the hearing.

¹¹ Unless the context indicates otherwise, references in this order to “part” and “section” refer to parts and sections of this order.

3.1 Information in Division of Water Rights Records Unit Files

3.1.1 License 1062

In 1926 and 1930, Department of Public Works, Division of Water Resources staff conducted field inspections to determine the permittee's progress building diversion facilities and applying water to beneficial use under Permit 513. (1927-01-05 Addendum to Report of H. M. Stafford; 1931-03-19 Addendum Report Covering Third Inspection.) Based on these inspections, staff determined that the permittee's application of water to beneficial use in 1929 and 1930 justified issuing a water-right license with a maximum authorized diversion rate of 7.44 cfs for irrigation of 715.56 acres. License 1062 specifies this acreage and this diversion rate. (1931-06-06 Water-Right License 1062.) The 1931 report indicates that the maximum total annual diversions under this permit of 1,072 af occurred in 1929. (1931-03-19 Addendum Report Covering Third Inspection, pp. 2-3 [1,072 af is the sum of the monthly diversion amounts listed for 1929 for the three diversion facilities].)

The 1931 ~~addendum~~ report does not explicitly state how Division staff calculated the 7.44 cfs maximum authorized diversion rate that staff included in License 1062. It appears that the Division evaluated diversions during the three-year period before the inspection and determined the maximum authorized diversion rate at each point of diversion (POD).¹² Then, staff combined these three rates to determine the total maximum authorized rate of 7.44 cfs.

For the first POD, staff noted that maximum monthly use occurred in 1930, and suggested that the authorized diversion rate for this POD should be determined after further staff consideration. (*Id.*, p. 3.) It appears that the Division later determined the rate by applying the rate of 1 cfs to 80 acres specified in water-right Permit 513 to the 374 acres irrigated in 1929, resulting in a maximum authorized rate of 4.67 cfs for this

¹² The report indicates that the points of diversion were at three pumps identified as: Driver & Person₂; Bennett₂; and Martin & Carter. (1931-03-19 Addendum Report Covering Third Inspection, p. 2.)

point of diversion (374 acres / (~~1 cfs~~ / 80 acres / 1 cfs) = 4.67 cfs; see 1918-08-28 A001061 Application, p. 1).

For the second and third PODs, Division staff determined the number of acres irrigated for each POD, 128 and 93.59 acres, during the month of maximum water use in the three-year period, and then applied the rate of 1 cfs per 80 acres to the number of acres irrigated, resulting in maximum authorized diversion rates of 1.60 and 1.17 cfs for these points of diversion. (*Id.*, pp. 2-3.) The combined maximum authorized diversion rate for all three PODs is the total of these three rates, 7.44 cfs. (4.67 cfs + 1.60 cfs + 1.17 cfs = 7.44 cfs). License 1062 does not contain any annual limit on diversions. (1931-06-06 Water-Right License 1062.)

Division of Water Rights staff conducted a field inspection for License 1062 in September 1977. In a September 15, 1977 internal memorandum regarding the field inspection, Division staff reported that the owner of one of the parcels within the License 1062 place of use had asked the Board to revoke his interest in the license for irrigation of his 306.75-acre parcel. (1977-09-15 Field Investigation Memo (License 1062), p. 2; see exh. Sac County 48, p. 28.) Division staff therefore recommended that the Board revise the authorized place of use in License 1062 to remove this parcel and make a corresponding reduction in the authorized place of use from 715.56 acres to 408.81 acres. (1977-09-15 Field Investigation Memo (License 1062), p. 2.)¹³ The Board never made these amendments to License 1062 and the County now owns this parcel. (See exh. Sac County 3, pp. 17-18.) Nevertheless, the estimates of 2001 and 2003 historical use in the County's change petitions are based on irrigation of various parcels under

¹³ One of Sacramento County's witnesses testified that a 1952 Reclamation report indicates that, since 1950, this parcel has been irrigated with water from wells constructed in 1948. (Exh. Sac County 80, p. 4, ¶ 7.) This witness also testified that he is not aware of any groundwater use on the remaining parts of the License 1062 authorized place of use or any part of the License 4060 authorized place of use. (*Id.*, p. 5, ¶ 8.)

License 1062, which do not include this parcel. (Exh. Sac County 48, pp. 6-7; see exh. Sac County 80, p. 4, ¶ 7.)¹⁴

The Division of Water Rights Records Unit files contain licensee reports for License 1062 for each year from 1931 through 1977, 1982 through 1984, and 1995 through 1997, and the Division's electronic files contain reports for 2008 through 2019. Only nine of these reports list amounts of water diverted.¹⁵ Of these, the amount reported for 1964, 897.25 af, is the highest. Many of these reports listed numbers of acres irrigated. However, the accuracy of these numbers is questionable. For example, the reports for 1982-1984 list 715.6 irrigated acres, even though the 1977 Field Investigation Memo states that only 408.81 acres remained under irrigation with water diverted under License 1062. (Compare 1985-01-17 A001061 Report of Licensee for 1982, 1983, 1984, p. 1, with 1977-09-15 Field Investigation Memo (License 1062), p. 2.)

¹⁴ The 1977 Field Investigation Memo does not contain any estimates of amounts of water diverted or used under License 1062.

The 1977 Field Investigation Memo states that a 1956 Cooperative Study indicated that all the parcels in the place of use besides the 306.75-acre parcel are riparian to the Sacramento River. (1977-09-15 Field Investigation Memo (License 1062), p. 1.) DWR's closing brief refers to this statement and argues that riparian rights may have authorized the diversions and use of water to irrigate these lands, in which case no diversions occurred under License 1062 after diversions for the 306.75-acre parcel stopped. (DWR Closing Brief, pp. 9-10; see *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 905 [owner of riparian land may perfect appropriative right only by diverting water for beneficial use on noncontiguous lands].) However, the report of the 1956 Cooperative Study is not in the administrative record, and DWR concedes that it has not conducted any analysis of these potential riparian rights.

There is no other evidence in the administrative record on this issue. Absent any other evidence, we will assume that the appropriative rights confirmed by water-right License 1062 were perfected by 1931 when the Department of Public Works, Division of Water Resources issued the license.

¹⁵ Some of the reports refer to attached sheets, which are not contained in the administrative record. The report "1939 01-22 A001061 Report of Licensee for 1939" lists amount used in acre-feet for 1937, 1938, and 1939. The report "1963-04-30 A001061 REPORT OF LICENSEE FOR 1960, 1961, 1962" lists amounts used for those years, as does "1966-01-31 A001061 REPORT OF LICENSEE FOR 1963, 1964, 1965."

3.1.2 License 4060

In 1953, Department of Public Works, Division of Water Resources staff conducted a field inspection to determine the permittee's progress building diversion facilities and applying water to beneficial use under Permit 8921. (1954-02-25 Inspection Report (Permit 8921).) Based on this inspection, Division staff determined that the permittee's application of water to beneficial use in June 1953 justified issuing a water-right license with a maximum authorized diversion rate of 1.57 cfs for irrigation of 123.32 acres, and License 4060 specifies this acreage and this diversion rate. (1955-01-26 Water-Right License 4060.) The 1954 report states that "seasonal use" was estimated to be 350 acre-feet (1954-02-25 Inspection Report (Permit 8921), p. 1), but License 4060 does not contain any annual limit on diversions (1955-01-26 Water-Right License 4060).

The Division of Water Rights files contain licensee reports for License 4060 for each year from 1954 through 1974, 1979 through 1984, 1996 through 1998, and 2005 through 2007. The Division's electronic files contain reports for 2008 through 2019. The reports list amounts of water diverted for nine of these years. The amounts listed in the reports for 1960 through 1965 ranged from 661 to 1,032 af. These numbers appear to be incorrect, because they equate to annual diversion rates of 5.4 to 8.4 acre-feet per acre for the 123.32 acres in the authorized place of use ($661 \text{ af} \div 123 \text{ acres} = 5.4 \text{ af/acre}$; $1,032 \text{ af} \div 123 \text{ acres} = 8.4 \text{ af/acre}$) and are far higher than the amounts listed for 1951 through 1953 in the 1954 inspection report. (It is possible that these amounts include water that was diverted and used under License 1062).

Many of ~~the above~~these licensee reports list numbers of irrigated acres. The reports for 1982 through 1984 and 1996 through 1998 list the license amount of 123.32 acres. (1985-02-21 A014494 REPORT OF LICENSEE FOR 1982, 1983, 1984; 2000-02-17 A014494 REPORT OF LICENSEE FOR 1996, 1997, 1998.) On the other hand, the accuracy of these numbers for other years is questionable. For example, the report for 2005 and 2006 lists 500 irrigated acres, which substantially exceeds the 123.32 acres in the License 4060 authorized place of use.

3.2 Sacramento County's Hearing Evidence

Sacramento County witness Gerald Johns estimated the amounts of historical water use under Licenses 1062 and 4060 using estimates of the applied water values for cultivation of different crop types and estimates of the numbers of irrigated acres for each crop type within the authorized place of use for each year from 1977 to 2019. (Exh. Sac County 79, pp. 5-8)

For estimates of the numbers of irrigated acres of the various crop types, Mr. Johns used a technical memorandum prepared by Land IQ. (Exh. Sac County 68.) To prepare this memorandum, Land IQ used Landsat Explorer and Google Earth time series images to define 14 fields (Land IQ Fields) within the places of use to represent the smallest field sizes that had the same areas from 1977 to 2020 and to identify crop types for the irrigated fields (Land IQ Crop Types). (*Id.*, p. 3.) From these images, Land IQ prepared estimates of the number of acres of land that were irrigated each year and the crop type grown on each field during each year. (*Id.*, pp. 5-6.) Mr. Johns identified nine of the 14 Land IQ Fields, corresponding to seven Sacramento County Assessor Parcels and totaling 373 acres, as fields within the License 1062 authorized place of use, and one Land IQ Field, corresponding to 125 acres within one Sacramento County Assessor Parcel, as the field within the License 4060 authorized place of use. (Exh. Sac County 79, pp. 5-6, ¶¶ 10-11.)

Mr. Johns estimated the amounts of water necessary for irrigation of the Land IQ Crop Types using DWR's estimates of applied water values for cultivation of different crop types in Sacramento County in 2001 (2001 Applied Water Values). (Exh. Sac County 67; exh. Sac County 79, pp. 6-7, ¶ 13.) The Land IQ Crop Types do not correspond directly to the categories of crops in the 2001 Applied Water Values, so Mr. Johns identified categories of crops in the 2001 Applied Water Values that were reasonably similar or appropriate to use in place of the Land IQ Crop Types. (Exh. Sac County 79, p. 7.)

Mr. Johns estimated the amounts of historical water use under Licenses 1062 and 4060 by multiplying the applicable 2001 Applied Water Value for each crop type by the

number of irrigated acres for that crop type estimated from the Land IQ data, for each year from 1977 to 2019. (Exh. Sac County 79, pp. 7-8.) These estimates indicate that the estimated annual water use under License 1062 ranged between 227 and 1,434 af during 1977 through 2006. (*Id.*, p. 8.) The estimated annual water use averaged 769 af. (*Id.*) The annual water use under License 4060 during this period alternated between zero and 370 af and averaged 148 af. (*Id.*)

4.0 DISCUSSION

4.1 Were the License 1062 and 4060 Water Rights Abandoned?

An appropriative right may be lost by abandonment. For this to occur, the owner must “relinquish possession thereof without any present intention to repossess.” (*Utt v. Frey* (1895) 106 Cal. 392, 397.) The concept of abandonment of an appropriative water right is distinct from the concept of forfeiture of an appropriative water right through nonuse (discussed in the next section). Abandonment of an appropriative water right requires both nonuse and an intent to abandon. Nonuse alone, “without an intention to abandon,” is not sufficient to be an abandonment. (*Id.*; *Wood v. Etiwanda Water Co.* (1905) 147 Cal. 228, 233-234; see generally Hutchins, *The California Law of Water Rights* (1956) pp. 286-289.)

DWR does not assert that Sacramento County abandoned the License 1062 and 4060 water rights. (DWR Closing Brief, p. 4.) Reclamation points out that intent to abandon an appropriative right may be inferred from the facts, citing *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 455, and argues that abandonment may be inferred here from “the complete disfunction of diversion works and a [15-year] non-use period.” (Reclamation Closing Brief, p. 2.)

While there have not been any diversions or use under the License 1062 and 4060 water rights since 2006, there is no evidence that Sacramento County ever took any affirmative steps to permanently relinquish the rights or had such intent. Moreover, beginning in 2013, Sacramento County has taken various actions to attempt to obtain authorization from the State Water Board to change the authorized points of diversion, places of use, and purpose of use in these licenses so that the County may continue to

use them. Considering these circumstances, we conclude that the County has not abandoned these water rights.

4.2 ~~Are~~Should the Board Revoke Licenses 1062 and 4060 ~~Subject to Revocation Under Water Code Sections 1241 and 1675?~~

One part of Water Code section 1675, subdivision (a), provides that the State Water Board may revoke a water-right license if the Board finds that: ~~(i) “the licensee has failed to observe any of the terms and conditions in the license.”~~ Section 4.2.1 applies this part of this statute to Licenses 1062 and 4060.

The other parts of section 1675 provide that the Board may revoke a water-right license if the Board finds “that the licensee has not put the water granted under the license to a useful or beneficial purpose in conformity with” ~~Division 2 of the Water Code (Water Code sections 1000-5976); (ii) “the licensee has failed to observe any of the terms and conditions in the license”;~~ or (iii) “that the licensee has ceased to put the water to that useful or beneficial purpose”. Sections 4.2.2 through 4.2.9 apply these parts of this statute to these licenses.

~~As discussed in part 3.0, the licensees put the water granted under Licenses 1062 and 4060 to useful and beneficial purposes for many years from the year in which each license was issued through 2006. The provision in subdivision (a) of section 1675 that authorizes the Board to revoke a water-right license when the licensee has not put the water to a useful or beneficial purpose in conformity with Division 2 of the Water Code therefore does not apply here.~~

4.2.1 ~~There Were No~~Violations of License Terms or Conditions Sufficient to Justify Revoking the Licenses

DWR points out that the holders of Licenses 1062 and 4060: (a) sometimes reported diversions during months outside the authorized diversion seasons specified in the licenses, (b) reported use under License 4060 on significantly more acres than the number of acres in the authorized place of use during two years, and (c) did not file any licensee reports for many years’ diversions and use. (DWR Closing Brief, p. 4.) DWR does not argue that these violations ~~were serious enough to justify~~ merit revocations of

these ~~license~~licenses, and instead focuses on the fact that water has not been used under these licenses for many years. (DWR Closing Brief, pp. 4-5.)

License 1062 states that the authorized diversion season is from “about” April 1 to “about” October 1 of each year. License 4060 states that the authorized diversion season is from “about” May 1 to “about” October 1. Accordingly, diversions of small amounts of water in March or November under License 1062 and in April or November under License 4060 may have been within the authorized diversion season. The reports of use on more acres than authorized under License 4060 during two years may have been the result of confusion regarding the reporting under License 1062 versus the reporting under License 4060.

The licensees’ failures to file licensee reports for many years’ diversion and use are more serious, particularly for License 4060, which has a term requiring the licensee to file such reports.¹⁶ As discussed in section 3.1 above, these failures created significant gaps in the sets of data for diversions and use under these licenses. However, ~~there is no evidence that as discussed in section 2.5, the Board ever notified licensees that these County filed the annual licensee reports for 2008-2011 promptly after receiving the draft CDOs from the Division based on the County’s prior failures to file reports could result in revocation of the licenses. Absent any record of such notices, these reports. These filings satisfied the Division’s primary goal when it would not be appropriate for the Board to revoke issued these licenses now because of licensees’ failures to file licensee reports many years ago.~~

~~Accordingly, draft CDOs, which was to seek the County’s compliance with the licenses’ terms and conditions and the Board’s reporting requirements. (See Order WR 85-9, p. 3.) Considering these circumstances, we conclude that none of these violations were serious enough to justify merit revocations of these licenses under the provision in subdivision (a) of Water Code section 1675 that authorizes the Board to revoke a water-~~

¹⁶ A term in License 4060 states: “Reports shall be promptly filed by licensee on appropriate forms which will be provided for the purpose from time to time by the State Engineer.” (1955-01-26 Water-Right License 4060, p. 1.) License 1062 does not contain any similar term.

~~right license because the licensee has failed to observe any of the terms or conditions of the license.~~

4.2.2 The Board Has Discretion to Revoke Licenses 1062 and 4060 Due to More Than Five Consecutive Years of Nonuse

~~As discussed above, a provision in Water Code section 1675, subdivision (a) authorizes the Board to revoke a water right license if the Board finds “that licensee has ceased to put the water to [a] useful or beneficial purpose” in conformity with Division 2 of the Water Code.~~

In matters where the Board is considering whether to revoke a water-right license under Water Code section 1675 due to ~~a period of~~ nonuse, Water Code section 1241 ~~also~~ applies. The text of the current version of the provisions of Water Code section 1241 that apply to water-right licenses states:

If the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him or her, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. That reversion shall occur upon a finding by the board following notice to the . . . licensee . . . and a public hearing if requested by the . . . licensee . . .

The Legislature first enacted section 1241 in 1943. (1943 Cal. Stats., c. 368, p. 1615, § 1241.) That version of section 1241 contained the phrase “such unused water reverts to the public” and did not provide for the State Water Board’s predecessor to exercise any discretion on the issue of whether a reversion should occur.¹⁷

In 1980, the Legislature amended Water Code section 1241 to change the three-year nonuse period to five years, to change the phrase “such unused water reverts to the

¹⁷ The full text of the 1943 version of Water Code section 1241 was:

When the person entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water reverts to the public and shall be regarded as unappropriated water.

(1943 Cal. Stats., c. 368, p. 1615, § 1241, underlining added.)

public” to “such unused water may revert to the public,” to add the phrase “if reverted,” and to add a new sentence stating that such reversion shall occur upon a finding by the Board. (1980 Cal. Stats., c. 933, p. 2955, § 5, underlining added.)¹⁸ In 2010 and 2011, the Legislature further amended section 1241 to expand the references to permittees to include licensees and holders of other types of water rights. (2010 Cal. Stats., c. 288; 2011 Cal. Stats., c. 578.)¹⁹

In Order WR 85-9, the Board discussed the 1980 amendments to Water Code section 1241, emphasized the new statutory language regarding the ~~phrase~~phrases “may revert” and “if reverted” and the new sentence specifying the need for a Board finding for reversion to occur, and concluded:

Pursuant to Section 1241, as amended, the reversion of water to the public no longer is automatic. The Board has the discretion to find that the holder of a license has valid justification for its nonuse of water; therefore, the Board may choose not to revoke a license.

(Order WR 85-9, p. 5.)²⁰

¹⁸ The full text of the 1980 version of Water Code section 1241 was:

When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which is was appropriated or adjudicated, for a period of five years, such unused water may revert to the public, and shall, if reverted, be regarded as unappropriated public water. Such reversion shall occur upon a finding by the board following notice to the permittee and a public hearing if requested by the permittee.

(1980 Cal. Stats., c. 933, p. 2955, § 5, underlining added.) After adopting this amendment to section 1241 as a regular statute, the Legislature adopted the same amendment as an urgency statute. (1980 Cal. Stats., c. 1100, p. 3532.)

¹⁹ Besides water-right permittees and licensees, Water Code section 1241 now also refers to holders of livestock stockpond certificates and small domestic use, small irrigation uses, and livestock stockpond registrations.

²⁰ Unless the context indicates otherwise, citations to “Order” and “Decision” are citations to State Water Board orders and decisions.

In its Order WR 81-17, the Board similarly noted that a water-right permit or license does not automatically expire when there is a period of five years of nonuse. The Board stated:

A right to appropriate water obtained from the board or its predecessor does not expire merely from the passage of the prescribed time. A permit or license remains in effect until revoked in the manner prescribed by the Water Code.

(Order WR 81-17, p. 4.)

This statutory background and these prior Board orders demonstrate that the Board has discretion to decide whether or not to revoke a water-right license when there has been nonuse for a period of at least five years during which water was available for diversion and use under the license.²¹

It is undisputed that no water has been diverted or used under water-right Licenses 1062 and 4060 since 2006 and that the licensee currently is not diverting or using any water under these licenses. (Exh. Sac County 80, p. 5, ¶¶ 10-11.) Even if 2014 and 2015 are excluded from this analysis because water was not available for diversion in those drought years during most of the authorized diversion seasons, there still ~~are two~~ were 12 years of nonuse ~~periods of at least five years each, in the period from 2007-2013 and 2016- through~~ 2020, during which water was available for diversion. (*Id.*, pp. 8-9, ¶¶ 18-19.)²² Accordingly, the Board has discretion to decide whether or not to revoke Licenses 1062 and 4060. In sections 4.2.7 and 4.2.8, we discuss how the Board is exercising this discretion ~~in this matter~~.

4.2.3 Past Board Orders on License-Revocation Issues

The Board has considered water-right license revocation issues in several past orders.

²¹ “The unavailability of water due to natural conditions can constitute a defense to forfeiture of an appropriative water right for non-use.” (Order WR 2016-0001, p. 31, citing *Huffner v. Sawday* (1908) 153 Cal. 86, 92; *Barnes v. Husa* (2006) 136 Cal.App.4th 1358, 1372; Hutchins, *The California Law of Water Rights* (1956) p. 296.)

²² For License 4060, there is an additional period of nonuse ~~for at least~~ of over five years when water was available, 1995-2000. (Exh. Sac County. 80, p. 9, ¶ 19.)

In Order WR 79-2, the Board revoked the relevant water-right license, which the licensees had shared with others, because there was a six-year period of nonuse, and because the licensees had obtained their own separate water-right permit under which they were reporting their diversions and use.

In Order WR 81-17, the Board decided not to revoke the two relevant water-right licenses even though very little water was diverted or used under them during the six-year period preceding the order. The Board noted that: (a) no water was available for diversion or use during the first two years of that period because of drought; (b) some water, although only a minimal amount, was used during the third year; and (c) no water was used during the last two years because the Forest Service had improperly revoked the special-use permit that was necessary for the licensee to access the public land between the point of diversion and the place of use, and, absent that revocation, the licensee could have diverted and used water during those two years. (Order WR 81-17, pp. 4-5.)

In Order WR 85-6, the Board considered potential revocations due to nonuse of two water-right licenses held jointly by two irrigation districts, Table Mountain Irrigation District (TMID) and Thermalito Irrigation District (TID). Although TMID had not used any water under its shares of these licenses for the primary purposes of use for over five years, the Board decided not to revoke TMID's shares of these licenses because: (a) TMID had used water under the licenses for recreation in the reservoir where the licenses authorized water to be stored (Order WR 85-6, p. 7); (b) TMID had filed a petition to change the authorized place of use in one of the licenses, and the Board had not yet acted on the petition (*id.*, p. 13); and (c) TID might have been able to use TMID's share of the water under the other license (*id.*, p. 12). The Board decided not to revoke TID's shares of these licenses because TID's use under one of the licenses had dropped significantly because of water-conservation measures and was likely to increase again when TID expanded its service area (*id.*, pp. 10-12). The Board's decision was also due to the fact that TID was required to use well water in lieu of surface water diverted under the licenses to provide water of adequate quality for a state fish hatchery. (*Id.*, pp. 11-12.) In its subsequent Decision 1615, the Board

confirmed that the second of these two licenses should not be revoked because licensees had made reasonable efforts to obtain Board approval of their petition to change the place of use. (Decision 1615, p. 39.)

In Order WR 88-25, the Board considered a water-right license for power generation. No water had been diverted or used during the 15 years preceding the order, and the licensee had no plans for future diversions or use under the license. Considering these facts, the Board revoked the license.

In Order WR 2014-0021, the Board considered a water-right license issued in 1959 under which the Masonite Corporation (Masonite) had diverted and used water at its facility that had produced various wood products. (Order WR 2014-0021 (Millview-Masonite matter), pp. 4-5.) Masonite's reports for 1959 through 1985 did not provide any specific details regarding rates of diversion or quantities of use. (*Id.*, p. 5.) Masonite did not report its water diversions and use for 1986 through 1993. (*Id.*, pp. 5-6.) Masonite's reports for 1994 through 1998 listed diversion rates that were substantially less than the maximum authorized rate, and the 1999 rate was even lower. (*Id.*) In 2000, Masonite began dismantling its facility. Masonite did not report any diversions or use under the license during 2000 through 2006. (*Id.*, p. 7.)

In 2007, Masonite transferred the license to the Millview County Water District (Millview). (*Id.*, at p. 8.) In 2007 and 2008, Millview did not report that any water was diverted or used under the license. Millview's licensee report for 2009 through 2011 stated that there were no diversions or use under the license during that period. (*Id.*)

In April 2008, Division of Water Rights staff conducted a site inspection of the Masonite plant and met with Millview's general manager. (*Id.*, p. 8.) Following that site inspection and meeting, the Division issued a notice of proposed revocation of the water-right license. (*Id.*, p. 2.)

The Board held a hearing on the proposed revocation in 2013 and adopted Order WR 2014-0021 in 2014. (*Id.*, pp. 2-3, 18.) After reviewing the evidence, the order concluded that, starting in 2000, there was "no documented record of diversions" under

the license, and “the weight of the evidence indicates that water was not diverted or used under the license.” (*Id.*, p. 11.)

Order WR 2014-0021 discusses the petition Millview filed in 2007 to request Board authorization to divert water under the license at new points of diversion and to use the water for new purposes of use within Millview’s service area, a new place of use. (*Id.*, pp. 11-12.) The order notes that Millview had not used the correct petition form and had not satisfied the CEQA requirements ~~of the CEQA~~ for the petition, and that, unless the Board approved the petition, Millview could not divert or use any water under the license. (*Id.*, pp. 12-13 & fn. 10.)

Order WR 2014-0021 also discusses various policy considerations. Millview argued that it would have an inadequate water supply if the license were revoked. (*Id.*, pp. 15-16.) The Sonoma County Water Agency argued that new future diversions by Millview under the license could interfere with the Agency’s water rights. CDFW argued that future diversions by Millview under the license could adversely affect anadromous fish in the Russian River. (*Id.*, p. 16.)

The Board noted the importance of an adequate water supply for human consumption but concluded that Millview’s “need to serve additional customers is not a valid policy argument to nullify a forfeiture.” (*Id.*, p. 17.) The Board revoked Millview’s water-right license. (*Id.*, pp. 17-18.)²³

4.2.4 Consideration of Conflicting Claims

In *Millview County Water Dist. v. State Water Resources Control Bd.*, (2014) 229 Cal.App.4th 879, the court held that a pre-1914 appropriative right may not be forfeited for nonuse absent “the presence of a competing claim to the unused water by a rival diverter who is prepared to use, or is using, the surplus.” (*Id.*, p. 900, citing *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555 and *North*

²³ Millview County Water District filed a petition for writ of mandate challenging Order WR 2014-0021. (*Millview County Water Dist. v. State Water Resources Control Bd.* (2019) 32 Cal.App.5th 585, 589-590.) The trial court entered judgment granting Millview’s petition. (*Id.*) The Court of Appeal reversed on statute-of-limitations grounds. (*Id.*, pp. 590-601.)

Kern Water Storage Dist. v. Kern Delta Water Dist. (Jan. 31, 2003) F033370, 2003 WL 215821 (internal quotation marks omitted).²⁴ The court noted that, although this principle “appears not to have been announced explicitly by earlier California decisions, we have not located any finding of a forfeiture in the absence of an existing or potential completing claim” and “there is no policy reason for finding a forfeiture until an alternative use has been asserted.” (229 Cal.App.4th, p. 900.)

In *Millview*, the court held: “[i]n general terms, a conflicting claim has been asserted if another claimant”: (a) “has actually appropriated the water otherwise covered by the original claim and has perfected that appropriation by making beneficial use of the surplus water,” (b) “has attempted to appropriate the water by instituting proceedings to establish a right—for example, in California, by seeking a permit from the Board to appropriate the surplus water,” or (c) “[has commenced] a legal action for a declaration of rights.” (*Id.*, p. 903.)²⁵

If such a conflicting claim is present before the end of the period of nonuse, a partial or full forfeiture of the original claimant’s pre-1914 appropriative right will occur:

So long as the original claimant’s use of less than the full appropriation lasts for at least five years and does not end before the assertion of this type of conflicting claim, a forfeiture occurs.

(*Id.*)

There are two important distinctions between forfeitures of pre-1914 appropriative rights for nonuse and revocations of licenses for post-1914 appropriative rights for nonuse.

First, while the above statement in the *Millview* decision indicates that forfeitures of pre-1914 appropriative rights occur automatically when all the required elements are present, the Board does not automatically revoke licenses for post-1914 rights when all

²⁴ *Millview*’s pre-1914 appropriative right claim in this case was distinct from *Millview*’s post-1914 appropriative right claim involved in [Order WR 2014-0021 and *Millview County Water Dist. v. State Water Resources Control Bd.*, supra](#), 32 Cal.App.5th 585.

²⁵ The Court of Appeal’s decision uses the terms “competing claim” and “conflicting claim” interchangeably. (See 229 Cal.App.4th, pp. 900-903.) In this order, we use the term “conflicting claim.”

the required elements are present. Rather, as discussed in section 4.2.2, the State Water Board has discretion to decide whether or not to revoke the license.

Second, neither Water Code section 1241 nor section 1675 (which apply only to post-1914 appropriative rights) states that there must be a conflicting claim to the water that could have been diverted and used under a water-right license during the period of nonuse for the Board to be authorized to revoke the license. This contrasts with the requirement stated in *Millview*, *supra*, 229 Cal.App.4th, at p. 900, that a conflicting claim must be present during the period of nonuse of a pre-1914 appropriative right before forfeiture of the right may occur.

In Order WR 2016-0001, the Board considered the potential revocation of a water-right license held by the Morongo Band of Mission Indians (Morongo Band).²⁶ That order discusses the *Millview* decision. (Order WR 2016-0001, pp. 17-18.) The order notes that, although the *Millview* decision “purported to interpret section 1241 of the Water Code, the case concerned a pre-1914 water right,” and that “the holding is arguably distinguishable from one involving a permit or license.” (*Id.*, p. 17, fn. 6.) The order states that Water Code section 1241 “expressly authorizes the State Water Board to revoke a permit or license after five years of non-use, and does not require the Board to find that a conflicting claim has been asserted.” (*Id.*) Nevertheless, the order states that, “[u]nder the circumstances of this case, however, we perceive no reason why a different rule should be applied to the Morongo Band’s post-1914 water right license.” (*Id.*)

Order WR 2016-0001 recognizes that, besides conflicting claims based on other appropriative rights, “[o]ther situations can give rise to a conflicting claim and support a finding of forfeiture.” (*Id.*, p. 18.) The order notes that one such situation “involves the need for water to remain instream to protect public trust uses.” (*Id.*)

²⁶ In *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, the California Supreme Court rejected a challenge to a prior State Water Board order on procedural issues in the proceeding that ultimately resulted in Order WR 2016-0001.

Order WR 2016-0001 concluded that the record supported findings of nonuse under the relevant water-right license during three periods, each longer than five years, 1952-1960, 1962-1968 and 1991-1999 (*id.*, pp. 31-32), and that there was sufficient evidence in the record to conclude that water was available for diversion and use during the second and third of these periods (*id.*, pp. 32-33). The order concluded that there was not sufficient evidence in the record to establish a conflicting claim to the water that was not diverted or used under the license during either of these latter two periods. (*Id.*, pp. 33-37.) Even though there was no evidence that the licensee had resumed use under the license after 1999, the order noted that the licensee could resume use under the license if the Board approved its pending change petition. (*Id.*, pp. 37-38.) The Board decided not to revoke the license. (*Id.*, p. 39.)

4.2.5 Summary of Factors Board Has Considered in License-Revocation Proceedings

In these Board orders, ~~the Board has considered the following factors~~ in proceedings involving license-revocation issues, the Board has considered the following factors when deciding whether to exercise its discretion to revoke a water-right license when the statutory prerequisites for revocation have been met:

1. Length of Period or Periods of Nonuse. The Board has been more likely to revoke a water-right license if the period of nonuse substantially exceeded the five-year minimum specified in Water Code section 1241. (See Order WR 88-25 [15 years of nonuse]; Order WR 2014-0021 [14 years of nonuse].)

2. Conflicting Claim. In Order WR 2016-0001, the Board decided not to revoke the relevant water-right license even though there were extensive periods of nonuse when water was available because there was no conflicting claim to the water that could have been diverted and used under the license during these periods. The Board noted that, besides diversions and use by another appropriator under a conflicting claim, other situations, including the need for water to remain instream to protect public trust uses, may support a Board finding under Water Code sections 1241 and 1675 that the water-right license should be revoked and the water subject to the license should revert to the public. (Order WR 2016-0001, pp. 17-18.)

3. Plans for Future Use. The Board has been more likely to revoke a water-right license if the licensee did not have any plans to divert or use water under the license in the future. (See Orders WR 79-2, WR 88-25 [licensees had no plans for future diversion and use under the relevant license]; cf. Orders WR 81-17, WR 85-6, WR 2016-0001 [licensees had plans for future diversions and use].)

4. Licensee's Diligence in Actions to Obtain Authorizations for New Diversions and Uses. If the licensee needed to obtain Board authorization for a new point of diversion, place of use or purpose of use, then the Board has considered how diligent the licensee had been in seeking this authorization, including the licensee's diligence in filing and pursuing any necessary change petition and preparing any necessary CEQA document. (See Decision 1615, p. 39 [license not revoked for nonuse where licensee had made reasonable efforts to obtain Board approval of change in place of use]); cf. Order WR 2014-0021, pp. 11-13 [license revoked where licensee did not file petition until six years after onset of nonuse, did not use correct petition form, and had not diligently pursued preparation of necessary CEQA documents].)

5. Factors Beyond Licensee's Control. The Board has not revoked water-right licenses in cases where either the nonuse or the delay in obtaining authorization for the new use were due to factors beyond the licensee's control. (See Order WR 81-17 [nonuse was because Forest Service improperly revoked special-use permit necessary for diversion and use of water]; Order WR 2016-0001, pp. 3-7, 21 [Board delayed processing of licensee's change petition until Board completed proceeding on potential license revocation, which was delayed because of protracted court and administrative proceedings].) As the Board stated in Decision 1247:

The Board, consistent with the general policy of the law which does not favor forfeitures, has not held a licensee to strict account for nonuse of water due to destruction of diversion facilities by floods, governmental restrictions, and other circumstances in which a prudent man following the dictates of good husbandry, either could not or should not be expected to use the water during the interim.

(Decision 1247, pp. 4-5, ¶ 8.)

4.2.6 Burden of Proof

Sacramento County argues that DWR and Reclamation, the parties asserting that the Board should revoke the County's water-right licenses, have the burden of proving the necessary elements for revocation. (Sacramento County Closing Brief, p. 2; see *Millview County Water Dist. v. State Water Resources Control Bd.*, *supra*, 229 Cal.App.4th, p. 891.)

This issue, however, is more nuanced. As the Board explained in Order WR 2011-0016, in an enforcement action "the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation." (Order WR 2011-0016, p. 35.) Once the prosecution team has satisfied this initial burden, the burden shifts to the water-right holder "to produce evidence that a threat of violation does not exist." (*Id.*, p. 36.) Although Order WR 2011-0016 concerned an enforcement action, similar rules regarding burdens of proof apply to the water-right forfeiture issues in the present matter.

Here, DWR and Reclamation satisfied their initial burden of proof through Sacramento County's annual licensee reports for 2008 through 2018, copies of which are in the administrative record. (Exhs. Sac County 14-21, 26-27, 29-30 & 44.) These reports show that there were no diversions or use under either of these licenses during this 11-year period. The burden therefore shifted to Sacramento County to demonstrate why, notwithstanding this period of nonuse, the Board should not revoke the County's water-right licenses.

As discussed in part 3.0, the evidence regarding historical diversions and use under Licenses 1062 and 4060 is not complete. Nevertheless, it is undisputed that the licensees filed the licensee reports and other documents that are in the administrative record, and we have no reason to question any of the statements in the Board staff reports in the record. It also is undisputed that no water has been diverted or used under either license since 2006, and that Sacramento County did not file its change petitions until 2015.

As discussed in the following section, in this order the Board uses the statements in these documents and other undisputed evidence regarding historical diversions and use and other facts to decide how to exercise its discretion under Water Code sections 1241 and 1675. With this approach, the Board does not need to address any further the burden-of-proof issues associated with potential revocations of Licenses 1062 and 4060.²⁷

4.2.7 Application of License-Revocation Factors

As discussed in section 4.2.5, the Board has applied five factors in prior decisions and orders considering license-revocation issues. In this section, we apply ~~the~~these factors ~~listed and described in section 4.2.5~~ to water-right Licenses 1062 and 4060 and Sacramento County's actions regarding these licenses.²⁸

1. Length of Period or Periods of Nonuse. As discussed in section 2.4, no diversions or use occurred under License 1062 or License 4060 after 2006. The nonuse periods for Licenses 1062 and 4060 currently are 2007 through 2020, a total of 14 years. ~~These periods~~Even if the drought years of 2014 and 2015 are excluded, the 12 years of nonuse during this period are substantially ~~longer~~more than the five-year minimum specified in Water Code section 1241.

²⁷ Sacramento County's arguments regarding burden of proof do not address the burden of proof for issues associated with the County's change petitions. Sacramento County has the burden of proof and the burden of producing evidence on these issues. (See Order WR 89-8, pp. 39-41; Evid. Code, §§ 500, 550.) As discussed in section 4.3, the County has met these burdens.

²⁸ This order considers all five factors discussed in section 4.2.5 because they all are relevant here. Nothing in this order should be construed to suggest that all five factors will apply in all future matters involving potential revocations of water-right licenses, that all five factors must be satisfied for the Board to have authority to exercise its discretion to revoke a water-right license where there has been at least five years' nonuse while water was available for diversion and use, or that the Board must give all five factors equal consideration when it exercises its discretion in future matters involving license-revocation issues. The Board's future applications of these factors will depend on the specific facts involved in each matter.

Nothing in this order should be construed to prevent the Board, when appropriate, from considering other factors in future matters involving license-revocation issues.

2. Conflicting Claim. DWR operates the State Water Project (SWP) and Reclamation operates the CVP. These projects consist of several major reservoirs upstream of the Delta on the Sacramento River and some of its tributaries, imports of water into the Sacramento River watershed, and diversions of water from the Delta to various places of use outside the Delta watershed. DWR and Reclamation release imported and previously stored water into the Delta, where they redivert ~~the~~some of that water ~~released from storage~~ and divert natural flows. (Revised Decision 1641, p. 6.) DWR and Reclamation also must operate the SWP and CVP to maintain the minimum Delta outflow requirements and various Delta water-quality objectives that are specified in the SWP and CVP water-right permits. (*Id.*, p. 146.)

In the winter and early spring, unregulated flows plus SWP and CVP imports and reservoir releases typically exceed all system needs. These conditions are referred to as “excess conditions.” (Exh. DWR 1, p. 3, ¶ 6; exh. Sac County 79, pp. 14-15. ¶ 20.) In the late spring, summer and fall, unregulated flows plus SWP and CVP imports and reservoir releases normally are insufficient to meet all system needs and the SWP and CVP must actively manage the system. These conditions are referred to as “balanced conditions.” (Exh. DWR 1, pp. 3-4, ¶ 6; exh. Sac County 79, p. 14, ¶ 20.) When balanced conditions are present, DWR and Reclamation meet the applicable instream flow requirements and water-quality objectives in their permits by reducing exports or increasing releases from upstream reservoirs as necessary. (Exh. DWR 1, p. 4, ¶ 7.)

If unregulated flows are not sufficient during balanced conditions to meet in-Basin requirements, which include diversions by legal users of water in the Sacramento River Basin and all water necessary to meet the Delta outflow and salinity requirements in their permits, then the SWP and CVP must release imported and previously stored water, called “supplemental project water.” (*Id.*, ¶ 8.) When DWR and Reclamation must make such releases, holders of appropriative water-right permits and licenses that contain the State Water Board’s Standard Term 91 (Term 91)²⁹ are not authorized to

²⁹ The Division of Water Rights has prepared various standard terms for inclusion, as appropriate, in water-right permits and licenses. See https://www.waterboards.ca.gov/waterrights/water_issues/programs/permits/.

divert water under their permits and licenses. (*Id.*, pp. 3-4, ¶¶ 5-8; exh. Sacramento County 79, p. 15,

¶ 21.)³⁰ For permits, Term 91 states:

No diversion is authorized by this permit 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.

The State Water Resources Control Board shall notify permittee of curtailment of diversion under this term after it finds that supplemental Project water has been released or will be released. The Board will advise permittee of the probability of imminent curtailment of diversion as far in advance as practicable based on anticipated requirements for supplemental Project water provided by the Project operators.

³⁰ Since 1965, the State Water Board has included Standard Permit Term 80 in all water-right permits for diversions in the Delta watershed. (See Decision 1594, p. 1.) This term reserved the Board's jurisdiction to change the season of diversion when water availability became known with greater certainty. (*Id.*) In November 1983, the Board adopted Decision 1594, which added Term 91 to all permits for diversions of greater than 1.0 cfs or 100 af/yr of water from the Delta or the Sacramento River watershed that contained Standard Permit Term 80. (*Id.*, pp. 57-58; see exh. DWR-1, p. 8, ¶ 18.) The Board includes Term 91 in all new permits for such diversions that exceed these thresholds. (Exh. Sac County 79, p. 15, ¶ 21.) ~~Term 91 may be accessed at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/permits/license_80t_hru99.html.~~

https://www.waterboards.ca.gov/waterrights/water_issues/programs/permits/terms/permitem091.pdf.)³¹ Since 1984, when Term 91 went into effect, balanced conditions have occurred in the Delta during every year except 1995 and 1998. The Term 91 diversion prohibition has been in effect during part of every year except 1995, 1998, 2005, 2006, 2011, 2017 and 2019. (Exh. Sac County 69; Sac County 79, p. 16, ¶ 22.)

Sacramento County's witness Gerald Johns testified that, when the Delta is in excess conditions, "any additional unused water in the system does not lead to more water appropriation since all in-[B]asin demands, including Delta Outflow and export demands, are being met by more than sufficient natural and abandoned flows. The unused water in the system simply flows un-appropriated out of the Delta." (Exh. Sac County 79, p. 16, ¶ 23.) Mr. Johns testified that, when the Delta is in balanced conditions but the Term 91 diversion prohibition is not in effect, "additional abandoned water could be appropriated by the SWP or CVP in the Delta." (*Id.*) He testified that the "Term 91 curtailments are triggered typically a short time after balanced conditions are declared," and that, once this happens, no water is available for appropriation. (*Id.*, p. 17, ¶ 23.) Finally, he testified that "DWR and [Reclamation] could benefit from abandoned water when Term 91 curtailments are imposed by releasing less water from their storage projects to meet Delta requirements." (*Id.*, p. 17, ¶ 24.) However, he testified that "this benefit is not an appropriation." (*Id.*)

In its closing brief, Sacramento County acknowledges that "allowing water to flow out of the Delta to help meet Delta outflow requirements and water quality objectives is a beneficial use of water." (Sacramento County Closing Brief, p. 9.) However, Sacramento County argues that "[a]ny unused water that [DWR and Reclamation] may have accounted for to meet Delta outflow requirements or Delta water quality objectives, is not an appropriation of water and cannot constitute a conflicting claim." (*Id.*)

³¹ [Term 91 for water-right licenses contains essentially the same text. \(https://www.waterboards.ca.gov/waterrights/water_issues/programs/permits/license_80_thru99.html.\)](https://www.waterboards.ca.gov/waterrights/water_issues/programs/permits/license_80_thru99.html)

DWR does not assert that it diverted water from the Delta that could have been diverted under Licenses 1062 and 4060 during the nonuse period since 2006 in a manner that would constitute a conflicting claim. Instead, relying on Order WR 2016-0001, DWR argues that a Board order revoking these licenses may be based on the need for water to remain instream to protect public trust uses. (DWR Closing Brief, pp. 14-15.) DWR argues that, when the Term 91 diversion prohibition is in effect, “all unregulated flows are being used to help meet water quality objectives,” and “[t]his presents a conflicting claim.” (*Id.*, p. 15.) DWR notes that “there is no requirement that a conflicting claim be present during the whole five-year period to establish forfeiture to a conflicting claim,” and that “[b]etween 2007 and 2013, Term 91 was in effect 6 out of 7 years, including in 2012, which came immediately after a five-year period of non-use.” (*Id.*, p. 16.)

Like DWR, Reclamation argues that “instream flows for public trust resources can be a conflicting claim,” and that water not diverted under Licenses 1062 and 4060 “has been used by the CVP and SWP to meet public trust requirements in the Delta.”

(Reclamation Closing Brief, pp. 6-7.)

Consistent with Order WR 2016-0001, we conclude that, when the Board is exercising its discretion under Water Code sections 1241 and 1675 to consider whether to revoke a water-right license, the Board should consider claims to the water the licensee could have diverted by holders of other appropriative water-right permits or licenses that used the water to help implement terms in their permits or licenses for protection of public trust uses or to meet other regulatory requirements. (See Order WR 2016-0001, p. 18.)

~~Because~~ DWR and Reclamation at times may have used ~~much~~some of the water that could have been diverted under Licenses 1062 and 4060 since 2006 to help meet the Delta outflow and water quality requirements in their water-right permits, and may have diverted some of that water. DWR and Reclamation at times also may have been able to reduce their releases of stored and imported water to operate the SWP and CVP because water was not being diverted under these licenses. For these reasons, we conclude that a conflicting claim was present during ~~much~~some of the periods of nonuse since 2006 under these licenses.

3. Plans for Future Use. As discussed in section 2.8, Sacramento County has prepared and filed petitions to change water-right Licenses 1062 and 4060 that described in detail the County's plans for future diversions and use under these licenses, if the Board approves the petitions. As discussed in section 2.9, Sacramento County has prepared a CEQA Negative Declaration for the proposed project described in these change petitions. These documents indicate that Sacramento County now has definite plans for future use of these licenses.

4. Licensee's Diligence in Actions to Obtain Authorizations for New Diversions and Uses. No water has been diverted or used under License 1062 or License 4060 since 2006. (Exh. Sac County 10, p. 1; exh. Sac County 48, p. 5.) There is no evidence in the record that Sacramento County took any actions regarding potential changes to these licenses to authorize the proposed new diversions at the Freeport Regional Water Facility or the proposed new use in Sacramento County Water Agency Zone 40 until June 2013, when County Airports notified the FAA of the proposed transfer of the water rights to the Sacramento County Water Agency. (Exh. Sac County 24, p. 6, ¶ 15.) Following its discussions with the FAA, Sacramento County notified State Water Board staff about this proposed transfer in February 2014. (Exh. Sac County 28.) As discussed in section 2.7, Sacramento County took some additional actions regarding the potential changes in 2014, and then filed its change petitions in 2015. Since 2014, Sacramento County has diligently pursued these petitions.

5. Factors Beyond Licensee's Control. It was beyond Sacramento County's control when the FAA determined that the lands within the authorized places of use in Licenses 1062 and 4060 no longer should be irrigated because of concerns about terrorist threats and risks of bird strikes to aircraft.

4.2.8 Conclusions Regarding License-Revocation Issues

As discussed in section 4.2.7, the period of nonuse for Licenses 1062 and 4060 when water was available is at least 14¹² years, from 2006~~2007~~ through 2020, excluding 2014 and 2015. During parts of all of those years, the Delta was in balanced conditions, and, when such balanced conditions were present, DWR's and Reclamation's operations of the SWP and CVP to meet the Delta outflow and water-quality

requirements in their water-right permits, and for their diversions from the Delta, were under conflicting claims to the water that could have been diverted and used under the County's licenses. The first two factors discussed in section 4.2.7, the length of the period of nonuse and the presence of a conflicting claim, therefore support revoking these licenses.

On the other hand, the other three factors discussed in section 4.2.7 do not support revoking these licenses. ~~Sacramento County has definite plans for future diversions and use under these licenses, if the Board grants the County's change petitions, and the~~The Water Agency has a definite plan to use existing facilities to divert water under Licenses 1062 and 4060 to supply water to its municipal customers, which will help reduce their dependence on critical groundwater supplies. The County has been diligently pursuing these petitions since 2014, when it advised Division of Water Rights staff of the County's proposal. ~~Also, the~~The County's need to change the water-right licenses arose because of a factor beyond its control, the directions from FAA to terminate irrigation of the lands within the licenses' authorized places of use.

~~There are several important distinctions between the relevant facts in this present matter and the relevant facts in the Millview-Masonite matter that ultimately led to~~In~~Order WR 2014-0021.~~

~~First, in the Millview-Masonite matter, Division of Water Rights staff had issued a notice of proposed revocation of the relevant water-right license and presented exhibits and testimony during the Board hearing that supported staff's recommendation that the Board revoke the license. (Order WR 2014-0021, pp. 1-2, 7-11.) In contrast, Division staff never issued any notice of proposed revocation of Licenses 1062 and 4060 and declined the AHO's invitation to participate in the hearing in this matter. (See section 2.11.)~~

~~Second, in the Millview-Masonite matter, the licensee did~~had not diligently ~~proceed~~with~~pursued its petition before the Board revoked the license. Although the licensee was the CEQA lead agency (see CEQA Guidelines, § 15051, subd. (a)), the licensee had not prepared~~ the necessary CEQA document. ~~(Order WR 2014-0021, pp.~~

~~analysis, 12-13.) The licensee also~~ did not use the correct form for change petitions, and did not diligently pursue its petition. ~~(Order WR 2014-0021, (Id., pp. 11-13.)~~ The Division's concerns regarding the status of the license prompted Division staff to conduct the 2008 inspection that led to the notice of proposed revocation. ~~(Id., p. 13.)~~

In contrast, after Division staff notified Sacramento County staff in 2012 about the value of the water rights, the County proceeded diligently to work with Division staff to prepare and file the necessary change petitions, to complete the necessary CEQA documents, to modify the petitions to address Division staff's concerns, to try to resolve the protests to the petitions, and to notify the Division when it became clear that the protests would not be resolved. (See sections 2.6 through 2.10.)

~~Third, before Masonite began dismantling its facility in 2000, the historical diversions under its license were substantially less than the maximum authorized amount, ranging from 224 to 579 af/yr during 1994-1999, when the maximum authorized annual diversion amount was 4,271 af. (Order WR 2014-0021, pp. 5-6.) While the diversions under Licenses 1062 and 4060 through 2006 also were less than the maximum authorized amounts, they were substantial portions of these amounts.³²~~

~~Besides these factors, we also consider the flexibility that municipal water suppliers should have in developing their water supplies. In Order WR 2000-13, the Board stated:~~

~~A municipality . . . is to be afforded some latitude in putting water to beneficial use, because the municipality must be able to plan for, and meet, the needs of its existing and future citizens.~~

³²~~Mr. Johns estimated that annual diversions under License 1062 ranged between 227 and 1,434 af during 1977-2006 and diversions under License 4060 ranged between 0 and 370 af. (Exh. Sac County 79, pp. 7-8.)~~

~~The maximum authorized annual diversion amount under License 1062 for the April 1 through October 1 diversion season was 2,703 af (7.44 cfs x 1.9835 af/cfs-day x 183 days). The maximum authorized annual diversion amount under License 4060 for the May through October 1 diversion season was 476 af (1.23 cfs x 1.9835 af/cfs-day x 153 days).~~

~~(Order WR 2000-13, Considering these differences and our analysis of the five factors discussed above, we reach a result different from that reached in Order WR 2014-0021. We pp= 12-13.) Although that order concerned initial perfection of an appropriative right and a petition for extension of time for a water right permit, the same considerations apply to issues concerning proposed revocations of water right licenses that are proposed to be changed so they can be used for municipal purposes. (See also Wat. Code, § 106.5 [“It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses . . .”].)~~

~~In Order WR 2014-0021, we recognized the importance of water supplies for human consumption but concluded that this factor alone was not sufficient for us to decide not to revoke Millview’s water right license. (Order WR 2014-0021, p. 17.) Here, the combination of this factor and the several other factors discussed above lead us to a different result. Most important, Sacramento County responded promptly to develop and file its change petitions and to prepare and certify the necessary CEQA documents after Division staff advised the County of the value of the water rights. Also, the Water Agency has a definite plan to use existing facilities to divert water under Licenses 1062 and 4060 to supply water to its municipal customers, which will help reduce their dependence on critical groundwater supplies.~~

~~For these reasons, we~~ conclude that the Board should exercise its discretion under Water Code sections 1241 and 1675 not to completely revoke water-right License 1062 or License 4060.

4.2.9 Partial Revocations of Licenses 1062 and 4060

The first sentence of Water Code section 1241 states:

If the person entitled to the use of water fails to beneficially use all or any part of the water claimed by him or her, for which a right of use has vested, for the purpose for which is water appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated water.

(Underlining added.) The references in section 1241 to “all or any part of the water” and “that unused water” indicate that the Board may partially revoke a water-right license under Water Code section 1675 when the licensee has diverted and used water under the license at rates lower than the maximum authorized rates during all or part of the authorized diversion season.

As discussed in section 4.3.1, Sacramento County has asked the Board to use a baseline for analyzing its change petitions that is based on the estimated amounts of 2001 and 2003 historical diversions and use under Licenses 1062 and 4060. By making this request, Sacramento County implicitly has agreed that the Board may, as an initial step in the Board’s analysis of impacts of granting the change petitions, partially revoke these licenses by reducing their maximum authorized instantaneous diversion rates to the estimated 2001 and 2003 instantaneous rates, and by adding new maximum authorized annual diversion limits that equal the estimated 2001 and 2003 annual diversion amounts. We exercise the Board’s discretion to make such partial revocations as part of this initial step. (See Order WR 2010-0012-EXEC, pp. 1-4, 6 [Board’s Executive Director approved settlement agreement that partially revoked water-right license by adding new annual diversion limit].)

4.3 Sacramento County’s Change Petitions

4.3.1 Will the State Water Board’s Approval of Sacramento County’s Change Petitions Operate to the Injury of Any Legal User of the Water Involved?

Water Code section 1702 states that, before the Board may grant a petition to change the point of diversion, place of use or purpose of use in a water-right license, “the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.”

Sacramento County argues that the Board should use the amounts of diversions and return flows associated with the historical agricultural practices that occurred on the Licenses 1062 and 4060 place-of-use lands as the baseline to determine whether the requested changes will operate to the injury of any legal user of the water involved. (Sacramento County Closing Brief, pp. 13-15.) Comparing the amounts of return flows

that would occur if the Board granted the County's petitions, with these baseline return flows the County argues that the changes will not injure downstream water users. (*Id.*, pp. 14-15.)

Reclamation argues that, because no water has been diverted or used under these licenses for many years, if the Board approves the County's petitions, then that would effect a "revival" of the County's rights that would "cause injury to the CVP and SWP." (Reclamation Closing Brief, p. 8.)

DWR argues that Board approval of the County's petitions would present a risk that more water will be used under the licenses than has occurred during recent years, and that would result in injury to other legal users of water. (DWR Closing Brief, p. 17.) DWR cites California Code of Regulations, title 23, section 794, subdivision (a)(1), which requires a change petition to state the amount of water that would have been diverted or consumptively used under the water right in the absence of the proposed changes in a maximum year. (*Id.*) DWR argues that this amount is zero and that this amount should be used as the baseline for determining the effects of the County's proposed changes. (*Id.*, pp. 17-18.)

In the *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 735-745, the court considered a challenge by parties that diverted water from the Sacramento-San Joaquin Delta to a Board order granting a change petition of upstream water users. These parties argued that, under Water Code section 1702 and related statutes, the Board may not grant a change petition if doing so would result in any reductions in the downstream water users' historical water supplies, regardless of whether or not they had water rights that protected those historical water supplies. The court rejected the challenge and upheld the Board's decision. (*Id.*, p. 743.) The court held that the Board "properly focused on the effect of those changes on the *rights* of those users." (*Id.*, italics in original.)

Consistent with this court decision and our decision to exercise our discretion not to completely revoke water-right Licenses 1062 and 4060, we conclude that we should use the amounts of diversions and return flows that are estimated to have occurred during

the 2001 and 2003 historical-use period as the baseline for our analysis of the effects of the proposed changes on the rights of other legal users of water. (See Order WR 2013-0080-DWR p. 3, ¶ 8 [impact analysis for potential change in licensed place of use should consider potential for increased demand above and beyond historical use].)³³

While granting the County's petition may reduce the SWP and CVP water supplies compared to the amounts of these supplies since 2006, granting the petitions will not improperly infringe on SWP and CVP water rights. Rather, it will allow Sacramento County the Water Agency to re-initiate diversions divert and use water under its the senior appropriative rights: confirmed by water-right Licenses 1062 and 4060, which we have decided not to completely revoke. (See section 4.2.8.)³⁴

4.3.1.1 — Annual Diversion Rates

Sacramento County's change petition estimates that 735 af of water were used to irrigate the 28 acres of wheat and 180 acres of processing tomatoes that were grown in 2001 on five parcels within the License 1062 authorized place of use. (Exh. Sac County 48, pp. 6-7.) The County estimates that 232 af of water were used to irrigate the 130

³³ ~~By asking the Board to use a baseline for analyzing its change petitions that is based on 2001 and 2003 historical diversion and use under Licenses 1062 and 4060, Sacramento County implicitly is agreeing that the Board may partially revoke these licenses as an initial step in the Board's analysis of impacts of granting the change petitions. As necessary for this analysis, we exercise the Board's discretion to partially revoke these licenses as part of this initial step. (See Order WR 2010-0012-EXEC, pp. 1-4, 6 [Board's Executive Director approved a settlement agreement that partially revoked a water right license by adding a new annual diversion limit based on recent historical use, which was less than the full license amount because of reductions in the place of use].) As discussed in section 4.2.9, as part of this initial step, we exercise the Board's discretion to partially revoke these licenses by reducing their maximum authorized instantaneous diversion rates to the estimated 2001 and 2003 instantaneous diversion rates and by adding annual diversion limits that equal the estimated 2001 and 2003 annual diversion amounts.~~

³⁴ We reject DWR's argument regarding California Code of Regulations, title 23, section 794, subdivision (a)(1). (DWR Closing Brief, pp. 17-18.) This regulation requires a change petition to include information about the amounts of water that would have been diverted and used in the absence of the proposed changes. This regulation does not alter the rule stated in the *State Water Resources Control Board Cases* that the Board should apply the "no injury" rule in Water Code section 1702 to determine the effects of proposed changes on the rights of the other water users.

acres of safflower and 133.9 acres of wheat that were irrigated on the tract that includes the remaining License 1062 place-of-use lands and all of the lands in the License 4060 authorized place of use. (*Id.*, p. 7.) Using the proportional numbers of acres of this tract within each license's authorized place of use, the County estimates that 124 af of this amount were used on License 1062 place-of-use lands and 108 af were used on License 4060 place-of-use lands. (*Id.*) Combining these use estimates for 2001 and 2003, the County estimates that the "maximum water use" was 859 af/yr under License 1062 and 108 af/yr under License 4060. (*Id.*, p. 8.)

As discussed in section 3.2, Sacramento County's witness Gerald Johns used the Land IQ Crop Types and DWR's applied water values for cultivation of different crop types in Sacramento County to estimate the amounts of water use on the License 1062 and 4060 lands during 1977 through 2019. Using these data, Mr. Johns estimated that, during 1977 through 2006, water use under License 1062 ranged from 227 to 1,434 af/yr and water use under License 4060 ranged from 0 to 370 af/yr. (Exh. Sac County 79, p. 8.)

Mr. Johns's estimates for License 1062 include historical-use estimates of 110 af for 2008 and 329 af for 2017. (Exh. Sac County 79, p. 8.) During the hearing, the hearing officer asked Mr. Johns about these estimates, which are for years when no diversions occurred under License 1062. (Hearing Recording 3:04:58-3:05:24.) Mr. Johns testified that the 2008 Land IQ data may have resulted from vegetation growth without irrigation resulting from seepage of water from the Sacramento River to the parcels, or another factor, noting "it's hard to tell." (*Id.* 3:06:12-3:06:44.) Mr. Johns testified that 2017 was a very wet year and the Land IQ data for that year may have resulted from summer vegetation that grew without irrigation, following very wet spring conditions. (*Id.* 3:05:25-3:06:11.)

In response to follow-up questions from the hearing officer, Mr. Johns admitted that the process to develop his estimates "is not an exact science," and that, for this reason, he did a sensitivity analysis with different applied-water factors. (*Id.* 3:06:45-3:11:19)

There also is a discrepancy between Mr. Johns’s estimates of zero use under License 4060 during 2005-2006 (exh. Sac County 79, p. 8) and the licensee reports for those years, which state that there were diversions of 160.8 af in 2005 and 138.3 af in 2006 (2008-06-26 A014494 REPORT OF LICENSEE FOR 2005, 2006, 2007).

These discrepancies raise questions about the accuracy of Mr. Johns’s estimates. Nevertheless, Mr. Johns’s analysis used reasonable methods and developed reasonable estimates of historical use amounts when diversion data were not available. Despite these discrepancies, the results of Mr. Johns’s analysis support our use of the estimates in Sacramento County’s petitions of recent maximum annual water use based on data for 2001 and 2003 as the baseline amounts in our analysis of the effects of the County’s proposed changes on other legal users of water, particularly when neither DWR nor Reclamation offered any contrary estimates of the amounts of historical use under these licenses.

Sacramento County’s petition states that flood irrigation like that historically used to irrigate the License 1062 and 4060 lands “can achieve about 75% irrigation efficiency.” (Exh. Sac County 48, p. 16.) Sacramento County’s witness Darren Cordova noted this percentage (exh. Sac County 80, p. 12, ¶ 24) and no other party offered any other estimated percentage. Applying this percentage to the County’s estimated maximum historical water use estimates, we calculate the following estimated historical consumptive-use amounts:

Table 1. Estimated Historical Consumptive Use

License	Historical Use (af/yr)	Consumptive Use (75% of Historical Use) (af/yr)
1062	859	644
4060	108	81

Sacramento County’s petitions estimate that the return flows associated with the proposed new diversions and use will be approximately 20 percent of the diversion amounts. (Exh. Sac County 48, p. 18.) Mr. Cordova noted this percentage in his testimony (exh. Sac County 80, p. 13, ¶ 25), and no other party offered any other estimated percentage. Using this 20-percent estimate and the resulting 80-percent consumptive-use percentage, Sacramento County’s annual diversions under Licenses 1062 and 4060 at the new point of diversion for the proposed new uses will need to be reduced to the following amounts to avoid any increases in the consumptive-use amounts:

Table 2. New Annual Diversion Limits

License	New Diversion Limits (af/yr)	New Consumptive Use (80% of Diversions) (af/yr)
1062	805	644
4060	101	81

Our order adds these amounts as new annual diversion limits in these licenses.

4.3.1.2 Instantaneous Diversion Rates

Sacramento County’s petition to change License 1062 states that 28 acres of wheat and 180 acres of processing tomatoes were grown on License 1062 place-of-use lands in 2001. (Exh. Sac County 48, p. 6.) This petition states that 130 acres of safflower and 133.9 acres of wheat were grown on a tract the petition refers to as “Tract 8777” in 2003. This tract includes some License 1062 and all of the License 4060 lands. Because 123 acres of License 4060 lands were irrigated in 2003 (*id.*, p. 5), 140.9 acres of Tract 8777 lands within the License 1062 place of use were irrigated in 2003. (130 acres + 133.9 acres - 123 acres = 140.9 acres.) For our analysis, we use 349 acres of lands irrigated with water diverted under License 1062. (28 acres + 180 acres + 140.9 acres = 348.9 acres, which we round to 349 acres.)

As discussed in section 3.1, the Department of Public Works, Division of Water Resources used the “basis for diversion” rate of 1 cfs per 80 acres that was specified in water-right Permit 513 to calculate the 7.44 cfs limit on authorized diversions in License 1062. California Code of Regulations, title 23, section 697, subdivision (a)(1) similarly states that “for most portions of the central valley of California,” one cfs per 80 acres “shall be considered to be a reasonable headgate duty for most crops.” Applying these rates to the 349 acres of License 1062 lands that were irrigated in 2001 and 2003, we conclude that a reasonable baseline diversion rate for License 1062 is 4.36 cfs. (349 acres / (~~1 cfs~~ / 80 acres) / 1 cfs) = 4.36 cfs.) The 1.57 cfs diversion rate in License 4060 for irrigation of 123.32 acres is consistent with the 1 cfs per 80-acre rate. (123.32 acres / ~~1~~ 1.57 cfs = 78.55 acres / ~~1~~ 1 cfs.)

The following table lists the estimated consumptive-use rates associated with these diversion rates and the 75-percent consumptive-use percentage:

Table 3. Estimated Consumptive-Use Rates

License	Historical Diversion Rate (cfs)	Consumptive Use (75% of Historical Use Rate) (cfs)
1062	4.36	3.27
4060	1.57	1.18

The next table lists the new maximum authorized diversion rates that need to be included in the amendments to Licenses 1062 and 4060 so the consumptive-use rates associated with the new diversions for municipal uses will not exceed the historical consumptive--use rates:

Table 4. New Maximum Authorized Diversion Rates

License	New Diversion Rates (cfs)	New Consumptive Use (80% of Diversion Rates) (cfs)
---------	---------------------------	--

1062	4.09	3.27
4060	1.48	1.18

Our order changes the maximum authorized diversion rates in the licenses to these new rates.³⁵

In *Barnes v. Husa* (2006) 136 Cal.App.4th 1358, 1369, the court discussed how injuries to other legal users of water may occur from changes in places of use in appropriative water rights:

Injury from a change in place of use generally occurs when use at the new location results in the appropriator using a greater amount of water than he was entitled to [citation] or when use at the new location reduces return flows to the watercourse, thus reducing the amount of water available for diversion by downstream users [citation].

With the new annual diversion limits and new diversion rates this order adds to Licenses 1062 and 4060, the amounts of water available for diversion by downstream users, including the SWP and CVP, will not be reduced, compared to the amounts that were available for diversion by downstream users with the 2001 and 2003 baseline diversion and use amounts and rates under these licenses in place. The changes to these

³⁵ Each license contains a term stating “[i]n case of rotation, the equivalent of the continuous flow allowance for any thirty-day period may be diverted in a shorter time if there be no interference with other vested rights.” (1931-06-06 Water-Right License 1062, p. 1; 1955-01-26 Water-Right License 4060, p. 1.) No party has argued that the Board should change this term. This order replaces this term in each license with the Board’s Standard ~~Permit~~-Term 27, which states:

The equivalent of such continuous flow allowance for any 30-day period may be diverted in a shorter time provided there is no interference with other rights and instream beneficial uses and provided further that all terms or conditions protecting instream beneficial uses are observed.

licenses in this order therefore will not operate to the injury of any other legal user of the water involved.³⁶

4.3.2 Will the State Water Board's Approval of Sacramento County's Change Petitions Lead to Any Unreasonable Effects on Fish, Wildlife or Other Instream Beneficial Uses?

Although Water Code section 1702 does not explicitly refer to effects of changes to water-right permits and licenses on fish, wildlife or other beneficial instream uses, the State Water Board considers such effects when it acts on water-right change petitions. (Decision 1651, p. 17, fn. 12 [citing Order WR 2009-0033, p. 6, fn. 4].)

Relying on the CALSIM II hydrological modeling described in the 2003 Draft EIR/EIS for the Freeport Regional Water Project (FRWP), Sacramento County's witness Forrest Williams, Jr. testified that simulated changes in flow patterns and resulting changes in CVP and SWP release patterns and storage in response to the entire FRWP demand "generates a simulated change in flow that is nearly always small and changes that exceed 10 percent are infrequent." (Exh. Sac County 71, p. 5, ¶ 11.) He testified that FRWP operations "would result in less than significant impacts to listed fish species." (*Id.*, p. 6, ¶ 16.)

Because granting Sacramento County's petitions to change water-right Licenses 1062 and 4060 would result in only small changes in FRWP operations, the environmental effects of granting these petitions will be much smaller than the overall effects of all FRWP diversions that were analyzed in the 2003 Draft EIR/EIS.³⁷ Based on the 2003

³⁶ Sacramento County's petitions proposed that annual diversion limits be added to Licenses 1062 and 4060 to address the conveyance losses between the existing authorized points of diversion and the proposed new authorized point of diversion. (Exh. Sac County 48, p. 9.) During the hearing, Mr. Johns testified that he did not believe that the Board's order on the petitions should contain any provision to address these losses. (Exh. Sac County 79, p. 4, ¶ 7.) Neither DWR nor Reclamation asserts that this order should contain a provision addressing these conveyance losses. This order does not contain any such provision.

³⁷ The total FRWP diversion capacity is 185 million gallons per day, which equals 286 cfs. With the diversion limits of 4.09 and 1.48 cfs this order places on water-right

EIR/EIS's conclusion that FRWP operations would have less than significant impacts to listed fish species, we conclude that the small changes in FRWP operations associated with granting Sacramento County's petitions will not unreasonably affect fish, wildlife, or other instream beneficial uses.³⁸

4.3.3. Will the State Water Board's Approval of Sacramento County's Change Petitions be in the Public Interest?

Although Water Code section 1702 does not explicitly refer to the public interest, the State Water Board considers the public interest when it acts on water-right change petitions. (Decision 1651, p. 17, fn. 12.)

Consistent with our decision to exercise our discretion not to completely revoke water-right Licenses 1062 and 4060, we conclude that granting Sacramento County's petitions to change these licenses is in the public interest. After Sacramento County purchased the License 1062 and 4060 place-of-use lands, the County decided that it should stop irrigated agriculture on these lands to reduce risks to aircraft approaching and departing from the Sacramento International Airport. This decision, obviously in the public interest, freed up the License 1062 and 4060 water rights for other potential uses.

As discussed in the preceding sections, granting these petitions will not improperly infringe on the water rights of any other legal users of the water involved and will not have any unreasonable effects on fish, wildlife, or other instream beneficial uses. Granting the petitions will further the State policy stated in Water Code section 106.5 that the rights of municipalities to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses. (See Order 2000-13, p. 19 [granting extension of time for municipality to complete construction and apply

Licenses 1062 and 4060, total diversions under these two licenses will not exceed 5.57 cfs, approximately 2 percent of the total FRWP diversion capacity.

³⁸ Based on this conclusion, we include the following finding in amended water-right Licenses 1062 and 4060:

The State Water Board has complied with its independent obligation to consider the effect of the proposed change on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346, 658 P.2d 709].)

water to beneficial use is in the public interest, citing Wat. Code § 106.5].) Granting these petitions will allow the Water Agency to divert some additional amounts of water from the Sacramento River at the Freeport Regional Water Project, and to use this water to further conjunctive use of surface water and groundwater supplies in the Water Agency's Zone 40. (Exh. Sac County 70, p. 9, ¶ 31.) This will further the goals of the Sustainable Groundwater Management Act. (See Wat. Code, § 10750, subd. (a).)

4.3.4 Will the State Water Board's Approval of Sacramento County's Change Petitions Initiate a New Water Right?

"A fundamental principle of water right law . . . is that a right cannot be so changed that it in essence constitutes a new right." (Order WR 2009-0061, p. 5, citing Cal. Code Regs., tit. 23, § 791, subd. (a).) Changes that may constitute a new right include expansions of the right "to appropriate a greater amount of water, to increase the season of diversion, or to use a different source of water." (Order WR 2009-0061, pp. 5-6.) "The common feature among the changes that have been found to constitute the creation of a new right, as opposed to a change in an existing right, is that the changes that initiate a new right increase the amount of water taken from a water source at a given time." (*Id.*, p. 6.)

With the new annual and instantaneous diversion limits discussed in section 4.3.1, diversions under Licenses 1062 and 4060 will be less than or equal to the diversions that are estimated to have occurred under these licenses during the 2001 and 2003 baseline period. The authorized seasons of diversion in these licenses will not change. These new and existing license terms will ensure that our decision to grant the County's change petitions will not initiate a new water right.

4.3.5 What New Terms Should be Added to Licenses 1062 and 4060?

Water Code section 1704, subdivision (a), authorizes the Board, after a hearing, to "approve with conditions" a petition to change a water-right license. As discussed in section 4.3.1, the order adds new annual diversion limits to Licenses 1062 and 4060 and changes the maximum authorized diversion rates. These additions and changes

are necessary so the changes this order makes in these licenses will not operate to the injury of any legal user of the water involved.

DWR and Reclamation argue that the State Water Board should add Standard Term 91 to water-right Licenses 1062 and 4060. (DWR Closing Brief, pp. 20-21; Reclamation Closing Brief, pp. 10-12.) They argue that, if the Board grants Sacramento County's change petitions, the County would receive new water rights, and that it therefore is appropriate to add Term 91 to the licenses. (*Id.*)

Sacramento County argues that the Board should not add Term 91 to these licenses, because doing so would violate the "rule of priority" that applies to appropriative water rights³⁹, and that adding Term 91 is not necessary to protect the public trust or to prevent the unreasonable use of water. (Sacramento County Closing Brief, pp. 18-20.)

In Decision 1635, the State Water Board assigned a state-filed water-right application with a 1927 priority date to El Dorado Irrigation District and decided not to apply Term 91 to that application. (Decision 1635, pp. 128-129.) In Order WR 2001-22, acting on petitions to re-consider Decision 1635, the Board decided to modify Decision 1635 to require the district to comply with Term 91. (Order WR 2001-22, p. 64.)

In *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, the court held that the Board abused its discretion when it imposed Term 91 on the district ~~when~~while the Board had not required holders of hundreds of appropriators with rights junior to the district's to contribute to the implementation of the Bay-Delta water quality objectives. (*Id.*, p. 943.) Although the court held that there may be circumstances that justify the Board's taking an action inconsistent with a strict application of the rule of priority for appropriative rights, the court concluded that the Board had not demonstrated a subversion of the rule of priority was appropriate in that case. (*Id.*, pp. 965-971.)

³⁹ The rule of priority is that between appropriators, the user with priority is the person who is "first in time, first in right", such that "[t]he senior appropriator is entitled to fulfill his needs before a junior appropriator is entitled to use any water." (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961.)

Because water-right Licenses 1062 and 4060 have priority dates that are senior to the priority dates of many water-right permits and licenses for diversions of water in the Sacramento River watershed that do not have Term 91, the Board would be violating the rule of priority if it were to add Term 91 to Licenses 1062 and 4060- in this proceeding, which does not affect these other water-right permits and licenses.⁴⁰ None of the circumstances discussed by the *El Dorado* decision that may justify a Board action that would be inconsistent with the rule of priority are present here. Contrary to DWR's and Reclamation's arguments, the Board's granting the County's petitions will not initiate new appropriative water rights. Rather, it will allow the County Water Agency to ~~re-initiate diversions~~divert and ~~uses~~use water under previously perfected appropriative rights.

Since water-right License 1062 was issued in 1931 and amended in 1954, and since License 4060 was issued in 1955, the Division of Water Rights has developed several standard terms that it incorporates into water-right licenses when the licenses are amended. (See

https://www.waterboards.ca.gov/waterrights/water_issues/programs/permits/.)

Appendices A and B to this order contain the new versions of Licenses 1062 and 4060 that we are directing the Division of Water Rights to issue. These new versions of these licenses contain the appropriate standard terms. This order also adds to each license a new special term regarding the measurement and reporting of diversions at the Freeport Regional Water Project.⁴¹

⁴⁰ Nothing in this order precludes the Board from adding Term 91 to License 1062 or License 4060 in a future comprehensive proceeding regarding water-right permits and licenses for diversions of water from the Delta and its tributaries, as authorized by the *El Dorado* decision.

⁴¹ This new term states:

No water may be diverted under this right unless right holder maintains a record of all water diverted at the Freeport Regional Water Project intake facility under this right and all other rights. This record shall specify each basis of right used for any diversions at this facility and the amount of water diverted each day under each right. This record shall comply with reporting requirements in chapter 2.7, division 3, title 23, California Code

4.3.6 CEQA Compliance

As discussed in section 2.8, the Freeport Regional Water Authority certified a Final EIR for the Freeport Regional Water Project in 2004. In 2015, the County adopted a CEQA Negative Declaration for the County's water-right change petitions that tiered off the 2004 EIR. In 2020, the County prepared a CEQA Addendum to the 2015 Negative Declaration for the County's 2017 amendments to its petitions.

DWR and Reclamation both raise questions regarding whether the State Water Board may rely on the 2003 Draft EIR/EIS for the Freeport Project for the Board's CEQA compliance. (DWR Closing Brief, pp. 19-20; Reclamation Closing Brief, p. 10.) Neither DWR nor Reclamation discusses the County's 2015 Negative Declaration or its 2020 Addendum. Moreover, neither DWR nor Reclamation has presented any evidence or arguments that any of the provisions in Public Resources Code section 21166⁴² or CEQA Guidelines sections 15162 and 15164⁴³ requires the preparation of a subsequent EIR or addendum here. Absent such evidence or argument, we conclude that the County's CEQA documents satisfy the CEQA requirements that apply to the Board here as a CEQA responsible agency.

of Regulations, and measuring and monitoring requirements in chapter 2.8, division 3, title 23, California Code of Regulations. Right holder shall make the record for the current year available to interested parties upon reasonable request. Right holder shall file a copy of the entire annual record for each calendar year with the Report of Licensee for that year.

⁴² Public Resources Code section 21166 provides that “[w]hen an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency” unless certain events occur, such as substantial changes are proposed in the project, substantial changes regarding the circumstances under which the project is being undertaken, or new information that was not known and could not be known becomes available.

⁴³ These CEQA Guidelines specify the circumstances when a CEQA lead agency or CEQA responsible agency must prepare a subsequent EIR or an addendum to a previously adopted EIR or negative declaration. (Cal. Code Regs. tit. 14, §§ 15162, 15164.)

5.0 RESPONSES TO COMMENTS ON DRAFT PROPOSED ORDER

As discussed in section 2.11, the AHO circulated a draft proposed order, and Sacramento County and DWR submitted comments on it. The following sections describe these comments and our responses.

5.1 Sacramento County Comments

Sacramento County's comments noted that the County's change petitions did not ask the Board to delete the existing authorized points of diversion, places of use or purpose of use from these licenses, and asked the AHO to revise the draft proposed order to remove its provisions deleting these existing authorizations. (2021-03-01 Sac. Cty. ltr. commenting on draft proposed order.)

As discussed in section 2.5, the County's annual licensee reports for 2008-2011 for Licenses 1062 and 4060 stated that, because no agricultural use will ever occur again in the properties covered by the licenses, "[i]t is unlikely that water diversions will ever occur again." (Exhs. Sac County 14-21.)

Consistent with these statements, the project description in the County's 2014 CEQA Initial Study and Proposed Negative Declaration states:

Under the proposed project, the properties that comprise the current places of use are anticipated to remain idle for the foreseeable future. Instead of diverting water at the existing points of diversion, SCWA would divert water at the [Freeport Regional Water Project] point of diversion, which is approximately 12-13 miles downstream of the existing points of diversion.

(Exh. Sac County 54, p. 8.) Sacramento County's 2020 CEQA Addendum to the 2014

Negative Declaration similarly states:

To reduce wildlife attractants on property adjacent to the airport, the County allowed all tenant agricultural leases on such property south of Interstate 5, including the places of use for Licenses 1062 and 4060, to expire on December 31, 2007. Now, the County manages the land exclusively to reduce bird attraction, and the County has no intention of reinstating tenant agriculture.

(Exh. Sac County 56, p. 4.)

Considering these statements, it is appropriate for this order to delete the existing authorized points of diversion, places of use or purpose of use in Licenses 1062 and 4060. If the County changes its plans and decides to start diverting water at any of these points of diversion in the future for irrigation of lands within these places of use, then the County may file petitions to amend the licenses and prepare an appropriate CEQA document that analyzes the associated environmental impacts.

5.2 DWR Comments

1. Separate Legal Entities. DWR’s comments note that Sacramento County and the Water Agency are not the same legal entity, and that the draft proposed order therefore incorrectly stated that “the County” would “re-initiate diversion and use under its senior appropriative rights.” (2021-03-01 DWR memo commenting on draft proposed order (DWR Comments), p. 2.)

To address this comment, the AHO added text to footnote 1, which explains that the Water Agency and Sacramento County are separate legal entities, and the AHO edited text in sections 4.3.1 and 4.3.5 to delete the references to re-initiations of diversions and use. These changes do not affect the conclusions in these sections that the Water Agency’s diversions and use of water under Licenses 1062 and 4060 will not improperly infringe on SWP and CVP water rights or initiate new appropriative water rights.

2. [Order WR 2014-0021](#). DWR argues that the draft proposed order improperly attempts to distinguish Order WR 2014-0021 by considering additional factors besides the five factors discussed in section 4.2.5. (*Id.*, pp. 3-5.)

Considering these comments, the AHO edited section 4.2.8 of the draft proposed to remove the discussions about additional factors.

As part of this argument, DWR asserts that the petitioner’s diligence in CEQA compliance “should not be considered an important distinguishing factor when deciding whether to apply the *Millview Order’s* rationale here.” (*Id.*, p. 4.) We disagree. As discussed in section 4.2.5, the licensee’s diligence in actions to obtain authorizations for new diversions and uses is one of the factors the Board historically has considered in

proceedings involving potential revocations of water-right licenses. CEQA compliance is a critical part of this diligence for most water-right change petitions. The very significant differences in diligence between Millview and Sacramento County on their petitions, including the very significant differences in their CEQA compliance work, are the critical factors that lead us to a conclusion on the license-revocation issue in this order that is different from the conclusion on the similar issue in Order WR 2014-0021.

3. Uses of Water for Public Trust Purposes and Effects on DWR's Water Supplies. DWR argues that the draft proposed order's analysis of conflicting claims does not properly distinguish between water diverted by the CVP and SWP from the Delta, water needed for Delta outflows, and water DWR and Reclamation must release from storage to maintain required Delta outflows. (*Id.*, pp. 5-7.)

Subsection 2 of section 4.2.7 discusses in detail how Reclamation and DWR must operate the CVP and SWP, including releases of stored water, to meet the Delta outflow requirements and water-quality objectives in the CVP and SWP water-right permits. The AHO edited the last paragraph of this subsection to provide more detail regarding the effects of the lack of diversions under License 1062 and 4060 since 2006 on various aspects of SWP and CVP operations.

When the Delta is in balanced conditions, DWR and Reclamation must meet the applicable instream flow requirements and water-quality objectives in their permits by reducing exports or increasing releases from upstream reservoirs as necessary. (See section 4.2.7.) This order does not change any of these requirements or objectives. When the Water Agency diverts water under Licenses 1062 and 4060 while the Delta is in balanced conditions, Reclamation and DWR theoretically may need to reduce their Delta exports or increase their releases of stored or imported water to compensate for these diversions, so that the required Delta outflows and water quality conditions are

maintained.⁴⁴ This is consistent with the priorities that the License 1062 and 4060 water rights have over the CVP and SWP water rights. (See section 4.3.5.)

DWR's comments refer to the statement in Order WR 2014-0021 that the Sonoma County Water Agency (SCWA) and CDFW raised "legitimate concerns regarding interference with SCWA's conditioned water rights, which require the maintenance of instream minimum flows in the Russian River for public trust purposes." (DWR Comments, p. 7, citing Order WR 2014-0021, p. 16.)

This order recognizes DWR's similar concerns regarding the SWP's operations and water rights. Notwithstanding these concerns, this order reaches a different conclusion on the license-revocation issue than that reached in Order WR 2014-0021, for the reasons discussed in this order.

4. Term 91. DWR argues that the Board should "partially revoke the Licenses during the periods when Term 91 is in effect" and criticizes the draft proposed order for not discussing this proposal. (DWR Comments, p. 8.)

For the reasons discussed in section 4.3.5, this order concludes that the Board should not add Term 91 to Licenses 1062 and 4060. DWR's proposed "partial revocation," even if possible, is not appropriate for these same reasons.

⁴⁴ While such reductions theoretically might be required, it is very unlikely that Reclamation and DWR ever could adjust their required releases of Supplemental Project Water at the level of precision that would be necessary to compensate for the Water Agency's diversions under Licenses 1062 and 4060. See exhibit DWR-15, which depicts historical required releases of Supplemental Project Water on a graph for which the scale for the required releases and has minimum increments of 5,000 cfs. Maximum future diversions under Licenses 1062 and 4060 will be 4.09 and 1.48 cfs, respectively. (See section 4.3.1.2.)

While DWR states that it "is concerned with future use of the precedent if the Draft Proposed Order is not amended (DWR Comments, p. 1), there is no evidence in the administrative record that there are any other water-right licenses for diversions in the Delta watershed for which the licensees are likely to request changes like those authorized by this order for Licenses 1062 and 4060.

5. Decision 1247. Citing Decision 1247, DWR argues that Sacramento County “did not practice ‘good husbandry’ of the Licenses,” and that the draft proposed order “will encourage entities to sit on water rights and wait for the State Water Board to do something before making any attempt to put water to beneficial use. (DWR Comments, pp. 8-9.) DWR argues that the draft proposed order indicates that the five revocation factors “provide[] a checklist, where presumably the decision to revoke or not is dependent on how many checks favor revocation and how many do not.” (*Id.*, p. 8.)

We disagree. This order does not encourage any entity to “sit on water rights.” This order discusses the factors that are relevant to the Board’s decisions on license-revocation issues and how we have applied these factors. Our detailed analysis of these factors is not a simple checklist or tally.

As discussed in section 4.2.5, Decision 1247 states:

The Board, consistent with the general policy of the law which does not favor forfeitures, has not held a licensee to strict account for nonuse of water due to destruction of diversion facilities by floods, governmental restrictions, and other circumstances in which a prudent man following the dictates of good husbandry, either could not or should not be expected to use the water during the interim.

(Decision 1247, pp. 4-5.) Consistent with this statement, this order follows the general policy of the law that does not favor forfeitures, and it recognizes that the primary reason for the long period of nonuse under License 1062 and 4060 was governmental restrictions, specifically the FAA policy discouraging irrigation of the lands within the licenses’ authorized places of use. Considering this FAA policy, Sacramento County could not be expected to use water under these licenses until the Board has granted the County’s change petitions.

6. California Code of Regulations, title 23, section 794, subdivision (a)(1). Citing this regulation, DWR argues that “when a license ceases to be used for a period of five or more years, then the right to change or transfer that license should cease as well,” and that “the appropriate response to nonuse under a license is revocation.” (DWR Comments, p. 10.)

We disagree. DWR's argument ignores the State Water Board's discretion to decide whether or not to revoke a water-right license when there has been nonuse for a period of at least five years during which water was available. (See section 4.2.2.)

6.0 CONCLUSIONS

1. Exercising our discretion under Water Code sections 1241 and 1675, we do not completely revoke water-right License 1062 or License 4060.
2. We grant Sacramento County's petitions to change water-right Licenses 1062 and 4060. We make the following changes to these licenses:
 - a. For both licenses, the authorized purpose of use is changed from irrigation to municipal and industrial.
 - b. For both licenses, the prior authorized points of diversion are deleted, and the Freeport Regional Water Project intake facility is added as the new authorized point of diversion.
 - c. For both licenses, the prior authorized places of use are deleted and Sacramento County Water Agency Zone 40, as depicted on Exhibit Sacramento County 1, is added as the new authorized place of use.⁴⁵
 - d. For License 1062, the maximum authorized diversion rate is reduced to 4.09 cubic-feet per second and a new annual diversion limit of 805 acre-feet per year is added.
 - e. For License 4060, the maximum authorized diversion rate is reduced to 1.48 cubic-feet per second and a new annual diversion limit of 101 acre-feet per year is added.
3. With these changes to these license terms, our granting Sacramento County's change petitions will not operate to the injury of any legal user of the water involved, will not unreasonably affect fish, wildlife or other instream beneficial

⁴⁵ If there is any discrepancy between the depiction of Sacramento County Water Agency's Zone 40 in the attached Figure 1 and the map dated September 4, 2018, a copy of which is Exhibit Sac County 1, the authorized place of use for these licenses will be the depiction of Zone 40 in the September 4, 2018 map.

uses or any other public trust values, will be in the public interest, and will not initiate any new water rights.

ORDER

IT IS HEREBY ORDERED THAT:

1. Sacramento County's petitions to change water-right Licenses 1062 and 4060 are granted.
2. The Deputy Director for the Division of Water Rights is directed to issue amended Licenses 1062 and 4060 in the forms of the attached Appendices A and B.
3. The Deputy Director for the Division of Water Rights is directed to prepare and file a CEQA Notice of Determination for this order.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on _____, 2021.

AYE:

NAY:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board

Figure 1 – Licenses 1062 and 4060 Existing POD and POU Locations

Figure 2 – Licenses 1062 and 4060 Proposed POD and POU Locations

Appendix A – License 1062 and Amended License for Diversion and Use of Water

Appendix B – License 4060 Amended License for Diversion and Use of Water