

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

DIVISION OF WATER RIGHTS

ORDER WR 2007-0019-DWR

**IN THE MATTER OF LICENSE 2685 (APPLICATION 1224)
MERCED IRRIGATION DISTRICT
ORDER APPROVING TEMPORARY CHANGE
IN PLACE OF USE AND POINTS OF REDIVERSION
AND TRANSFER OF 25,000 ACRE-FEET OF WATER**

SOURCE: Merced River

COUNTY: Mariposa and Merced

ORDER APPROVING TEMPORARY CHANGE IN PLACE OF USE AND POINTS OF REDIVERSION AND TRANSFER OF 25,000 ACRE-FEET OF WATER BY THE CHIEF OF THE DIVISION OF WATER RIGHTS

1.0 SUBSTANCE OF PETITION

On March 9, 2007,

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

filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a Petition for Temporary Change pursuant to Water Code Sections 1725 through 1732. If approved, the Merced Irrigation District (District) would temporarily expand their licensed place of use and also add seven new points of rediversion. Temporary changes under Water Code section 1725 may be effective for a period of up to one year.

1.1 Description of the Transfer

The District proposes to transfer up to 25,000 acre-feet (af) of stored water under its License 2685 to irrigate land that is currently not included as a place of use under the license.

The District is required to release water from its storage reservoir at Lake McClure to downstream water users to satisfy water supplies for riparian and pre-1914 claims of water rights as mandated by the Cowell Agreement (Agreement). The Agreement was established on January 17, 1926 pursuant to a Merced Superior Court Order, and stipulates a scheduled quantity of flow rates to be maintained by the District, measured at Crocker-Huffman Dam.

The Agreement requires the District to bypass and release water in the summer so that the riparian and pre-1914 downstream users would experience the same hydrologic conditions that were in place prior to the construction of the New Exchequer Dam. Consequently, the District has at times been

required to supplement downstream flows in the Merced River with releases from storage when inflow to Lake McClure has been insufficient to satisfy the flow requirements downstream of the Crocker-Huffman Dam.

The downstream diverters of the water released from storage are known as the Cowell Agreement Diverters (CAD). The CAD group irrigates acreage that is not included as a place of use in License 2685. The District filed the temporary change petition to include the acreage irrigated by the downstream diverters as a place of use in License 2685 and to include the seven points of redirection used to supply water to the CAD group. The District seeks authorization to serve 13,003 acres within a gross area of 19,700 acres.

In the absence of the proposed temporary change, the water would be used by the District on land currently included within the District boundaries.

1.2 Previous Temporary Transfer

The District previously filed a similar petition for a temporary transfer to cover the CAD group in 2004, and the State Water Board approved the transfer with Amended WR Order 2004-0041-DWR on November 4, 2004. The State Water Board discourages the use of repeated temporary transfers for the same purpose year after year when a permanent water right change is needed. Repeatedly using the temporary transfer process is not an appropriate substitute for a permanent change. Further, at the end of a temporary transfer, there is a potential that the water right holder will continue to act as if the transfer is in effect, which would violate the water right. Accordingly, in Amended WR Order 2004-0041-DWR, the District was requested to submit to the Division a plan for its future compliance with its water right license in connection with its releases to the CAD group. The District submitted a plan on August 1, 2005.

In order to implement the needed permanent changes to License 2685, the Division requests that the District continue to follow its August 1, 2005 plan. In the absence of adhering to the plan, the Division will review the matter to determine whether a violation is threatened and enforcement action is appropriate.

2.0 BACKGROUND

2.1 Substance of the District's License

Original Water Right under License 2685

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

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

Modified Water Right under License 2685

Effective February 16, 1995, License 2685 was modified from its original conditions to allow the direct diversion of 5,000 afa of water from the Merced River at a rate not to exceed 7 cfs from November 1 of each year to February 29 of the following year for municipal use in the Mariposa Town Planning Area. Storage under License 2685 is reduced in the amount of water diverted to the Mariposa Town

Planning Area, up to 1,667 afa. Combined maximum direct diversion and storage under License 2685 cannot exceed 345,440 afa. The point of diversion for the water delivered to the Mariposa Town Planning Area is located approximately 40 miles upstream of New Exchequer Dam.

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

2.2 Place of Use and Points of Rediversion under the Proposed Transfer

The District's petition requests the temporary addition of the lands irrigated by the CAD group which are shown on a map submitted with the petition titled *Proposed Addition to Place of Use and Points of Rediversion*, dated March 7, 2007.

The new points of rediversion are as follows:

1. Canevaro Ditch - located within projected NW¼ of NE¼ of Section 11, T5S, R14E, MDB&M.
2. Robinson/Cuneo Ditch - located within projected NW¼ of NE¼ of Section 10, T5S, R14E, MDB&M.
3. Ruddle Ditch – located within projected NW¼ of NE¼ of Section 9, T5S, R14E, MDB&M.
4. Dale/Scott Ditch – located within projected NW¼ of SW¼ of Section 9, T5S, R14E, MDB&M.
5. Jorgenson/Ferrell Ditch – located within projected NE¼ of NE¼ of Section 17, T5S, R14E, MDB&M.
6. Cowell Ditch – located within projected NW¼ of SW¼ of Section 17, T5S, R14E, MDB&M.
7. Bettencourt/Schaffer/Griffith Ditch – located within projected SE¼ of SW¼ of Section 28, T5S, R13E, MDB&M.

3.0 PUBLIC NOTICE AND COMMENT TO THE PROPOSED TRANSFER

Public notice of the petition for temporary change was provided March 14, 2007 via regular mail to interested parties and by publication in the Merced Sun-Star on March 17, 2007 and the Mariposa Gazette on March 22, 2007. Timely comments regarding the proposed temporary change were submitted by the Anglers Committee.

Anglers Committee opposed the proposed temporary change based on the following:

1. The District's diversions under License 2685 have adversely affected San Joaquin River anadromous fisheries.
2. The District should have formally consulted with NOAA Fisheries, US Fish and Wildlife Service, and California Department of Fish and Game (DFG) regarding the proposed transfer.
3. Numerous environmental laws and court decisions prevail over the Cowell Agreement, which makes the Agreement invalid and not applicable without full compliance with federal and state environmental statutes.
4. The District's petition does not provide any mitigation and protection measures to protect fisheries resources.

State Water Board Responses:

1. In considering a petition for temporary transfer, the State Water Board does not re-evaluate the previous issuance of a water right license. This assertion does not claim any impacts solely related to the transfer. No further action is needed on this issue.
2. A public notice of the temporary transfer petition was sent to NOAA Fisheries, US Fish and Wildlife Service and DFG. No comments were received.
3. The proposed temporary transfer is subject to the terms imposed by the State Water Board, and the State Water Board will condition the transfer to comply with Water Code section 1727 (b)(2). The State Water Board is not party to the Cowell Agreement and is not conditioning the transfer pursuant to that agreement. No further action is needed on this issue.
4. Water transferred to the Cowell Agreement Diverter lands will not involve an increase in the historical consumptive use of water, and will not involve a change or reduction in instream flows made in compliance with License 2685 for fishery purposes. The assertion does not claim any fishery impacts solely related to the transfer. No further action will be taken on this issue.

4.0 AVAILABILITY OF WATER FOR TRANSFER

The water proposed for transfer will be collected to storage in Lake McClure from October 1 of each year to July 31 of the succeeding year. Under License 2685, the District can both divert directly and collect water to storage. The District does not provide water by direct diversion under License 2685 to the CAD service area. When adequate instream flow is available for direct diversion, the District limits its diversion to maintain sufficient instream flow for the CAD diverters to use their claimed riparian and pre-1914 appropriative rights set forth in the CAD agreement. Therefore, the transfer will be limited to water released from storage at Lake McClure. In the absence of the proposed transfer, the water would remain in storage in Lake McClure or be released from storage for use by the District within the District boundaries.

No substantive objections to the transfer on the basis of injury to legal water rights were filed with the Division.

The District has historically released water from Lake McClure in the same manner proposed for this temporary transfer, to satisfy its agreement with the CAD group. As noted above, however, the District does not have a place of use and points of redirection in its water right license to cover the use of water by the CAD group. Accordingly, the District cannot, in the absence of a temporary, long-term, or permanent change, continue to provide stored water to the CAD group. Because the District lacks a place of use and points of redirection for this water, the Division has considered taking enforcement action against the District or the members of the CAD group.

This year, the District elected to petition for this temporary transfer to cover the CAD place of use and points of diversion. This temporary transfer will remain in effect for one year from the date of this Order. Before the District provides water to the CAD group after this temporary transfer expires, the District will need to either obtain permission for a further temporary transfer or make other arrangements. For example, the District could release stored water to the CAD group on a permanent basis if the District seeks and obtains approval for a permanent change in its place of use and points of diversion, pursuant to Water Code section 1700, et seq. Alternatively, the CAD diverters could seek water right permits that allow them to divert water that is not from natural flow.

In light of the above, I find in accordance with Water Code section 1727(b)(1) that the proposed temporary transfer would not injure any legal user of the water and that the proposed temporary transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.

5.0 ENVIRONMENTAL CONSIDERATIONS

In accordance with Water Code section 1729, temporary changes involving transfer of water are exempt from the requirements of the California Environmental Quality Act (CEQA) (Public Resources Code section 21000 et seq.). However, the State Water Board must consider potential impacts on fish, wildlife, and other instream beneficial uses in accordance with Water Code section 1727(b)(2).

The water available for transfer is either currently stored or will be stored in Lake McClure under the provisions of License 2685. The District states that irrigation of the CAD service area (the project) was approved prior to the effective date of CEQA, and the project has not changed since the effective date of CEQA. On March 6, 2007 the District adopted Resolution No. 2007-05, which determined that this project is an existing facility and categorically exempt from CEQA under Title 14, California Code of Regulations section 15301, Class 1. According to the District, since the public project approval in 1929 there has been negligible, if any, expansion of place of use.

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

No substantive objections to the transfer on the basis of injury to fish, wildlife or other instream beneficial uses were filed with the Division.

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

6.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY

Resolution 2002-0106, section 2.6.17 delegates to the Chief of the Division the authority to approve temporary changes due to a transfer of water in accordance with Water Code sections 1725-1732, provided the necessary findings can be made.

7.0 CONCLUSIONS

I conclude that, based on the available evidence:

1. The proposed temporary change will not injure any legal user of the water.
2. The proposed temporary change will not unreasonably affect fish, wildlife, or other instream beneficial uses.
3. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.

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ORDER

NOW, THEREFORE, IT IS ORDERED that the petition for temporary change in the place of use and points of redirection under the District's License 2685 (Application 1224) for the transfer of 25,000 af of water to the CAD service area is approved.

All existing terms and conditions of License 2685 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing on the date of this Order and continuing for one year. Only water stored in Lake McClure may be transferred. Water shall not be provided to the CAD service area by direct diversion.
2. License 2685 shall be temporarily amended to add the new points of re-diversion, described as follows:

Canevaro Ditch – West 1,792 feet and South 366 feet from projected NE corner of Section 11, being within NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 11, T5S, R14E, MDB&M.

Robinson/Cuneo Ditch – West 2,117 feet and South 423 feet from projected NE corner of Section 10, being within NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 10, T5S, R14E, MDB&M.

Ruddle Ditch – West 1,963 feet and South 1,174 feet from projected NE corner of Section 9, being within NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 9, T5S, R14E, MDB&M.

Dale/Scott Ditch – East 742 feet and South 2,683 feet from projected NW corner of Section 9, being within NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 9, T5S, R14E, MDB&M.

Jorgenson/Ferrell Ditch – West 926 feet and South 674 feet from projected NE corner of Section 17, being within NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 7, T5S, R14E, MDB&M.

Cowell Ditch – East 390 feet and North 1,744 feet from projected SW corner of Section 17, being within NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 17, T5S, R14E, MDB&M.

Bettencourt/Shaffer/Griffith Ditch – East 2,021 feet and North 545 feet from projected SW corner of Section 28, being within SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 28, T5S, R13E, MDB&M.

3. The place of use shall be modified to include the following area: Irrigation of 13,003 acres within a gross area of 19,700 acres as shown on a map entitled "Merced Irrigation District – Proposed Addition to Place of Use and Points of Rediversion" dated March 7, 2007, filed with the Division.
4. Within 60 days of completion of the transfer, but not later than August 1, 2008, the Licensee shall provide to the Chief of the Division a report describing the use of water transferred pursuant to this Order. The report shall include a summary showing the monthly amounts of water actually transferred under this Order.
5. The District shall comply with the License 2685 instream flow requirements at all times while transferring water pursuant to this Order.

6. I reserve jurisdiction to supervise the transfer, exchange and use of water under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY

*Victoria A. Whitney, Chief
Division of Water Rights*

Dated: May 18, 2007