

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

DIVISION OF WATER RIGHTS

ORDER WR 2010-0027-DWR

**IN THE MATTER OF LICENSE 11395 (APPLICATION 16186)
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 15,000 ACRE-FEET OF WATER
FROM THE MERCED IRRIGATION DISTRICT
TO FOUR STATE WATER CONTRACTOR AGENCIES**

**ORDER AUTHORIZING TEMPORARY CHANGE IN POINTS OF REDIVERSION,
PLACE OF USE, AND PURPOSE OF USE**

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On May 3, 2010,

Merced Irrigation District
c/o Marc Van Camp
MBK Engineers
1771 Tribute Road, Suite A
Sacramento, CA 95815

filed with the State Water Resources Control Board (State Water Board) a Petition for Temporary Change under Water Code section 1725, et seq. Pursuant to the petition, Merced Irrigation District (MID) seeks to transfer up to 15,000 acre-feet (af) of water to four State Water Contractor Agencies. Water would be used within the State Water Project (SWP) service area. Temporary changes approved pursuant to Water Code section 1725 may be effective for up to one year from the date of approval.

1.1 Description of the Transfer. MID proposes to transfer up to 15,000 af of stored water under License 11395 (Application 16186) to the Dudley Ridge Water District, the Kern County Water Agency, the Oak Flat Water District, and the Tulare Lake Basin Water Storage District (hereinafter collectively referred to as the Agencies). Water will be released from Lake McClure to the Merced River thence the San Joaquin River to be diverted at the Banks Pumping Plant for delivery to the Agencies. The water is scheduled to be released over a short period in September, 2010, and will coincide with an instream flow study to support relicensing of MID's Merced River Hydroelectric Project. The transfer releases will be calculated as the flow in the Merced River at Cressy minus the required instream flow at that location. The petition states that the final release schedule will be coordinated with the U.S. Fish and Wildlife Service (USFWS) and the Department of Fish and Game (DFG). The petition states that MID is willing to accept refill criteria to ensure that no injury to other legal users of water results from the transfer. A copy of MID's petition is posted online at:

www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_notices/.

In the absence of the proposed change, the 15,000 af of water would remain in storage within Lake McClure.

1.2 Other Agency Consultation. MID submitted to the State Water Board a flow schedule titled *Merced I.D. 2010 Water Transfer – Proposed Flow Schedule*, dated August 13, 2010. This flow schedule describes the expected flows in the Merced River below Merced Falls Dam and at Cressy associated with the proposed temporary change. MID developed the flow schedule in coordination with DFG, USFWS, and National Marine Fisheries Service (NOAA – Fisheries). The schedule includes a description of the hourly flow changes associated with the transfer. The maximum hourly change in flows is 275 cubic feet per second (cfs) as requested by DFG, USFWS, and NOAA – Fisheries. DFG, USFWS, and NOAA – Fisheries approved the flow schedule provided the transfer starts in late August or September, 2010. MID’s petition has stated that the latest possible start date (identified on the flow schedule as Day 1) for the proposed transfer is September 15, 2010. The flow schedule is available for viewing online with the copy of this Order at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_orders/

1.3 Refill Criteria. The transfer total consists of water currently stored in Lake McClure. MID has developed criteria with the Department of Water Resources (DWR) and the United States Bureau of Reclamation (USBR), titled *Accounting Procedures For Determining Refill Impacts On The Projects of Merced Irrigation District-State Water Contractors Water Transfer* (Refill Criteria), to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the SWP or Central Valley Project (CVP). The Refill Criteria provides for an accounting of refill of Lake McClure resulting from the proposed transfer. Pursuant to these criteria, any refill occurring during balanced conditions in the Delta is subject to repayment to DWR and USBR according to a schedule agreed to by MID, DWR, and USBR. The Refill Criteria is available for viewing online with the copy of this Order as described above.

2.0 BACKGROUND

2.1 Substance of MID’s License. License 11395 (Application 16186) authorizes the diversion to storage of up to 605,000 af of water from the Merced River between October 1 and July 1. The points of diversion for License 11395 are located at the New Exchequer Dam and the McSwain Dam. The points of rediversion for License 11395 are located at the McSwain Dam, the Merced Falls Diversion Dam, the Crocker-Huffman Diversion Dam, and at Duck Slough. The water is used for irrigation, domestic, recreational, fish culture, and wildlife enhancement purposes within the authorized places of use identified by the “Official map of MID-1973” and additional maps on file with the State Water Board.

2.2 Proposed Temporary Changes. The proposed transfer would temporarily add the SWP’s Banks Pumping Plant as a point of rediversion to License 11395. The service area of the SWP would also be temporarily added to the place of use under License 11395. The Banks Pumping Plant and SWP service area are identified on Maps 1878-1, 2, 3 & 4 on file with the State Water Board, Division of Water Rights under Application 5629. Municipal, industrial, salinity control, fish and wildlife enhancement, and water quality control would be temporarily added as purposes of use under License 11395.

2.3 OCAP Biological Opinions. The operations of the Banks Pumping Plant are governed by Biological Opinions issued by USFWS and NOAA-Fisheries for the long-term operations of the CVP and the SWP (referred to as OCAP BOs). These BOs were issued in 2008 (USFWS) and 2009 (NOAA-Fisheries) and are based on CALSIM modeling of SWP and CVP operations. The modeling includes up to 600,000 af of water transfers during the period from July 1 through September 30 of each year. Additionally, the Reasonable and Prudent Alternatives (RPAs) contained in the BOs do not include export restrictions during the July 1 through September 30 period (also referred to as the “transfer window”). The total amount of additional pumping due to all water transfers (including the subject transfer) in 2010 is less than the 600,000 af assumed in the modeling performed for the BOs. The start of the subject transfer will

be no later than September 15, 2010, to ensure that the additional pumping at the Banks Pumping Plant associated with the transfer is in conformance with the OCAP BOs.

3.0 PUBLIC NOTICE AND COMMENT TO THE PROPOSED TEMPORARY CHANGE

Public notice of the petition for temporary change (dated June 22, 2010) was provided via first class mail to interested parties and by publication in the Sacramento Bee on June 25, 2010. DWR, California Fisheries and Water Unlimited (CFWU), Stockton East Water District (SEWD), and USBR submitted timely comments regarding the proposed temporary change. These comments and the State Water Board's responses are briefly summarized below. The comments are available for viewing online with this Order at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_orders/

3.1 Comments of the Department of Water Resources. DWR objects to the proposed temporary change based on potential injury to its water rights. The proposed temporary change involves the transfer of stored water and has the potential to adversely impact DWR's water rights if refill of the vacated storage space occurs when the Delta is in balanced conditions. MID must work with DWR and USBR to develop acceptable refill criteria. DWR also states that the petitioner must develop an adequate method for determining the quantity of water released from Lake McClure pursuant to the transfer that reaches the Clifton Court Forebay for diversion. DWR states that its objections may be addressed if adequate refill criteria language and an acceptable method for determining the amount of water available for transfer at Clifton Court Forebay are included in any order approving the temporary transfer.

State Water Board Response: As stated in Section 1.3 of this Order, MID has developed the Refill Criteria in concert with DWR and USBR to ensure that the refill of Lake McClure resulting from the proposed temporary change does not adversely impact the SWP or CVP. This Order requires MID to comply with the Refill Criteria. This Order also requires MID to coordinate its transfer releases with USBR to ensure that USBR is not releasing water from Goodwin Dam to meet water quality objectives at Vernalis during the transfer period. Following submission of its comments, DWR reviewed the potential for determining the amount of water available for transfer at Clifton Court Forebay with MID. DWR staff contacted State Water Board staff and stated that this issue is no longer a concern.

3.2 Comments of the California Fisheries and Water Unlimited. CFWU objects to the proposed temporary change. CFWU's comments cite concerns regarding compliance with federal and State Endangered Species Act requirements and impacts to listed species related to the underlying operations of the SWP. CFWU requests that the State Water Board hold a hearing regarding the subject petition and that the State Water Board require MID to prepare a California Environmental Quality Act (CEQA) document for the subject petition.

State Water Board Response: The period for this transfer is within the July 1 through September 30 "transfer window" and therefore the additional pumping at the Banks Pumping Plant is in conformance with the OCAP BOs. Rediversion of water at the Banks Pumping Plant pursuant to this Order is subject to compliance by the pumping plant operators with all applicable biological opinions, court orders, and any other conditions imposed by other regulatory agencies applicable to these operations. Rediversion of water at the Banks Pumping Plant pursuant to this Order is also subject to compliance by the operators with the objectives currently required of DWR and USBR set forth in Tables 1, 2, and 3 on pages 181 to 187 of State Water Board Revised Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at those points of diversion/rediversion, including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by DWR and USBR.

The State Water Board has reviewed the information submitted by the petitioner and determined that it is sufficient to make the required findings (described in Section 4.0 of this Order). The State Water Board

will not hold a hearing regarding this petition. Additionally, Water Code section 1729 states that a temporary change is exempt from the requirements of CEQA. The State Water Board will not require the petitioner to prepare an environmental document pursuant to CEQA for this petition.

3.3 Comments of the Stockton East Water District. SEWD states that refill of Lake McClure associated with the proposed temporary change has the potential to reduce flow in the San Joaquin River and trigger flow requirements resulting in increased demand from New Melones Reservoir. SEWD notes that “MID is willing to accept refill criteria to ensure that no injury to other legal users of water results from the transfer” and states that provided such criteria are imposed it has no objection to the requested change.

State Water Board Response: This Order requires compliance with the refill criteria developed with DWR and USBR.

3.4 Comments of the United States Bureau of Reclamation. USBR states that the proposed temporary change has the potential to adversely impact CVP operations when USBR is releasing supplemental project water to meet its requirements for the protection of water quality and fish and wildlife. USBR states that it has been working with MID to develop refill criteria to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the SWP or CVP. USBR requests that the order approving this petition contain the following terms:

- a. Prior to the release of transfer water, Petitioner shall enter into a reservoir refill agreement containing conditions, criteria and procedures that ensure that CVP operations and water rights are not adversely impacted by future refill following the release of transfer water. Implementation of the proposed transfer is subject to that reservoir refill agreement.
- b. During the transfer period, Petitioner shall communicate with USBR and shall coordinate its operations and the timing of releases of transfer water with USBR in order to ensure that USBR is not injured in the event that USBR is releasing water from Goodwin Reservoir to meet water quality objectives at Vernalis.

State Water Board Response:

- a. As stated in Section 1.3 of this Order, MID has developed the Refill Criteria in concert with DWR and USBR to ensure that the refill of Lake McClure resulting from the proposed temporary change does not adversely impact the SWP or CVP. This Order requires MID to comply with the Refill Criteria.
- b. This Order requires MID to communicate with USBR and coordinate its operations and the timing of releases of transfer water with USBR in order to ensure that USBR is not injured by the transfer.

4.0 REQUIRED FINDINGS OF FACT

4.1 Availability of Water for Transfer. Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Section 1011. (Wat. Code, §§ 1725, 1726.) Water Code section 1725 defines “consumptively used” to mean “the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.” The water proposed for transfer is currently stored in Lake McClure pursuant to the terms of License 11395. The petition states that in the absence of

the proposed change, the 15,000 af of water proposed for transfer would remain in storage within Lake McClure.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the water proposed for transfer pursuant to this Order would be stored in the absence of the proposed temporary change.

4.2 No Injury to Other Legal Users of Water. Before approving a temporary change due to a transfer or exchange of water pursuant to article 1 of Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would not injure any legal user of the water during any potential hydrologic condition that the Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows. (Wat. Code, § 1727, subd. (b)(1).) This Order requires MID to comply with the conditions contained in the Refill Criteria to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the SWP or CVP. This Order also requires MID to coordinate its releases with USBR to ensure that USBR is not releasing water from Goodwin Dam to meet Vernalis water quality requirements.

This Order includes terms and conditions to ensure that other legal users of water are not injured by potential water level and water quality impacts in southern Delta channels associated with the addition of the Banks Pumping Plant as a point of rediversion to License 11395.

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

4.3 No Unreasonable Effect on Fish, Wildlife, or Other Instream Beneficial Uses. Water Code section 1729 exempts temporary changes involving the transfer of water from the requirements of CEQA. (Pub. Resources Code, § 21000, et seq.) However, the State Water Board may approve a temporary change due to a transfer of water only if it determines that the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).)

DFG, USFWS, and NOAA – Fisheries reviewed MID's proposed flow schedule for this transfer and determined that the release rates are acceptable, provided the ramping up or down of flows from New Exchequer Dam, McSwain Dam, and Merced Falls Diversion Dam are made in increments not to exceed 275 cfs per one hour period. This Order requires MID to release water according to the flow schedule approved by DFG, USFWS, and NOAA – Fisheries and limits ramping up or down to increments not to exceed 275 cfs in any one hour period.

The period for this transfer is within the July 1 through September 30 “transfer window” identified in the OCAP BOs to ensure that the additional pumping at the Banks Pumping Plant is in conformance with the OCAP BOs. Rediversion of water at the Banks Pumping Plant pursuant to this Order is subject to compliance by the pumping plant operators with all applicable biological opinions, court orders, and any other conditions imposed by other regulatory agencies applicable to these operations. Rediversion of water at the Banks Pumping Plant pursuant to this Order is also subject to compliance by the operators with the objectives currently required of DWR and USBR set forth in Tables 1, 2, and 3 on pages 181 to 187 of State Water Board Revised Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at those points of diversion/rediversion, including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by DWR and USBR.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(2) that the proposed transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change in the place of use, purpose of use, and point of redirection under License 11395 (Application 16186) of the Merced Irrigation District (MID) for the transfer of up to 15,000 acre-feet (af) of water is approved.

All existing terms and conditions of License 11395 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 through September 30, 2010.
2. Releases from New Exchequer Dam, McSwain Dam, or Merced Falls Diversion Dam associated with this transfer shall be in accordance with the flow schedule titled *Merced I.D. 2010 Water Transfer – Proposed Flow Schedule*, dated August 13, 2010. The latest start date for the transfer (identified as Day 1 in the Proposed Flow Schedule) is September 15, 2010. Ramping of flows (either up or down) from New Exchequer Dam, McSwain Dam, or Merced Falls Diversion Dam associated with the transfer shall be made in increments not to exceed 275 cubic feet per second (cfs) per one hour period.
3. During the transfer period, MID shall communicate with the United States Bureau of Reclamation (USBR) and shall coordinate its operations and the timing of releases of transfer water with USBR.
4. The place of use under License 11395 is temporarily expanded to include the service areas of the State Water Project (SWP) as shown on Maps 1878-1, 2, 3 & 4 on file with Application 5629. Water transferred pursuant to this Order shall only be delivered to the Dudley Ridge Water District, the Kern County Water Agency, the Oak Flat Water District, and the Tulare Lake Basin Water Storage District.
5. The SWP's Banks Pumping Plant is temporarily added as an authorized point of redirection under License 11395. Rediversion of water at the Banks Pumping Plant pursuant to this Order is subject to compliance by the pumping plant operators with all applicable biological opinions, court orders, and any other conditions imposed by other regulatory agencies applicable to these operations. Rediversion of water at the Banks Pumping Plant pursuant to this Order is also subject to compliance by the operators with the objectives currently required of the Department of Water Resources (DWR) and USBR set forth in Tables 1, 2, and 3 on pages 181 to 187 of State Water Resources Control Board Revised Decision 1641 (D-1641), or any future State Water Board order or decision implementing Bay-Delta water quality objectives at those points of diversion/rediversion, including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by DWR and USBR.
6. Municipal and industrial, salinity control, fish and wildlife enhancement, and water quality control uses are temporarily added as purposes of use under License 11395.
7. The criteria titled *Accounting Procedures for Determining Refill Impacts On The Projects of Merced Irrigation District-State Water Contractors Water Transfer* (Refill Criteria) shall govern the conditions under which refill of the water released pursuant to this Order occurs, except that MID shall operate Lake McClure such that water that would otherwise constitute 'Daily Refill Volume', as defined in the Refill Criteria, is not allowed to accrue in Lake McClure and is bypassed during any time when the electrical conductivity (EC) at Vernalis, Brandt Bridge, Old River near Middle River, or Old River at Tracy exceed the requirements set forth in Table 2 of D-1641. MID shall be responsible for knowing when these requirements are exceeded.

At the conclusion of the Refill Period, if a “Cumulative Refill Impact,” as defined in the Refill Criteria, has accrued, MID is required to release that amount of water to DWR and USBR. Prior to any such release, MID shall consult with the Department of Fish and Game (DFG), the United States Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NOAA-Fisheries) and receive approval from these agencies for releases and rates of ramping (both up and down) from New Exchequer Dam, McSwain Dam, or Merced Falls Diversion Dam (similar to the approvals obtained for this transfer). MID shall also submit to the Deputy Director for Water Rights the schedule for these releases and a copy of the written approvals from DFG, USFWS, and NOAA-Fisheries at least 10 days prior to commencement of the releases. The approvals from DFG, USFWS, and NOAA – Fisheries must address any additional pumping at either the Central Valley Project’s (CVP’s) Jones or SWP’s Banks Pumping Plants associated with these releases.

8. Within 90 days of the completion of the transfer, but no later than December 1, 2010, MID shall provide to the Deputy Director for Water Rights a report describing the transfer authorized by this Order. The report shall include the following information:
 - a. The quantity of water (in af) delivered to the Dudley Ridge Water District, the Kern County Water Agency, the Oak Flat Water District, and the Tulare Lake Basin Water Storage District pursuant to Condition 4 of this Order;
 - b. The release rates from New Exchequer Dam, McSwain Dam, and Merced Falls Diversion Dam during the transfer period, reported in cfs on an hourly basis; and
 - c. An accounting of the rate at which water was made available for transfer from the Merced River at Cressy. This accounting shall include the difference between the flow rate of the Merced River at Cressy and the required base flow and shall be reported in cfs on an hourly basis throughout the transfer period.

MID shall also provide a report describing its refill of the transferred amount of water pursuant to this Order. The refill report shall be submitted annually on October 1, starting in 2011, until the value of “Cumulative Refill Volume”, as defined in the Refill Criteria, equals 15,000 af. The refill reports shall contain the daily values of the “Cumulative Refill Volume” and “Cumulative Refill Impact” and the information contained in items 8.b. and 8.c., above for any releases made by MID consistent with paragraph 7 above to address the Cumulative Refill Impact.

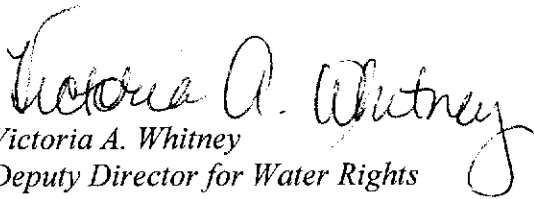
9. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change Order, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

The continuing authority of the State Water Board also may be exercised by imposing specific requirements over and above those contained in this Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.

10. This Order does not authorize any act which results in the take of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code §§ 2050-2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531-1544). If a “take” will result from any act authorized under this temporary transfer, the Licensee shall obtain authorization for an incidental take permit prior to construction or operation. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.

11. 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


Victoria A. Whitney
Deputy Director for Water Rights

Dated: **SEP 02 2010**