

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF WATER RIGHT PERMIT 15375 (APPLICATION 21945)
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 2,000 ACRE-FEET OF WATER FROM
FORESTHILL PUBLIC UTILITY DISTRICT
TO WESTLANDS WATER DISTRICT**

SOURCE: North Shirrtail Canyon Creek
COUNTY: Placer

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On May 13, 2020, Foresthill Public Utility District (FPUD or Petitioner) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a petition for temporary change (Petition) involving the transfer of water under water right Permit 15375 (Application 21945), pursuant to Water Code section 1725 et seq. Under the proposed transfer, up to 2,000 acre-feet (af) of water will be transferred to Westlands Water District (Westlands). The temporary transfer period begins on August 15, 2020, and is effective through September 30, 2020.

1.1 Description of Transfer

FPUD originally petitioned to temporarily change Permit 15375 to allow for the transfer of up to 2,000 af to Central Valley Project (CVP) and/or State Water Project (SWP) contractors to provide additional water for domestic, municipal, industrial, recreational, and irrigation uses. On July 1, 2020, FPUD emailed the Division confirmation that the water will be transferred solely to Westlands Water District, a CVP contractor. Subsequently, on July 17, 2020, FPUD emailed the Division confirmation that the water will be transferred through SWP facilities only. To facilitate this transfer, FPUD is requesting the following temporary additions to its Permit 15375: 1) the California Department of Water Resources (DWR) Harvey O. Banks Pumping Plant (Banks Pumping Plant) as a point of rediversion; and 2) Westlands' service area to the place of use.

FPUD proposes to release stored surface water from Sugar Pine Reservoir into North Shirrtail Canyon Creek, thence to the North Fork American River, and subsequently into Folsom Reservoir. The water will be released from Folsom Reservoir into the Lower American River, and will then flow into the Sacramento River and the Delta and be rediverted and exported at the Banks Pumping Plant and directed into the California Aqueduct for delivery to Westlands. FPUD indicated that it proposes to initiate the transfer by releasing water from Sugar Pine Reservoir from August 18 through September 23, 2020.

1.2 Reservoir Reoperation

The transfer involves water currently stored in Sugar Pine Reservoir. Refill criteria developed in conjunction with DWR and the U.S. Bureau of Reclamation (Reclamation) are required to ensure that the future refill of the reservoir space made available in Sugar Pine Reservoir from this transfer does not adversely impact the SWP or the CVP. The refill criteria provide for an accounting of refill of Sugar Pine Reservoir resulting from the proposed transfer. Pursuant to the criteria, any refill occurring during balanced conditions in the Delta¹ is subject to repayment to DWR and Reclamation, according to a schedule agreed to by FPUD, DWR, and Reclamation.

2.0 BACKGROUND

2.1 Substance of FPUD's Permit 15375

Permit 15375 authorizes the direct diversion of up to 18 cfs of water from about November 1 of each year to about July 1 of the succeeding year, and 15,400 af per annum by storage to be collected from about November 1 of each year to about July 1 of the succeeding year. The total annual diversion (direct diversion and diversion to storage) from North Shirrtail Canyon Creek is limited to 24,076 af. The permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose. The source of water is North Shirrtail Canyon Creek, tributary Shirrtail Canyon, thence the North Fork American River.

The existing point of diversion to storage at Sugar Pine Reservoir is located by California Coordinate System of 1983 (CCS83), Zone 2, North 2,175,686 feet and East 6,901,861 feet, being within NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 24, T15N, R10E, MDB&M. The existing point of rediversion to a regulating reservoir is located by CCS83, Zone 2, North 2,142,247 feet and East 6,904,032 feet, being within SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 24, T14N, R10E, MDB&M.

¹ The Delta is referred to as in Balanced Condition when the CVP and the SWP are being operated to meet water quality and flow requirements in the Delta.

The existing place of use is in Sections 3, 4, 5, and 6 of T14N, R10E; Sections 13, 24, 25, 26, 27, 33, 34, 35, and 36 of T15N, R10E; and Sections 17, 18, 19, and 20 of T15N, R11E, MDB&M, as shown on a map filed with the State Water Board under Application 21945.

The authorized purposes of use are irrigation, municipal, industrial, domestic, recreational, and fishery maintenance and enhancement.

2.2 Proposed Temporary Changes

With the Petition, FPUD requests the temporary addition of the following point of rediversion to Permit 15375:

Banks Pumping Plant - located at CCS83, Zone 3, NAD 83, North 2,126,440 feet and East 6,256,425 feet being within the NW¼ of SE¼ of projected Section 20, T1S, R4E, MDB&M.

With the Petition, FPUD also requests the Westlands service area to be temporarily added to the place of use of Permit 15375. The Westlands service area is shown on the map provided to the Division by FPUD on July 1, 2020.

3.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On May 26, 2020, a public notice of the Petition was provided by posting on the Division's website and via the State Water Board's electronic subscription mailing list. In addition, on May 26, 2020, FPUD noticed the Petition via publication in the Auburn Journal newspaper and mailed the notice via first class mail to interested and downstream parties. The comment deadline was June 26, 2020. Timely comments were received from Richard Morat, Kimberly Jones, Reclamation, California Department of Fish and Wildlife (CDFW), Central Delta Water Agency (CDWA), DWR, and the American River Ranger District of the U.S. Forest Service (USFS). FPUD provided responses to the comments by letter to the Division dated July 15, 2020, which are discussed below.

3.1 Comments of Richard Morat

By letter dated May 28, 2020, Richard Morat provided comments on the proposed transfer. Mr. Morat requested conditions be included in any order approving the transfer that better protect public trust resources so as to not result in unreasonable effects on fish and wildlife or other instream beneficial uses. Mr. Morat also commented that the transfer should be conditioned for only essential uses in 2020, and that transfer of water that otherwise would have remained in storage be conditioned "such that conservation

storage replenishment of the transferred amount be timed and amounts allowed to be conserved scoped to the affected river's and the estuary's capacity to reasonably forego those flows.”

FPUD Response:

FPUD indicated that the party receiving the transferred water, Westlands, will only receive 20 percent of their CVP contract allocation this year, therefore the transfer water will help to meet essential water needs for agricultural food production that would otherwise go unmet in a dry year. FPUD also indicated it will enter into a refill agreement with Reclamation in order that the refill of Sugar Pine Reservoir will not result in an unreasonable effect on fish and wildlife, other instream beneficial uses, or public trust uses.

State Water Board Response:

The State Water Board is responsible for considering public trust resources, and while it does not anticipate any adverse public trust impacts to result from this transfer, the State Water Board is aware of long-standing challenges with regard to management of flows and maintaining habitat conditions that are suitable for protection of fish and wildlife in the Delta and its tributaries. Current outflow and water quality requirements are established by State Water Board Revised Water Right Decision 1641 (D-1641) and applicable Biological Opinions, compliance with which is the responsibility of DWR and Reclamation for the duration of this transfer.

The State Water Board is supportive of transfers to provide water where it is needed. Given the recent dry winter it can be assumed that additional water is needed by Westlands, who will only be receiving 20 percent of their CVP allocation this year.

The proposed temporary transfer by FPUD is for water that would have otherwise remained in storage pursuant to Permit 15375. By approving the transfer, additional water will flow in the American River to the Sacramento River and the Sacramento-San Joaquin Bay Delta. The transfer is conditioned such that FPUD is subject to a refill criteria agreement with Reclamation and DWR ensuring that future refill of storage space in Sugar Pine Reservoir created by the transfer will not reduce the amount of water that Reclamation, DWR, or other water users, could divert under their water rights. This Order requires FPUD to comply with the refill criteria, which would be conducted within, and be consistent with, the existing regulatory framework governing Delta exports. In light of the above discussion, it is not anticipated that this transfer will result in unreasonable effect on fish and wildlife, other instream beneficial uses, or other public trust resources.

3.2 Comments of Kimberly Jones

By email dated June 5, 2020, Kimberly Jones commented that she is a resident of the area surrounding Sugar Pine Reservoir and regularly uses the reservoir and surrounding area for recreation. She indicated when FPUD previously transferred water from Sugar Pine Reservoir, the water quality remaining in the reservoir suffered and resulted in negative impacts to recreational activities around the reservoir. She requested that the transfer of water not occur until October in order to avoid negatively impacting summertime recreational activities at Sugar Pine Reservoir this year.

FPUD Response:

FPUD indicated that due to State and federal regulatory requirements, they cannot transfer water in October. To avoid or minimize recreation impacts from the transfer, FPUD has agreed to the conditions requested of USFS as described below in Section 3.7 of this Order. Also, FPUD indicated that it has agreements in place with both CDFW and USFS specifying a minimum size of recreational pool in Sugar Pine Reservoir that will be fully protected as required by the agreements. Further, FPUD indicated that both boat ramps and the floating dock will remain fully operational.

State Water Board Response:

The State Water Board finds that FPUD's agreement to implement USFS's conditions regarding the transfer, as well as its commitment to comply with the CDFW/USFS minimum requirements for recreational pool in Sugar Pine Reservoir, are adequate to protect recreational activities in and around the reservoir as a result of the transfer.

3.3 Comments of Reclamation

By letter dated June 23, 2020, Reclamation commented on FPUD's proposed water transfer. Reclamation stated that the timing of the FPUD's August and September release will adversely impact Folsom Reservoir cold water pool operations needed to meet requirements associated with Lower American River temperature objectives. Reclamation adds that the warm water released from Sugar Pine Reservoir will enter into the upper reaches of Folsom Reservoir, while Reclamation will have to release water for the transfer from the hypolimnion of Folsom Reservoir, thereby impacting the volume of cold water pool. Reclamation also states that modeling shows there may be an effect on hydropower operations due to an increase in the volume of water needed for a power bypass for fall fishery flows above that which would have been needed absent the transfer. Reclamation had similar comments to FPUD's 2018 transfer and ultimately FPUD and DWR developed a release schedule that also satisfied Reclamation's concerns.

In order to protect Reclamation's water rights and operation of the CVP, Reclamation requested the Division condition FPUD's transfers as follows:

1. If FPUD proposes use of Jones Pumping Plant as a point of diversion for water delivered to CVP Contractors south of Delta, one or more Warren Act contracts between Reclamation and FPUD are necessary for Reclamation to convey the water being transferred by FPUD. Reclamation has also indicated that the Jones Pumping Plant pumping capacity for later this summer is currently predicted to be full; therefore, the use of the Jones facility as a point of diversion may not be a viable option for the FPUD transfer.
2. The transfer is contingent upon a refill agreement being signed and adopted between Reclamation and FPUD. Any order approving the transfer should include a term requiring the transfer be conducted consistent with that refill agreement.
3. The proposed water transfer shall be carried out in compliance with all existing regulatory constraints in the Delta and shall cause no harm to other legal water users or impact on water quality.
4. Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River and Delta.

FPUD Response:

FPUD responded to Reclamation's four main concerns as follows.

Water temperature

FPUD indicated that water from Sugar Pine Reservoir is cold and will benefit temperatures both in Folsom Reservoir's cold water pool as well as downstream in the American River. FPUD's consultants conducted temperature monitoring during the 2018 transfer and it was found that the water released from Sugar Pine Reservoir resulted in marginal cooling of North Fork American River water and incrementally lower temperatures in Folsom Reservoir inflows. Further, FPUD's consultant's monitoring found North Fork American River inflow temperatures similar on average to Folsom Reservoir's outflow temperatures. Overall, FPUD's monitoring from 2018 showed the transfer did not adversely affect water temperatures at Folsom Reservoir.

FPUD has indicated that the proposed 2020 transfer will occur under conditions similar to the 2018 transfer and should not impact Folsom Reservoir's cold water pool. However, FPUD will conduct temperature monitoring during the 2020 transfer to evaluate any potential impacts.

Hydropower

FPUD indicated that the 2020 transfer is a pass-through transfer and will not cause adverse impacts on hydropower production at Folsom Dam. Reclamation had similar concerns regarding FPUD's 2018 transfer and as a result paid Reclamation a power loss surcharge for the late-season transfer. Reclamation subsequently analyzed the 2018 transfer and determined that FPUD's 2018 transfer did not reduce hydropower generation and refunded FPUD's power loss surcharge payment.

FPUD indicated that an agreement will be reached regarding a power loss surcharge between FPUD and Reclamation prior to release of water for the 2020 transfer. However, if an agreement is not reached, FPUD will pay a power loss surcharge under protest pursuant to a Power Letter of Agreement with Reclamation. If the PLOA is necessary, FPUD anticipates that no loss of hydropower generation will occur due to the transfer and that Reclamation will again refund the surcharge payment to FPUD.

Jones Pumping Plant

FPUD indicated that the Jones Pumping Plant will not be used for the 2020 transfer and water will instead be delivered to Westlands via the Banks Pumping Plant.

Warren Act Contract

FPUD indicated that a Warren Act contract with Reclamation is not necessary for the 2020 transfer because no water will be stored in Folsom Reservoir and the Jones Pumping Plant will not be used for this transfer; therefore, no federal facilities will be used to store or convey the water. FPUD also indicates that if a Warren Act contract were necessary it would be the responsibility of Westlands and not FPUD.

FPUD indicated that it is in the process of developing a refill agreement associated with the 2020 transfer with Reclamation and DWR, as it did for its transfers in 2015 and 2018. FPUD agrees that the 2020 transfer will only occur when the Delta is in balanced conditions and that the transfer will occur within the existing regulatory constraints on CVP and SWP operations in the Delta.

State Water Board Response:

Although FPUD claimed that the 2018 transfer had no negative impacts to Folsom Reservoir temperatures, there is still a potential for this year's proposed transfer to adversely impact water temperatures in Folsom. Therefore, this Order includes a condition requiring FPUD to obtain regular confirmation from Reclamation during the transfer period that the cold water pool in Folsom Reservoir is not being negatively impacted by FPUD's transfer. Also, to avoid injury to the water rights and operations of the CVP, this Order includes a condition requiring FPUD to obtain a reservoir refill agreement with Reclamation and DWR prior to initiating the transfer. Further, this Order

includes conditions requiring that the transfer take place only during balanced conditions in the Delta, and that when rediverting FPUD's water for transfer, the Banks Pumping Plant operate in compliance with all existing regulatory constraints in the Delta.

3.4 Comments of CDFW

By letter dated June 22, 2020, CDFW provided comments on FPUD's proposed water transfer, citing concerns about the potential impacts to foothill yellow-legged frog (FYLF), a California Endangered Species Act candidate species, which reside in North Shirttail Canyon Creek. CDFW states FYLF breeding occurs in the spring after winter runoff has subsided and air and water temperatures increase. Tadpole rearing sites require some level of protection from scouring flows, and egg masses are often attached to cobble, boulder, and bedrock substrates that may be swept downstream as flows have increased for the transfer of water. To mitigate for these potential impacts, CDFW requested that any proposed flow schedule be developed in consultation with CDFW to ensure ramping rates are fully protective of FYLF.

CDFW had similar comments regarding the 2018 transfer and requested that FPUD develop its transfer release flow schedule in consultation with CDFW. During that transfer, FPUD's consultant conducted a monitoring study at and downstream of Sugar Pine Dam to assess potential effects of the water transfer on FYLF and the northwestern pond turtle. No significant adverse impacts were documented on tadpole observations as late as mid-August 2018. CDFW has concerns with the currently proposed transfer as FPUD proposes to modify its release schedule by starting the releases earlier and ramping the release rates up and down faster than occurred in 2018.

CDFW has indicated that a single year of monitoring does not provide conclusive information regarding different water year types and the potential impacts to tadpole and metamorphic life of FYLF. Therefore, CDFW requested that FPUD adhere to the following conditions relative to the proposed 2020 transfer:

1. Conduct pre-, during-, and post-transfer species and temperature monitoring;
2. Adjust the proposed ramping rates to follow more closely those used in the 2018 water transfer; and
3. Develop flow schedule and ramping rates in coordination with CDFW and USFS.

FPUD Response:

FPUD responded that it successfully resolved CDFW's concerns. FPUD met with CDFW and USFS in early July 2020 to address the concerns raised in their comment letters. FPUD agreed to perform pre-, during-, and post-transfer species and temperature monitoring. FPUD also developed a revised ramping rate and flow schedule satisfactory to both CDFW and USFS.

FPUD believes that no potentially negative impacts to FYLF will occur as a result of the 2020 transfer. FPUD claims that the 2020 transfer will be conducted under similar conditions as the 2018 transfer and the results of the 2018 transfer monitoring showed no negative impacts to FYLF.

To resolve CDFW's concerns regarding the proposed negative impacts to FYLF due to the release of water from Sugar Pine Reservoir, FPUD agreed to modify the originally proposed transfer release ramping rates to more closely align with the 2018 transfer ramping rates.

State Water Board Response:

The Order will be conditioned to require FPUD operate the transfer in accordance with the release ramping rate schedule FPUD developed with CDFW and USFS.

3.5 Comments of CDWA

By letter dated June 25, 2020, CDWA provided comments regarding the proposed transfer as described below.

Comment 1- Notice of Petition and Posting of Pertinent Documents

CDWA commented on the State Water Board's public notice procedures for petitions for temporary transfer as follows: 1) CDWA stated that the State Water Board should post temporary transfer petitions and supporting documentation along with the public notice on the State Water Board's website to better facilitate public review of proposed transfers; 2) CDWA indicated that Water Code section 1726 requires that water right holders who may be affected by the proposed transfer be notified in writing of the proposed transfer, however none of the members within CDWA were notified; and 3) CDWA believes that the State Water Board should re-notice the proposed transfer to additional parties, including CDWA member agencies, and allow additional time for processing the transfer.

FPUD Response:

FPUD indicated that CDWA did not list any water right holders that will be affected by the transfer but did not receive the public notice. Given the lack of specific information provided by CDWA and the other forms of public notice that were available, FPUD believes the State Water Board should not adjust the timeline for processing the proposed transfer. FPUD further indicated that it sent the public notice to all water right holders provided by the State Water Board.

State Water Board Response:

The State Water Board posted the public notice on its website and provided an email notice to its electronic email list for transfers, which includes over two thousand recipients who have requested to be notified of all proposed water right transfers. The State Water Board is limited to what documents can be posted on its website based on the requirements for all State agencies to satisfy Priority 1, 2, and 3 guidelines for “AA” compliance of the World Wide Web Consortium, Web Content Accessibility Guidelines 1.0. The State Water Board’s website is also required to comply with Section 508, Subpart B, Subsection 1194.22, Guidelines A-P of the Rehabilitation Act of 1973 as revised in 1998. Therefore, in order to comply with web accessibility requirements, the State Water Board was not able to post the petition on its website. However, the State Water Board provided a copy of the petition and supplemental information to all parties who requested the documents.

Further, the notice was published in the Auburn Journal newspaper and mailed to applicable counties, interested parties, and downstream diverters who Division staff believed could be harmed by the transfer. The Division and FPUD have complied with the public notice requirements in Water Code section 1726 subdivision (d); therefore, the State Water Board declines to adjust the timeline of the proposed transfer and the timeline for processing the petition will not be extended.

Comment 2 – Demonstration that the Transferred Water is Surplus to the Delta and Areas of Origin

CDWA stated that Water Code section 11460 (the Watershed Protection Act) and section 12204 (the Delta Protection Act of 1959) “expressly prohibit the export of water that is not surplus to the needs of the Delta or areas where the water originates.” CDWA further commented that FPUD’s petition did not demonstrate that the water proposed to be transferred was truly surplus and would not be needed to meet requirements in the Delta such as the State Water Board’s Revised Water Right Decision 1641 (D-1641). CDWA also stated that Petitioner should demonstrate that the proposed transfer would not injure water right holders subject to Term 91.²

FPUD Response:

See FPUD response to Comment 4.

² The State Water Board has included Term 91 in permits and licenses issued after August 16, 1978 that authorize the diversion of water within the Sacramento-San Joaquin River Delta watershed at a rate greater than one cubic foot per second or authorize the collection to storage within the Delta of more than 100 acre-feet of water per year. There are 115 active water right permits and licenses that include Term 91.

State Water Board Response:

The proposed temporary transfer involves water that has already been diverted to storage from North Shirrtail Canyon Creek tributary to the North Fork American River pursuant to FPUD's permit. By approving the transfer, water normally held in storage will flow in the American and Sacramento Rivers to the Delta. Absent the transfer, this water would not be released by FPUD and would not be available instream to meet temperature or other requirements such as those established by State Water Board Revised Water Right Decision 1641. Reclamation and DWR cannot require release of water previously diverted to storage by another right holder to assist in establishing compliance with water quality and flow standards in the Delta.

The State Water Board disagrees with CDWA's assertions that the Watershed Protection Act applies to the water that is the subject of the proposed transfer and that the proposed transfer would result in the export of non-surplus water from the Delta. Water Code section 11460 applies to DWR and Reclamation. (State Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 754.) Further, CDWA fails to explain how the proposed transfer would "deprive" the Delta of flows it would receive absent the transfer (Wat. Code, § 11460) or otherwise result in diminished flows to the Delta or to CVP or SWP operations compared to the without-transfer scenario. As discussed above, the proposed transfer would increase the flow of water to the Delta. In addition, the Delta Protection Act provides the State Water Board with discretion to "balance in-Delta needs and export needs." (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at pp. 770-771, quotation marks and citation omitted.)

FPUD's permitted points of diversion and redirection are on North Shirrtail Canyon Creek tributary to North Fork American River, eventually tributary to the American and Sacramento Rivers. The waterways from FPUD's diversion area to the Project pumps are currently controlled by Term 91 which restricts diversions from streams tributary to the Sacramento-San Joaquin Delta and the Delta.

With the proposed temporary transfer, FPUD would transfer water that has already been diverted to storage under their permit. The transfer of previously stored water will not decrease the flow in streams tributary to the Delta and therefore will not impact whether or when Term 91 will apply during the transfer period. The amount of water available for transfer by FPUD is determined by their water rights and established diversion and beneficial use histories. Normal river operation and the application of Term 91 will ensure that the water entering the project facilities will be similar to that absent the proposed transfer.

Comment 3 – Reservoir Storage Release Information

CDWA indicated that FPUD should have provided the same reservoir storage release information to the State Water Board that is required by DWR's and USBR's *Draft Technical Information for Preparing Water Transfer Proposals* (Water Transfer White Paper).

FPUD Response:

No response given.

State Water Board Response:

DWR and Reclamation require parties proposing stored water transfers to provide historical reservoir operation information in order to develop a reservoir refill agreement with the transferor. DWR and Reclamation require a refill agreement to ensure that the stored water that is transferred will not be replaced at a time when operations of the SWP and CVP could be injured. In order to protect SWP and CVP water rights, this Order requires FPUD obtain and comply with a reservoir refill agreement with DWR and Reclamation.

Comment 4 – Analysis of Potential Effects to Fish, Wildlife, or Instream Beneficial Uses in the Delta

CDWA indicated that FPUD's Petition lacks analysis of potential effects to fish, wildlife, or instream beneficial uses in the Delta since FPUD focused its analysis on potential impacts to FYLF, Northwestern pond turtle, rainbow trout, and salmonids in North Shirttail Canyon Creek and the North Fork American River. CDWA indicated that FPUD should have analyzed the proposed transfer's potential impacts to aquatic or terrestrial species that inhabit the Delta since movement of water through the Delta (including increased deliveries and exports by the SWP and CVP, resulting in increased reverse flows and decreased Delta outflows) has a potential to impact these species.

FPUD Response:

FPUD indicated that their proposed water transfer will increase water in the Delta as a portion of the water will be left in the Delta due to carriage loss, which in some years can exceed 25 percent of the transfer amount. FPUD also indicated that their proposed transfer is subject to numerous State and federal environmental regulations and requirements protecting Delta fish and wildlife. Further, FPUD states that DWR will be delivering the transferred water through the Delta to Westlands and DWR's delivery operations will comply with all State and federal environmental regulations and requirements protecting Delta wildlife and habitat.

FPUD also stated that they met with USFS and CDFW and made the aforementioned changes to the proposed transfer ramping rates to address concerns regarding potential impacts to FYLF.

State Water Board Response:

Water released from Sugar Pine Reservoir pursuant to the transfer is new water in the system that would not have been available in downstream systems if not for the transfer. However, the increase in flows tied to the release of water for the transfer has

a potential negative impact on fish and wildlife immediately downstream of Sugar Pine Reservoir and this Order will be conditioned to mitigate those potential negative impacts.

State Water Board staffs' comment letter on the Draft Environmental Impact Report for the Long Term Operation of the SWP discusses the proposed increased transfer period tied to changes in long term operations of the SWP. However, the referenced State Water Board comment letter does not discuss impacts from SWP operations related to the current transfer window. This transfer is being operated under SWP's current transfer window.

Comment 5 – Quantification and Timing of Proposed Transfer

CDWA stated that it is unclear of the timing and amount of water that will be released from storage to effectuate the proposed transfer. Specifically, CDWA indicated that information provided with FPUD's petition showed an overall release of 1,895.95 af as opposed to the 2,000 af requested with the petition.

FPUD Response:

FPUD stated that the release values shown in Table 1 of the originally submitted petition were meant to characterize the transfer volume only and did not include the minimum flow requirement for North Shirttail Canyon Creek downstream of Sugar Pine Dam. Total release rates during the transfer will include an additional 0.5 cfs minimum flow requirement governing Sugar Pine Dam operations irrespective of the proposed transfer. Therefore, FPUD indicates that the total transfer release in the original Table 1 actually reflects 2,003.3 af.

The revised Table 1 release values were developed in consultation with USFS and CDFW and reflects a total release of 2,000 af. The releases from Sugar Pine Reservoir are expected to take 36 days ending on September 23, 2020. With travel time through Folsom Lake, the American River, the Sacramento River, through the Delta, and eventual delivery to Westlands, the entire transfer is expected to take 43 days and be completed when the transfer window closes on September 30, 2020.

State Water Board Response:

The State Water Board agrees with the clarification provided in FPUD's response and finds that it provides CDWA and the public with adequate information regarding the quantity and timing of the proposed transfer.

Comment 6 – Quantification of Losses from Transferred Water Source to Export Pumps and Transferee's Place of Use

CDWA commented that an accurate analysis and quantification of losses that occur is required to prevent injury to legal users of water. CDWA requested that this analysis

include losses from the source of the transferred water to the export pumps, carriage losses, and losses from the export pumps to the ultimate places of use.

FPUD Response:

See FPUD response to Comment 4.

State Water Board Response:

The Draft Technical Information requires a conveyance agreement between FPUD, Reclamation, and DWR as the transferred water is non-project water being conveyed through CVP and SWP facilities. According to the Draft Technical Information, only that portion of the proposed transfer that is determined to represent new water to the system is transferable using CVP or SWP facilities. This water, frequently referred to as "new water or real water," is the net addition of water to the downstream system that would not be available absent the transfer.

Reclamation and DWR have a shared responsibility for meeting Delta water quality and environmental requirements. Appendix A of the Draft Technical Information addresses potential adverse effects of transfers on the CVP and SWP. If water transferred is not new water to the system, it will instead come out of the supply for CVP and SWP contractors. The Draft Carriage Water Overview for Non-Project Water Transfers (Carriage Water Overview) dated October 2019 describes how Reclamation and DWR account for the losses of water as it is transferred from the seller to the buyer. The document provides a methodology for determining carriage losses through the Delta. The transfer proposed by FPUD will be subject to this accounting as part of the conveyance agreement between FPUD and DWR. Once the water has been conveyed through the Delta, the SWP is responsible for delivering the transferred quantities and making up any potential conveyance losses to the final place of use for the transfer.

Comment 7 – Potential Effects of Return Flows

CDWA indicated that FPUD did not include analysis of potential impacts caused by changes in timing, quality, and volume of return flows as a result of the proposed transfer. CDWA also mentioned the potential for increased selenium runoff in the San Joaquin River as a result of the transfer.

FPUD Response:

FPUD stated that CDWA's issues regarding return flows and transfers of irrigation water are not relevant to FPUD's currently proposed transfer of 2,000 af of stored water from Sugar Pine Reservoir. FPUD indicates its transfer will add clean, cold mountain water to the Delta and provide temperature and water quality benefits to the Delta's aquatic environment and downstream water users.

State Water Board Response:

Senior water right diverters downstream of Sugar Pine Reservoir will not be affected by the transfer. The water under Permit 15375 is diverted to storage in accordance with water right priority on the stream system. Senior rights cannot be injured by the release of water previously stored under a junior water right.

The article referenced by CDWA indicated that historic irrigation practices have contributed to high selenium concentrations in the San Joaquin River but did not specifically mention that water transfers exacerbated the problem. As mentioned above, Westlands is only slated to receive 20 percent of their contracted CVP allocation; consequently, even with the proposed transfer, Westlands will likely have a net reduction in agricultural runoff to the San Joaquin River this year.

Comment 8 – Compliance with Federal Law

CDWA indicated that FPUD's proposed transfer appears to be inconsistent with the Central Valley Project Improvement Act (CVPIA) as they contend that the CVPIA considers any water delivered by the CVP to be considered CVP water. CDWA indicates that CVPIA limits the transfer of CVP water to only water that would have been consumptively used and does not allow the transfer of previously stored water as is allowed under Water Code section 1725. Therefore, CDWA indicates that in order for FPUD to transfer water via the CVP, FPUD must have an equivalent decrease in the amount of water beneficially used under Permit 15375.

FPUD Response:

FPUD indicates that the proposed transfer water is available under FPUD's water right Permit 15375 and is not CVP Project Water. Moreover, FPUD is using SWP facilities to deliver the transfer water, not CVP facilities.

State Water Board Response:

The State Water Board concurs with FPUD's response. The CVPIA does not preclude the use of non-CVP facilities to facilitate a transfer of non-CVP water supplies, which is what the Petition proposes.

3.6 Comments of DWR

By letter dated June 25, 2020, DWR provided comments regarding the proposed transfer. DWR indicated that the refill of water vacated from Sugar Pine Reservoir for the transfer may injure the water rights of DWR and impact the operations of the SWP, therefore requested the following:

1. FPUD provide DWR the baseline operation plan of Sugar Pine Reservoir;
2. The transfer be performed in compliance with existing regulatory requirements in the Delta;
3. Any order the State Water Board issues approving the transfer require that FPUD have a signed and executed refill agreement with DWR in place before the transfer begins. The refill shall not occur if the Delta is in balanced or restricted conditions; and
4. FPUD provide DWR with both copies of reports filed with the State Water Board pursuant to the transfer order, and monthly refill accounting reports after the transfer is complete.

FPUD Response:

FPUD responded that it successfully resolved the comments raised by DWR. FPUD indicated that FPUD and Westlands have met with Reclamation and DWR, and that Westlands is in the process of developing a conveyance agreement with DWR for the transfer. FPUD has agreed to comply with all of DWR's conditions.

State Water Board Response:

This Order includes a condition requiring FPUD obtain a reservoir refill agreement with Reclamation and DWR before the transfer may commence.

3.7 Comments of USFS

By letter dated June 26, 2020, USFS provided comments on FPUD's proposed transfer. Because Sugar Pine Reservoir is located on National Forest Service lands, FPUD is subject to a Special Use Permit issued by USFS. USFS indicated that the proposed transfer will require an amendment to the annual operating plan of the Special Use Permit. The Special Use Permit covers operation and maintenance of Sugar Pine Dam on North Shirttail Canyon Creek, which is located within the Tahoe National Forest.

USFS discussed their concerns regarding the proposed transfer's potential impacts on recreational opportunities at Sugar Pine Reservoir this summer. USFS specifically indicated that previous transfers dropped water levels in the reservoir creating a muddy shoreline, thereby negatively impacting recreation in and around the reservoir. USFS further indicated that habitat resources may be affected by the water transfer, including the rainbow trout fishery in North Shirttail Canyon Creek, western pond turtle, and a known population of FYLF, a Forest Service Sensitive Species. FPUD's Special Use Permit stipulates that USFS may specify protection measures when necessary to protect sensitive species habitat. USFS reviewed FPUD's proposed transfer and drawdown schedule and had concerns regarding negative impacts to aquatic resources from changes in timing, volume, and temperature of water released from Sugar Pine Reservoir into North Shirttail Canyon Creek. Specifically, USFS indicated that

increased flow downstream of Sugar Pine Reservoir resulting from this transfer may have a deleterious effect on the tadpole life stage of FYLF. USFS understands no significant adverse impacts to FYLF were seen as a result of the 2018 transfer, however the timing and quantity of release of transferred water proposed with the 2020 transfer varies from the 2018 transfer. USFS believes additional data collection is needed with the 2020 transfer to assess impacts of the modified transfer parameters on aquatic resources.

USFS requested the following from FPUD relative to the 2020 transfer:

1. Conduct basic FYLF visual encounter surveys and water temperature monitoring before during and after water transfers;
2. Develop the flow schedule and appropriate ramping rates in collaboration with USFS and CDFW;
3. Post a public notice a minimum of one week prior to the transfer commencement at the Sugar Pine Boat Launch and Manzanita Day Use sites. Coordinate with the American River Ranger District staff for posting locations;
4. Coordinate with American River Ranger District staff for web posting of public notice information at least one week prior to project implementation; and
5. Share monitoring study data with the American River Ranger District.

FPUD Response:

FPUD responded that it successfully resolved the comments raised by USFS. FPUD met with USFS and CDFW representatives in early July 2020 to work on issues raised in the comment letters. FPUD has agreed to all of the conditions requested by USFS in their comment letter as outlined above. Also see FPUD response to CDFW comments in Section 3.4 above.

State Water Board Response:

This Order includes conditions requiring FPUD's compliance with USFS's requested conditions as detailed above.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.) The State Water Board will file a Notice of Exemption.

5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

Pursuant to Water Code section 1725, “a permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would involve only 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, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses.” (Wat. Code, § 1725.)

The State Water Board shall approve a temporary change involving the transfer of water under Water Code section 1725 et seq., if it determines that a preponderance of the evidence shows both of the following:

- a. The proposed change would not injure any legal user of water, during any potential hydrologic condition that the State Water 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 water, or reduction in return flows.
- b. The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(Wat. Code, § 1727, subd. (b).)

In addition, the proposed change must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary change. (*Id.*, § 1726, subd.(e).)

Temporary changes pursuant to Water Code section 1725 may be effective for a period of up to one year from the date of approval. (Wat. Code, § 1728.) “The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out.” (*Ibid.*)

The State Water Board also has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The State Water Board considers the evaluation of public trust resources as part of its evaluation of impacts to fish, wildlife, or other instream beneficial uses under Water Code section 1727, subdivision (b)(2).

6.0 REQUIRED FINDINGS OF FACT

6.1 Transfer Only Involves Water That Would Have Been Consumptively Used or Stored

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 Water Code 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.”

In the absence of the proposed transfer, FPUD indicated the transfer water would have remained stored in Sugar Pine Reservoir.

Accordingly, pursuant to Water Code section 1726, subdivision (e), I find that the water proposed for transfer under to this Order would be consumptively used or stored in the absence of the proposed temporary change.

6.2 No Injury to Other Legal Users of the 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 State Water 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).)

The water proposed for transfer pursuant to this temporary change consists of water previously stored in Sugar Pine Reservoir pursuant to Permit 15375. In the absence of the proposed transfer, the water would remain in storage for future use by FPUD and would not be available to other water users. Further, the release of the water from storage at Sugar Pine Reservoir pursuant to the temporary transfer will not reduce the available supply to any other legal user of water downstream.

In general, the transfer of water that would have be consumptively used or stored will not result in injury to other legal users of water.

FPUD will enter into a reservoir refill agreement with DWR and Reclamation ensuring that future refill of any storage space in Sugar Pine Reservoir created by the transfer will not reduce the amount of water that Reclamation, or other water users could otherwise divert under their water rights. Therefore, no injury to other legal users of the water would occur due to the transfer.

Accordingly, pursuant to Water Code section 1727, subdivision (b)(1), I find that the proposed temporary change would not injure any legal users of the water.

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

Before approving a temporary change in order to facilitate a transfer of water, the State Water Board must find that the proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) The Petitioner provided CDFW and the Central Valley Regional Water Quality Control Board (Regional Board) with a copy of the petition in accordance with California Code of Regulations, title 23, section 794, subdivision (c). CDFW provided comments regarding protections for FYLF, and mitigating the potential negative impacts to FYLF by controlling the rate and timing of water released from Sugar Pine Reservoir during the transfer. Specific conditions, including operating the transfer in compliance with a water release schedule developed between CDFW and FPUD, have been included in this Order based on CDFW's comments, all of which are discussed above in Section 3.4. The Regional Board did not provide any comments to the State Water Board regarding potential effects of the proposed changes on water quality, fish, wildlife, and other instream beneficial uses.

The transfer will also be subject to all applicable federal and State Endangered Species Act requirements, including applicable Biological Opinions, Incidental Take Permits, court orders, and any other conditions imposed by other regulatory agencies applicable to diversions and exports of water at the SWP and CVP Delta pumps.

Accordingly, pursuant to Water Code section 1727, subdivision (b)(2), I find that the proposed transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

7.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to the Deputy Director for Water Rights the authority to act on petitions for temporary change if the State Water Board does not hold a hearing. This Order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2012-0029.

8.0 CONCLUSIONS

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

I conclude that, based on the available evidence:

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

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change for the transfer of up to 2,000 acre-feet (af) of water under Foresthill Public Utility District's (FPUD or Petitioner) Permit 15375 is approved.

All existing conditions of Permit 15375 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing August 15, 2020 through September 30, 2020.
2. The following point of diversion is temporarily added to Permit 15375:
Harvey O. Banks Pumping Plant (Banks Pumping Plant) via the Clifton Court Forebay located as follows:
California Coordinate System, Zone 3, NAD 83, North 2,126,440 feet and East 6,256,425 feet, being within NW¼ of SE¼ of projected Section 20, T1S, R4E, MDB&M,
3. The place of use under Permit 15375 is temporarily expanded to include the service areas of Westlands Water District (Westlands) as shown on the map accompanying the July 1, 2020 FPUD email to the Division.
4. During the period of transfer, Petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies. This Order shall not be construed as authorizing the violation of any agreement entered by the Petitioner.

5. If, at any time prior to or during the period of transfer, the State Water Board issues notification that water is unavailable for collection to storage pursuant to Permit 15375, only water collected to storage prior to issuance of the notification may be transferred.
6. Carriage loss shall be deducted from any water transferred through the Delta and delivered under this Order.
7. Diversion of water at the Banks Pumping Plant is subject to compliance by the operators (California Department of Water Resources (DWR)) with the objectives currently required of operators set forth in Tables 1, 2, and 3 on pages 181-187 of State Water Board Revised Water Right 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 Banks Pumping Plant by DWR . Diversion of water is also subject to compliance by DWR with all applicable federal and State Endangered Species Act requirements (ESA), including applicable Biological Opinions (BOs), Incidental Take Permits (ITP), court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.
8. Rediversion of water at Banks Pumping Plant is also subject to compliance with any State Water Board Orders establishing temporary or interim operating conditions during the transfer period, except if the State Water Board has specifically exempted conveyance of transfer water from the Order.
9. Species and temperature monitoring shall occur during intervals of scheduled ramping-up and ramping-down for protection of Foothill yellow-legged frogs (FYLF), as well as any additional monitoring necessary to prevent take of FYLF per FPUD's monitoring plan agreed to by California Department of Fish and Wildlife (CDFW) and the U.S. Forest Service (USFS). Results of the monitoring shall be submitted to CDFW and USFS.
10. Water may not be transferred through Banks Pumping Plant until FPUD has executed a Refill Agreement between the U.S. Bureau of Reclamation (Reclamation), DWR, and FPUD to address potential refill concerns in Sugar Pine Reservoir. Documentation that an acceptable Refill Agreement has been agreed to by DWR, Reclamation, and FPUD shall be submitted to the Division within 15 days of the date of execution of the agreement. The terms of the Refill Agreement shall be binding until such time as all the storage vacated for the transfer has been refilled during periods consistent with the terms of the Refill Agreement. The refill period may span multiple years if the hydrologic conditions in the year following the transfer are not consistent with the terms of the Refill Agreement. FPUD may be required to relinquish for downstream release any reservoir storage collected in violation of the Refill Agreement (up to the transfer quantity), in accordance with a schedule acceptable to DWR and Reclamation.

11. No water can be transferred under this Order unless Reclamation concurs that the transfer will not result in increased risks of negative impacts to the cold water pool at Folsom Reservoir resulting from incoming transfer water. Such approval may be given on a weekly basis or other time-step acceptable to Reclamation. FPUD shall provide documentation to the Deputy Director for Water Rights by email of any Reclamation approvals issued after the date of issuance of this Order. FPUD shall coordinate with Reclamation on the Folsom operations schedule as part of on-going real-time operations for the CVP.
12. FPUD must operate the release of water pursuant to this transfer in compliance with the proposed transfer schedule that was developed in consultation with CDFW and USFS. The transfer release schedule is included as an attachment to FPUD's July 15, 2020 response to comments.
13. FPUD shall post a notice a minimum of one week prior to the transfer at the Sugar Pine Boat Launch and Manzanita Day Use sites. FPUD shall provide the notices to the USFS so that the notices will be posted in a USFS approved location and manner, and FPUD shall coordinate with USFS for public notification to be posted to the Tahoe National Forest website and Reservation.gov.
14. FPUD shall provide the Deputy Director for Water Rights a monthly report describing the transfer of water pursuant to this Order until such time as the transfer has been completed. The report shall include the following information:
 - a. The average daily release rates and corresponding volume of water released from Folsom Reservoir as a result of this transfer (reported on a daily basis);
 - b. The daily average rate of water diverted and daily volume of water diverted at the points of rediversion at the Banks Pumping Plant pursuant to this Order;
 - c. The daily amounts of water delivered to Westlands pursuant to this Order; and
 - d. Recognizing that reservoir refill will occur after the transfer ends, monthly reporting of reservoir refill is not required during the transfer period. However, FPUD shall provide reservoir refill reporting in its Report of Permittee by April 1 of each year on monthly reservoir refill until the reservoir Refill Agreement has been satisfied. This occurs when the value of the Refill Reservation, as defined in the Refill Agreement, equals zero. These reports shall include the daily values of the Refill Reservation.

If any of the above required information is in the possession of DWR and Reclamation and has not been provided to FPUD in time for inclusion in a monthly or annual report, FPUD shall provide the information to the Deputy Director for Water Rights within 30 days of receipt.

15. 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.

16. This Order does not authorize any act which results in the taking 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 (ESA) (Fish and Game Code sections 2050 to 2097) or the federal ESA (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this temporary transfer, the Petitioner shall obtain authorization for an incidental take prior to commencing transfer of water. Petitioner shall be responsible for meeting all requirements of the applicable ESA for the temporary transfer authorized under this Order.

17. The State Water Board reserves authority to supervise the transfer, exchange and use of water under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses, and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

Erik Ekdahl, Deputy Director
Division of Water Rights

Dated: JUL 23 2020