

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF WATER RIGHT PERMITS 1267 AND 2492
(APPLICATIONS 1651 AND 2778)
OF SOUTH FEATHER WATER & POWER AGENCY**

**PETITION FOR TEMPORARY CHANGE INVOLVING THE TRANSFER OF UP TO
8,000 ACRE-FEET OF WATER TO SANTA CLARA VALLEY WATER DISTRICT**

SOURCES: Lost Creek and South Fork Feather River

COUNTIES: Butte and Plumas

ORDER APPROVING TEMPORARY CHANGES

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 OVERVIEW

On May 25, 2021, South Feather Water & Power Agency (South Feather WPA 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 Permits 1267 and 2492 (Applications 1651 and 2778), pursuant to Water Code section 1725 et seq. Under the proposed transfer, up to 8,000 acre-feet (af) of water (up to 4,000 af under water right Permit 1267 and up to 4,000 af under water right Permit 2492) will be transferred to the Santa Clara Valley Water District (Santa Clara Valley WD). The temporary changes approved pursuant to Water Code section 1725 under this petition may be effective until November 30, 2021.

2.0 TRANSFER TYPE

Petitioner proposes to make water available by releasing water that would otherwise be stored in Little Grass Valley Reservoir and Sly Creek Reservoir under Permits 1267 and 2492.

2.1 Reservoir Release

Under a reservoir release transfer, surface water supply is made available for transfer as a result of a petitioner releasing water held in storage that would remain in storage

and/or diverted if the transfer were not to occur. The transfer proposed by South Feather WPA involved water currently stored in Little Grass Valley Reservoir and Sly Creek Reservoir. Following the transfer, the reservoir may have additional storage capacity that will result in diversion that would not occur in the absence of the transfer, referred to as reservoir refill. Reservoir refill has the potential to injure other legal users of water if it occurs when the San Francisco Bay/Sacramento-San Joaquin Delta (Delta) is in balanced conditions¹ or there is limited streamflow in the channel from which the water is being transferred.

Refill criteria developed in conjunction with the Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) can ensure that the future refill of the reservoir space made available in Little Grass Valley Reservoir and Sly Creek Reservoir from this transfer does not adversely impact other legal users of water.

3.0 PETITIONS FOR TEMPORARY CHANGE INVOLVING TRANSFER

3.1 Description of the proposed temporary changes

In order to facilitate the transfer, South Feather WPA proposes to temporarily add the following to Permits 1267 and 2492:

- 1) State Water Project's (SWP) Barker Slough Pumping Plant as a point of redirection, located within NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of projected Section 18, T5N, R2E, MDB&M;
- 2) SWP's Harvey O. Banks Pumping Plant (Banks Pumping Plant) via the Clifton Court Forebay as a point of redirection, located within NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 20, T1S, R4E, MDB&M;
- 3) Central Valley Project's (CVP) Bill Jones Pumping Plant (Jones Pumping Plant) as a point of redirection, located within NE $\frac{1}{4}$ or SW $\frac{1}{4}$ of projected Section 29, T1S, R4E, MDB&M;
- 4) San Luis Reservoir as a point of redirection, located within SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 15, T10S, R8E, MDB&M; and

¹ The Delta is in balanced conditions when the State Water Project (SWP) and Central Valley Project (CVP) agree that releases from upstream reservoirs, plus unregulated flow, approximately equal water supply needed to meet Sacramento Valley in-basin uses and Project exports. During balanced conditions in the Delta when water must be withdrawn from storage to meet Sacramento Valley and Delta requirements, 75 percent of the responsibility to withdraw from storage is borne by the CVP and 25 percent by the SWP.

- 5) Service area of Santa Clara Valley WD as an additional place of use.

South Feather WPA will make surface water available for temporary transfer via reservoir release. Absent the proposed temporary change, the transferred water would remain in storage and/or diverted in Little Grass Valley Reservoir and Sly Creek Reservoir. Water would be delivered for use in Santa Clara Valley WD's service area via releases from Lake Oroville to the Feather River thence the Sacramento River thence the Delta for re-diversion at the SWP Banks Pumping Plant and/or Barker Slough Pumping Plant, and/or the CVP Jones Pumping Plant.

3.2 Summary of the South Feather WPA's Permits

Permit 1267 (Application 1651)

Permit 1267, which has a priority date of February 2, 1920, authorized the diversion to storage of up to 109,012 af of water per annum from the South Fork Feather River from October 1 of each year to July 1 of the succeeding year. Permit 1267 also authorizes the direct diversion from the South Fork Feather River of up to 200 cubic feet per second (cfs) from April 1 to July 1 of each year. The point of diversion to storage under Permit 1267 is located at the Little Grass Valley Dam. Points of re-diversion include the South Fork Diversion Dam, Sly Creek Storage Dam, Los Creek Storage Dam, Forbestown Diversion Dam, and Ponderosa Dam. The water is used for domestic, municipal, industrial, and irrigation purposes within the authorized place of use, and for recreational purposes within Little Grass Valley Reservoir, Sly Creek Reservoir, Lost Creek Storage Dam, and Ponderosa Reservoir.

Permit 2492 (Application 2778)

Permit 2492, which has a priority date of March 6, 1922, authorizes the diversion to storage of up to 25,000 af of water per annum from Lost Creek between October 1 of each year to June 1 of the succeeding year. Permit 2492 also authorizes the direct diversion from Lost Creek of up to 50 cfs from April 1 to June 1 of each year. The point of diversion to storage under Permit 2492 is located at the Sly Creek Storage Dam and the points of re-diversion are located at the Lost Creek Storage Dam, Ponderosa Dam, and Forbestown Diversion Dam. The water is used for domestic, municipal, industrial, and irrigation purposes within the authorized place of use, and for recreational purposes within Sly Creek Reservoir, Lost Creek Storage Dam, and Ponderosa Reservoir.

4.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On May 10, 2021, Governor Gavin Newsom declared a State of Emergency for the Klamath River, Sacramento-San Joaquin Delta, and Tulare Lake Watershed Counties due to drought. The signed proclamation modifies noticing requirements and notice

duration for temporary transfers of water. As such, the Division noticed the Petition on June 4, 2021 to the Division's website and via the State Water Board's electronic subscription mailing list pursuant to modified Water Code section 1726(d).

The comment deadline was June 21, 2021. Timely comments on the transfer were received from the California Department of Fish and Wildlife (CDFW), Reclamation, and the Central Delta Water Agency (CDWA). Petitioner provided responses to the comments by letter to the Division dated June 30, 2021 and are available in the record for Permits 1267 and 2492.

4.1 Comments of CDFW

By letter dated June 17, 2021, CDFW provided comments on South Feather WPA's proposed water transfer, citing concerns about the potential direct and cumulative adverse impacts from changes in the quantity, timing, temperature, and duration of water transfers on the sensitive resident fisheries within the South Fork Feather River. CDFW is particularly concerned about potential impacts of hydropower operations to foothill yellow-legged frog (FYLF), a California Endangered Species Act candidate, and other aquatic species, due to changes in streamflow and temperature. CDFW states that the South Fork Diversion Dam and the Forbestown Diversion Dam reaches support populations of FYLF, and the proposed transfer has the potential to significantly impact FYLF during vulnerable life stages.

CDFW indicated that FYLF breeding in the Sierra Nevada system typically occurs between late April and early July after winter runoff has subsided and water temperatures increase. Rates of embryonic development and length of tadpole period are both highly temperature dependent. Tadpole rearing sites require some level of protection from unpredictable scouring flows and appropriate ramp down rates to prevent desiccation after egg mass oviposition.

To mitigate for these potential impacts, CDFW requested that the release of transfer water comply with Condition 3(A) of the Water Quality Certification (WQC) for Federal Energy Regulatory Commission (FERC) Project No. 2088 issued in 2018. If the proposed transfer flow schedule does not follow WQC Condition 3(A), transfer ramping rates should be developed in coordination with CDFW and South Feather WPA; and South Feather WPA should conduct pre-, during-, and post-transfer FYLF and temperature monitoring.

South Feather WPA Response:

South Feather WPA stated that CDFW assertions are not consistent with the statutory criteria of Water Code section 1725 et seq. and fail to identify applicable scientific support for its statement that the transfer could significantly impact FYLF or for the conditions proposed by CDFW.

Based on CDFW's concerns, South Feather WPA proposed to modify its transfer period from July 1 through November 30, 2021, to mid-September through November 15, 2021. FYLF in the Sierra Nevada generally breed in May or June and complete metamorphosis in August or early September. South Feather WPA indicated that with the modified transfer period, it would avoid any impacts to FYLF breeding or tadpole rearing. South Feather WPA also claimed that the modified transfer period would avoid impacts to other aquatic resources, such as resident rainbow trout (*Oncorhynchus mykiss*) and benthic macroinvertebrates, which are not particularly affected by flow or water temperature changes in the fall.

South Feather WPA proposed that ramping rates for the proposed transfer be those set forth in the 2008 United States Department of Agriculture, Forest Service's (USDAFS) Final Section 4(e) conditions agreed to and imposed as part of South Feather WPA's relicensing process as those ramping rates were the subject of extensive environmental review and analysis as part of South Feather WPA's relicensing, were agreed upon by all participating agencies and stakeholders, including CDFW, and were assessed and determined sufficient in an environmental impact statement under the National Environmental Policy Act and initial study/mitigated negative declaration under the California Environmental Quality Act (CEQA).

South Feather WPA indicated that given the proposed changes to its transfer Petition, it believes that coordinating with CDFW on ramping rates during the transfer is not needed. Further, South Feather WPA believes that monitoring FYLF and water temperature prior to, during, and after a September through mid-November water transfer would provide no useful information since FYLF is not breeding and has completed the larval growth phase during the modified transfer period. South Feather WPA claimed that FYLF and other aquatic resources are relatively insensitive to water temperature during the modified transfer period.

South Feather WPA stated it would be inappropriate to apply conditions from an ineffective 401 WQC that conflict with the FERC approved ramping rates in the 2008 USDAFS's Final Section 4(e) requirements as it would violate Federal preemption and is inconsistent with the statutory criteria of Water Code section 1725 et seq. South Feather WPA indicated that a specific flow schedule for delivery of the transfer water in the modified transfer period will be developed by South Feather WPA, South Feather WPA's power purchaser, and in coordination with DWR. Further, South Feather WPA agreed to monitor its operations to ensure compliance with all legal and regulatory requirements, including ensuring that its operations do not unreasonably impact aquatic and terrestrial species, such as FYLF.

CDFW Response:

By email dated July 9, 2021, CDFW responded to South Feather WPA's June 30 response. CDFW indicated that they concurred with South Feather WPA's proposed

approach to its transfer Petition to mitigate most negative impacts to FYLF and other aquatic species. Further, CDFW requested clarification regarding South Feather WPA's monitoring operations and ramping rates as set forth in the 2008 USDAFS's Final Section 4(e) conditions.

State Water Board Response:

To address concerns of FYLF and as indicated in South Feather WPA's June 30 response and CDFW's July 9 response, South Feather WPA's transfer duration shall be conditioned to the period commencing on September 15 through November 15, 2021. Petitioner states that the transfer will be subject to the ramping rates provided in Part 5 of Condition 18 of the 2008 USDAFS Final Section 4(e) conditions and included a copy of the Final Section 4(e) with the Petition. However, Part 5 of Condition 18 describes monitoring and a process for developing ramping rates, not the ramping rates themselves. This Order conditions the transfer to use the interim ramping rate requirements specified in Condition 3 of the WQC for FERC Project No. 2088 issued in 2018. The ramping rate requirements in the 2018 WQC were developed by the State Water Board in coordination with CDFW, the United States Fish and Wildlife Service, USDAFS, and South Feather WPA, to prevent impacts to FYLF caused by rapid changes in stream flows due to reservoir releases. In the event a new FERC license is issued for Project No. 2088 with different ramping rates, those ramping rates may be provided to CDFW and the Deputy Director for Water Rights with a request to use in lieu of Condition 3 of the WQC for FERC Project No. 2088.

4.2 Comments of Reclamation

By letter dated June 21, 2021, Reclamation commented on South Feather WPA's proposed water transfer. Reclamation requested that the Order approving the proposed transfer includes the following conditions to protect Reclamation's water rights and operations for the Jones Pumping Plant.

- The transfer is subject to the refill criteria specified in a refill agreement between South Feather WPA, Reclamation, and DWR.
- Transferable water may be credited only during balanced conditions in the Delta.
- Execution of a Warren Act contract is required for South Feather WPA to use the Jones Pumping Plant.

South Feather WPA Response:

South Feather WPA indicated that they do not object to the conditions proposed by Reclamation. South Feather WPA also agreed to obtain a Warren Act contract if one is legally required to convey the transfer water to the buyer.

State Water Board Response:

This Order includes a condition requiring South Feather WPA to obtain a reservoir refill agreement with Reclamation and DWR prior to initiating the transfer. This Order also includes a condition that requires South Feather WPA to obtain a Warren Act contract with Reclamation if South Feather WPA uses the Jones Pumping Plant for water delivery under the transfer. Further, this Order includes conditions requiring that the transfer take place only during balanced conditions in the Delta.

4.3 Comments of CDWA

By letter dated June 21, 2021, CDWA commented on the proposed transfer. Summaries of CDWA's comments follow.

1. CDWA believes no transfer of water for export from the Delta watershed should be allowed unless State Water Board Revised Decision 1641 (D-1641) requirements without temporary urgency changes will be met.
2. CDWA indicated that South Feather WPA has not provided adequate information to show that the proposed water transfer is excess stored water originally diverted in compliance with Permits 1267 and 2492
3. CDWA believes that the State Water Board's June 1, 2021, approval of Reclamation and DWR's Temporary Urgency Change Petition (TUCP) to change D-1641 related terms and conditions contained in the CVP and SWP water rights and the potential for similar TUCPs in subsequent dry years will complicate making the necessary findings to approve South Feather WPA's transfer.
4. CDWA states that the State Water Board's June 15, 2021 *Notice of Unavailability of Water for Post-1914 Water Right Holders and Warning of Impending Water Unavailability for Pre-1914 and Riparian Claimants in the Sacramento-San Joaquin Delta Watershed* implied that post-1914 appropriators in the Delta cannot divert water which consists of storage releases necessary to meet other downstream purposes, such as salinity control in the Delta. CDWA believes that the release of water from storage is not necessarily water to which others are entitled in preference to Delta landowners' diversions under post-1914 licenses and other rights. CDWA also states that the storage of water that would have otherwise flowed into the Delta potentially creates a detriment that must be offset by release of such water or other water at a later period, and the water needs within the watersheds of origin should not be deprived to facilitate the export of water from the Delta.

5. CDWA indicated that South Feather WPA have been submitting similar temporary change petitions with increasing regularity, which have been repeatedly relied upon without the proper environmental and legal review that would otherwise be required under Water Code section 1735 et seq.
6. CDWA states that Santa Clara Valley WD is a party to other transfers this year, including a transfer under Reclamation and DWR water rights. CDWA believes that the State Water Board analyzes petitions for temporary change involving transfers of water in a piecemealed fashion resulting in cumulative impacts being redirected to non-parties to the transfers and to other legal users of water (including third party groundwater impacts), the public trust and threatened and endangered species. CDWA ultimately believes that due to piecemealing, a proper analysis of the transfer pursuant to Water Code section 1725 et seq. is precluded.

South Feather WPA Response:

A summary of South Feather WPA's responses to CDWA's comments follow.

1. South Feather WPA stated that Reclamation and DWR are the agencies responsible for meeting the requirements of D-1641 as well as the Delta Protection Act and the Watershed Protection Act. South Feather WPA claims to be a senior right holder and not subject to those requirements.
2. South Feather WPA believes that CDWA was conflating the State Water Board transfer approval process under Water Code section 1725 et seq. with DWR's separate approval process under Water Code section 1810. South Feather WPA indicated that it will provide the information to CDWA once it provides the information to DWR.
3. South Feather WPA claims that they are not obligated to meet D-1641 requirements in the Delta, or any other upstream requirements imposed on DWR or Reclamation pursuant to its SWP and CVP water rights. South Feather WPA indicated that if the transfer did not occur, it will retain that volume of water in storage for future use in accordance with Permits 1267 and 2492. South Feather WPA stated that under no scenario will the stored water proposed for transfer be used to meet D-1641 standards.
4. South Feather WPA indicated that CDWA is conflating curtailments of water rights in the Delta with the transfer process and the transfer would not reduce the amount of water available to water right holders in the Delta. South Feather WPA stated that if the proposed transfer did not occur, South Feather WPA would retain that contemplated transfer volume in storage for future use in

accordance with its water rights. South Feather WPA indicated that under no scenario would the transfer water be used to meet the needs of Delta water right holders. Also, South Feather WPA believes that if the transfer were to move forward, the transfer is likely to help control Delta salinity by increasing flows through the Delta during the prevailing emergency drought conditions while also being assessed a Delta carriage loss.

5. South Feather WPA indicated that its past submitted temporary transfers are immaterial and does not apply to the analysis under Water Code section 1725 et seq. for the proposed transfer. South Feather WPA further claims that the proposed transfer will not have an unreasonable effect on fish and wildlife, and no legal injury to other lawful users of water.
6. South Feather WPA stated that Santa Clara Valley WD is also buying water from other parties due to emergency drought conditions prevailing throughout California. South Feather WPA believes that multiple sellers selling to one buyer does not result in legal injury to other lawful users of water or an unreasonable effect to fish and wildlife. South Feather WPA indicates that Water Code section 1725 et seq. requires an analysis based on each individual water right that is subject to a change petition and the analysis required is inherently focused on the transferor – the water right holder petitioning for the change, in this case the rights held South Feather WPA.

State Water Board Response:

1. The June 1, 2021 TUCP approval Order applies only to Reclamation and DWR water rights and does not involve South Feather WPA's Permits 1267 and 2492. Further, Water Code section 1727 subdivision (e) indicates that when determining whether to approve a temporary change involving a transfer, "...the board shall not deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change." Reclamation and DWR filed the TUCP in response to the 2021 drought emergency. Reclamation and DWR did not file the TUCP to mitigate potential impacts from South Feather WPA's proposed transfer. Therefore, the State Water Board cannot deny South Feather WPA's petition for temporary changes based on Reclamation and DWR filing of the TUCP to achieve compliance with D-1641.
2. Water Code section 1725 indicates that 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 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. As discussed in Section 7.1 below, the State Water Board believes adequate information has been included in both the petition and South Feather WPA's Reports of Permittee

for Permits 1267 and 2492 to indicate that South Feather WPA has adequately stored water to allow a transfer of up to 8,000 af to Santa Clara Valley WD.

3. South Feather WPA's Permits 1267 and 2492 are not subject to Reclamation and DWR's 2021 TUCP request to change terms and conditions of CVP and SWP water rights.
4. Permits 1267 and 2492 do not require, and there are no other State Water Board orders in place that require, South Feather WPA to release (and abandon) its water previously diverted to storage to provide water for downstream Delta diverters.
5. Similar temporary transfers that are proposed and approved in multiple years does not transmute those changes into "long-term" changes, which would otherwise be subject to environmental and legal requirements under Water Code section 1735 et seq. Approval of a temporary change lasts at most one year and must be petitioned for, defended, and approved according to the criteria in Water Code section 1725 et seq., each and every year the petitioner wishes to operate in accordance with the change. In contrast, a long-term transfer need only be approved once before the transfer can proceed in each subsequent year. The one-year transfer that is the subject of this Petition meets the statutory definition of a "temporary" transfer, and Water Code section 1729 therefore exempts approval of the Petition from CEQA. Given the water transfer is for a one-year duration or less and the variance of South Feather WPA's proposed place of use in its past transfers and current proposed transfer, it does not meet the criteria for a long-term transfer and be subject to the extensive environmental and legal review pursuant to Water Code section 1735 et seq.
6. Santa Clara Valley WD is purchasing water from several parties to provide critical water supplies to its service area this year since Santa Clara County has declared a local emergency due to extreme drought conditions. South Feather WPA is correct in pointing out that Water Code section 1725 et seq. requires an analysis based on each individual water right that is subject to a change petition and the analysis required is focused on the water right holder petitioning for the change. Consequently, the State Water Board believes regardless of whether Santa Clara Valley WD will be the recipient of several water transfers, each transfer will be evaluated appropriately as required pursuant to Water Code section 1725 et seq.

5.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

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

6.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

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).

7.0 REQUIRED FINDINGS OF FACT

7.1 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, South Feather WPA indicated the transfer water would have remained in storage in Little Grass Valley Reservoir and Sly Creek Reservoir. South Feather WPA indicated that its combined end of year storage target is 60,000 af in 2021 without the proposed transfer.

The State Water Board conducted an independent evaluation of its records. The combined annual use under Permits 1267 and 2492 was 16,090 af, 6,956 af, 12,925.5 af, 31,435 af, and 23,672.4 af during 2016, 2017, 2018, 2019, and 2020, respectively. The maximum authorized storage is 109,012 af under Permit 1267 and 25,000 af under Permit 2492. According to the Petitioner, in 2021 the combined end of year storage in the absence of the transfer is 60,000 af. The end of year storage target with the transfer is 52,000 af.

In light of the above, and in accordance with Water Code section 1726, subdivision (e), the State Water Board finds that the water proposed for transfer pursuant to this Order would be consumptively used or stored in the absence of the proposed temporary change.

7.2 No Injury to Other Legal Users of the Water

Before approving a temporary change due to a transfer or exchange of water, 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).)

Thus, with respect to the “no injury” inquiry under Water Code section 1727, the State Water Board must evaluate whether the change will injure any legal user of the water involved in the change. The controlling consideration in the State Water Board’s inquiry is the effect of the change on the rights of others. (State Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 743, 805.) A person who claims injury from a proposed change “must show the change will interfere with his or her right to use the water, whatever the source of that right may be.” (Id. at p. 805, italics in original.) It is not enough for a water user to show that it will receive less water as a result of the change. Instead, a water user claiming injury must demonstrate that it has a right to the greater amount of water claimed and that the proposed change will interfere with that right. (*Ibid.*)

In general, the transfer of water that would have been consumptively used or stored will not result in injury to other legal users of water. The water proposed for transfer pursuant to this temporary change consists of water previously stored in Little Grass Valley Reservoir and Sly Creek Reservoir pursuant to Permits 1267 and 2492. In the absence of the proposed transfer, the water would remain in storage for future use by South Feather WPA and would not be available to other water users. Further, the release of the water from storage at Little Grass Valley Reservoir and Sly Creek Reservoir pursuant to the temporary transfer will not reduce the available supply to any other legal user of water downstream. Additionally, this Order is conditioned to only allow transfer of water collected to storage prior to issuance of the Order.

The refill criteria provide for an accounting of refill of Little Grass Valley Reservoir and Sly Creek Reservoir resulting from the proposed transfer. Pursuant to the criteria, any refill occurring during balanced conditions in the Delta is subject to repayment to DWR and Reclamation, according to a schedule agreed to by South Feather WPA, DWR, and Reclamation.

South Feather WPA will enter into a reservoir refill agreement with DWR and Reclamation ensuring that future refill of any storage space in Little Grass Valley Reservoir and Sly Creek Reservoir created by the transfer will not reduce the amount of water that Reclamation, DWR, 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.

In light of the above, and in accordance with Water Code section 1727, subdivision (b)(1), the State Water Board finds that the proposed temporary changes 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, or otherwise unreasonably affect a legal user of water.

7.3 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 (Central Valley Water Board) with a copy of the petition in accordance with California Code of Regulations, title 23, section 794, subdivision (c). CDFW provided comments regarding FYLF, which are discussed in Section 4.1 of this Order; the Order is conditioned to ensure the potential impacts to FYLF raised by CDFW are avoided. The Central Valley Water 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.

In general, North of Delta transfers result in an incremental increase in instream flows between the Petitioner's point of diversion and the location where the water is removed from the stream system. The increase in flows is not anticipated to be harmful to instream resources, provided that the transfer water does not cause instream temperatures to increase to harmful levels and also does not result in false fish attraction flows to streams not suited for fish rearing. No information is available that suggests the transfer flows will contribute to false fish attraction flows or significantly change stream temperatures or water quality. 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 diversion and exports of water at the SWP and CVP Delta pumps.

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

8.0 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.

9.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1725 et seq.

The State Water Board concludes that, based on the available information:

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 neither injure, nor unreasonably affect, any legal user of water, including 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 water or return flows.
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 petitions filed for temporary change for the transfer of up to 8,000 acre-feet (af) of water under South Feather Water & Power Agency's (South Feather WPA or Petitioner) Permits 1267 and 2492 are approved.

All existing conditions of Permits 1267 and 2492 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing on September 15, 2021 and continuing through November 15, 2021.
2. The following points of redirection are temporarily added to Permits 1267 and 2492:

Harvey O. Banks Pumping Plant (Banks Pumping Plant) via the Clifton Court Forebay:

California Coordinate System of 1983 (CCS83), Zone 3, North 2,126,440 feet and East 6,256,425 feet, being within NW $\frac{1}{4}$ or SE $\frac{1}{4}$ of projected Section 20, T1S, R4E, MDB&M.

Barker Slough Pumping Plant:

CCS83, Zone 2, North 1,862,435 feet and East 6,619,928 feet, being within NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of projected Section 18, T5N, R2E, MDB&M.

Bill Jones Pumping Plant (Jones Pumping Plant):

CCS83, Zone 3, North 2,121,505 feet and East 6,255,368 feet, being within the NE $\frac{1}{4}$ or SW $\frac{1}{4}$ of projected Section 29, T1S, R4E, MDB&M.

San Luis Reservoir:

CCS83, Zone 3, North 1,845,103 feet and East 6,393,569 feet, being within SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 15, T10S, R8E, MDB&M.

3. The place of use under Permits 1267 and 2492 is temporarily expanded to include the service area of Santa Clara Valley Water District (Santa Clara Valley WD) as shown on Map 1878 – 1, 2, 3, and 4 filed with the Division under Application 5630, and on CVP Map 214-202-84 filed with the Division.
4. During the period of transfer, Petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies, including the Federal Energy Regulatory Commission (FERC). This Order shall not be construed as authorizing the violation of any agreement entered by the Petitioner.
5. Only water collected to storage prior to issuance of this Order may be transferred pursuant to this Order.
6. Carriage loss shall be deducted from any water transferred through the Delta and delivered under this Order.
7. Rediversion of water at the Barker Slough, the Banks, or the Jones Pumping Plants is subject to compliance by the operators with the objectives currently required of Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) set forth in Tables 1, 2, and 3 on pages 181-187 of State Water Resources Control Board Revised Water Right Decision 1641 (D-1641), or any future State Water Board Order or decision implementing Bay-Delta water quality objectives at that point of diversion, including compliance with the various plans required under D-1641. Diversion of water is also subject to compliance by DWR and Reclamation with all applicable Biological Opinions and court orders and any other conditions imposed by other regulatory agencies applicable to these operations.
8. Rediversion of water at the Barker Slough, the Banks, or the Jones 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. Petitioner shall ensure that any required Warren Act contract with Reclamation is executed prior to use of the Jones Pumping Plant for the delivery of water to Santa Clara Valley WD under this transfer. Petitioner shall provide confirmation to the Deputy Director for Water Rights (email confirmation is acceptable) that this condition has been complied with, within 30 days of issuance of this Order.

10. Petitioner shall coordinate with the California Department of Fish and Wildlife (CDFW) and DWR in the development of reservoir release schedules and obtain CDFW concurrence that the release schedule will not impact foothill yellow-legged frog (FYLF). Documentation of the concurrence shall be submitted to the Deputy Director for Water Rights within 15 days after Petitioner obtains CDFW's concurrence.
11. When making releases for the transfer, South Feather WPA shall use the interim ramping rate requirements specified in Condition 3 of the Water Quality Certification (WQC) for FERC Project No. 2088 issued in 2018. In the event a new FERC license is issued for Project No. 2088, the ramping rates in the new FERC license may be used in lieu of the Condition 3 of the WQC if agreed to by CDFW and the Deputy Director for Water Rights.
12. Prior to transferring water, South Feather WPA shall consult and provide CDFW with the requested information in CDFW's July 9, 2021 response. Petitioner shall provide confirmation to the Deputy Director for Water Rights (email confirmation is acceptable) that this condition has been complied with, within 15 days after Petitioner consults with CDFW.
13. Water may not be transferred through the Barker Slough, the Banks, or the Jones Pumping Plants until South Feather WPA has executed a Refill Agreement between Reclamation, DWR, and South Feather WPA to address potential refill concerns in Little Grass Valley Reservoir and Sly Creek Reservoir. Documentation that an acceptable Refill Agreement has been agreed to by DWR, Reclamation, and South Feather WPA 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. South Feather WPA 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.
14. Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.
15. By December 15, 2021, South Feather WPA shall provide to the Deputy Director for Water Rights one or more tables describing the transfer authorized by this Order. The table(s) shall include the following information:

- a. The general location of where water was delivered, and the acreage and/or population served by water delivered to Santa Clara Valley WD pursuant to this Order;
- b. The average daily release rates and corresponding volume of water released from Little Grass Valley Reservoir and Sly Creek Reservoir as a result of this transfer (reported on a daily basis);
- c. For each day of the transfer, the daily average rate of water diverted and daily volume of water diverted at the Barker Slough, the Banks, or the Jones Pumping Plants pursuant to this Order;
- d. The daily amounts of water delivered to Santa Clara Valley WD pursuant to this Order;
- e. The amount of the Refill Reservation as defined in the Refill Agreement (reported on a daily basis); and
- f. Recognizing that reservoir refill will occur after the transfer ends, monthly reporting of reservoir refill is not required during the transfer period. However, South Feather WPA 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 South Feather WPA in time for inclusion in a submittal, South Feather WPA shall provide the information to the Deputy Director for Water Rights within 30 days of receipt.

16. 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.

17. 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.

18. 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 16 2021