

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF LICENSE 2685 (APPLICATION 1224)
OF MERCED IRRIGATION DISTRICT**

**PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF 1,500 ACRE-FEET OF WATER**

SOURCE: Merced River

COUNTY: Mariposa and Merced

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

1.1 Description of the Transfer

On July 15, 2013, Merced Irrigation District (MID or Licensee) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), a Petition for Temporary Change pursuant to Water Code sections 1725 through 1732.

Pursuant to the petition, MID seeks to transfer up to 1,500 acre-feet (af) of water previously diverted to storage in Lake McClure under its License 2685 (Application 1224) for use on lands within the East Bear Creek Unit of the San Luis National Wildlife Refuge (SLNWR) Complex. In order to facilitate the transfer, MID has requested the following temporary changes to License 2685: 1) the addition of the East Bear Creek Unit Pumping Plant on Bear Creek as a point of rediversion; and 2) the addition of the East Bear Creek Unit of the SLNWR to the place of use.

MID states that in the absence of the proposed temporary change, the 1,500 af of water would remain in storage in Lake McClure.

Temporary changes under Water Code section 1725 may be effective for a period of up to one year from the date of approval.

1.2 Place of Use Under the Proposed Transfer

MID proposes to add of the East Bear Creek Unit of the SLNWR to the current place of use under License 2685 in order to facilitate the transfer of water. The proposed additional place of use includes approximately 3,677 acres located within portions of Sections 6 – 9, 17 – 20, and 29, T8S, R11E, MDB&M, and portions of Sections 12 and 13, T8S, R10E, MDB&M, as identified on the map accompanying the petition.

1.3 Point of Rediversion Under the Proposed Transfer

MID proposes to temporarily add the East Bear Creek Unit Pumping Plant on Bear Creek as a point of rediversion to License 2685, which is located N 1,914,452 feet, E 6,480,299 feet, California Coordinate

System Zone 3, NAD 83, being within the SE ¼ of NE ¼ of Section 8, T8S, R11E, MDB&M, as identified on the map accompanying the petition.

1.4 Refill Criteria

MID's releases of previously stored surface water for the transfer will require refill of Lake McClure, which normally occurs during periods of high runoff. Refill criteria developed in coordination with U.S. Bureau of Reclamation (Reclamation) and Department of Water Resources (DWR) are necessary to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact downstream water rights including the water rights for the Central Valley Project (CVP) and the State Water Project (SWP). The refill criteria provide for an accounting of refill of Lake McClure resulting from this proposed transfer. Pursuant to the criteria, any refill occurring during balanced or restricted conditions in the Delta is subject to repayment to DWR and Reclamation according to a schedule agreed to by DWR, Reclamation, and the Licensee.

2.0 BACKGROUND

2.1 Substance of License 2685

Original Water Rights under License 2685

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

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

Modified Water Rights under License 2685

Effective February 16, 1995, License 2685 was modified from its original conditions to allow the direct diversion of 5,000 afa of water from the Merced River at a rate not to exceed 7 cfs from November 1 of each year to February 29 of the following year for municipal use in the Mariposa Town Planning Area. Storage under License 2685 is reduced in the amount of water diverted to the Mariposa Town Planning Area, up to 1,667 afa. Combined maximum direct diversion and storage under License 2685 cannot exceed 345,440 afa. The point of diversion for the water delivered to the Mariposa Town Planning Area is located approximately 40 miles upstream of New Exchequer Dam.

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

3.0 PUBLIC NOTICE AND COMMENTS ON THE PROPOSED TRANSFER

Public notice of the petition for temporary change was provided on July 24, 2013 on the Division's internet site and via regular mail and email to interested parties, and by publication in the Merced Sun-Star and Fresno Bee on July 26, 2013. Timely comments regarding the proposed temporary change were submitted by Richard Morat, Mary Ann Cardoza, DWR, Anthony Roggero, and, Gallo Cattle Company (Gallo). The comments and the State Water Board's responses are briefly summarized below.

3.1 Comments from Richard Morat

Mr. Morat commented on the proposed transfer by letter dated August 1, 2013. Mr. Morat indicated that the proposed transfer from the San Joaquin River basin to the westside of the San Joaquin Valley via export pumps in the delta estuary will be harmful to public trust resources including the potential for additional fish salvage operations at export facilities. Mr. Morat is also concerned regarding the refill of Lake McClure and the refill's potential adverse impacts on the aquatic resources of the Merced River, the San Joaquin River, and the Sacramento-San Joaquin Estuary. Mr. Morat questions whether the conservation storage replenishment aspects in New Exchequer Reservoir are potentially harmful to the Merced and San Joaquin Rivers, and/or the estuary. Mr. Morat further indicates that he is not opposed to the transfer, but objects to the transfer without refill agreements that protect the Merced River, San Joaquin River, and the Sacramento-San Joaquin Rivers estuary.

State Water Board Response

This Order is conditioned to include reservoir refill criteria. Therefore, the condition requested by Mr. Morat has been met.

3.2 Comments from Mary Ann Cardoza

Mrs. Cardoza submitted a comment letter dated August 18, 2013 indicating that the flows of the Merced River are currently so low that she cannot use her river pump to provide water to her property pursuant to her licensed water rights. Mrs. Cardoza owns water right License 6421 (Application 16895), which allows her to divert up to 0.15 cfs from the Merced River from April 1 to September 1 of each year for irrigation purposes, and her property is also riparian to the river. Mrs. Cardoza indicates that by transferring water, MID is diverting her water supply away from her as well as other local agricultural users. She believes that MID should return flow back to the Merced River or provide her with water, free of charge, from the MID canal that is adjacent to her property.

State Water Board Response:

The water that is proposed for transfer was already diverted pursuant to MID's License 2685 and is currently under the control of MID in storage at Lake McClure. Therefore, the water proposed for transfer is not subject to diversion by downstream parties under either licensed or riparian water rights.

3.3 Comments from DWR

By letter dated August 22, 2013, DWR objected to the proposed temporary change based on potential injury to water rights of the SWP. DWR indicated that the transfer has the potential to adversely impact operations of the SWP if refill of the vacated storage in Lake McClure occurs at times when it will diminish the flows otherwise available to the DWR under its permitted water rights. DWR states that its comments can be dismissed with the inclusion of a term in any order approving the transfer requiring the execution of a refill agreement acceptable to DWR which shall account for any transfer conducted by MID in 2013 as well as any refill obligations from prior year transfers.

State Water Board Response:

As stated in Section 1.4 of this Order, refill criteria are needed to ensure that the refill of Lake McClure resulting from the proposed temporary change does not adversely impact operations and/or water rights of the SWP or CVP or other downstream water rights. This Order requires the Licensee to comply with the refill criteria developed by DWR, Reclamation and MID as detailed in Section 4.2 of this Order. Further, the State Water Board will condition this transfer to require satisfaction of earlier transfer refill(s) prior to refill for the later transfer(s).

3.4 Comments from Anthony M. Roggero, Jr.

Mr. Roggero provided comments dated August 19 and 20, 2013 regarding MID's proposed transfers. Mr. Roggero claims that his water supply from MID was reduced from over 700 af in 2012 to approximately 240 af in 2013 and as such, he questions why MID is transferring water during a year when MID has curtailed the water supply to customers within the district. Mr. Roggero believes that MID is more concerned about the financial benefits of transferring water than honoring existing agreements with their customers.

State Water Board Response:

MID responded to Mr. Roggero by letter dated September 6, 2013. MID indicated that their representatives had previous discussions with Mr. Roggero in which they explained to him that MID would continue the same surface water deliveries to its existing customers, including Mr. Roggero, with or without the proposed temporary water transfers. MID further pointed out that they will continue to meet its commitments to provide surface water to its growers, including those within the former El Nido Irrigation District, as required by MID Resolution No. 35-91, which was adopted by MID's Board on December 17, 1991.

3.5 Comments from Gallo

Comments on the proposed transfer were provided on August 16 and 23, 2013 by Marshall C. Whitney of McCormick Barstow LLP, on behalf of Gallo. Gallo's comments included the following issues: 1) MID's water transfers constitute a single project under the California Environmental Quality Act (CEQA); 2) MID's conveyance system improvements are intended to increase surface water quantities stored in Lake McClure in order to increase future transfer opportunities for MID; and 3) the State Water Board cannot approve the proposed transfer because MID has not demonstrated that the proposed transfer will not injure other legal users of water.

State Water Board Response:

In its August 23, 2012 response to Gallo, MID cites State Water Board Corrected Order WR 2010-0029-DWR, which indicates that petitioners for temporary change who request a series of approvals of similar temporary changes are not subject to CEQA. The State Water Board has found that the CEQA exemption for temporary transfers is applicable, even when a transferor engages in a series of temporary transfers. Further, MID's previous and future conveyance system improvement projects are outside of the scope of the current transfer. MID is responsible for preparing appropriate CEQA documents for these projects.

A temporary change to transfer water pursuant to Water Code section 1725, et seq., is permissible if it will not injure any legal user of the water. A party claiming injury must show that the proposed change will interfere with his or her right to use water. Gallo did not provide information showing injury to its water rights as a result of MID's proposed transfer. The water proposed to be transferred by MID has already been appropriated pursuant to License 2685 and is in storage in Lake McClure. As MID's

rights are senior to Gallo's rights, Gallo has no right to the water that is the subject of this transfer as that water was previously diverted and is stored in Lake McClure pursuant to License 2685.

4.0 REQUIRED FINDINGS OF FACT

4.1 Availability of Water for Transfer.

Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Section 1011. (Wat. Code, §§ 1725, 1726.) Water Code section 1725 defines "consumptively used" to mean "the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion." The water proposed for transfer is currently stored in Lake McClure pursuant to the terms of License 2685. The petition states that in the absence of the proposed change, the 1,500 af of water proposed for transfer would remain in storage in Lake McClure. Under License 2685, Licensee can both directly divert and collect water to storage. Licensee will not provide water by direct diversion under License 2685 to the SLNWR.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the proposed transfer involves only an amount of water that would have been stored in the absence of the proposed temporary change.

4.2 No Injury to Other Legal Users of Water.

Before approving a temporary change due to a transfer or exchange of water pursuant to Article 1 of Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would not injure any legal user of the water during any potential hydrologic condition that the Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows. (Wat. Code §1727, subd. (b)(1).)

MID will continue the same surface water deliveries to its existing customers with or without the proposed temporary water transfer. In addition, MID is required to release water to meet its other existing downstream commitments and requirements below the inlet to its Main Canal. Therefore, there will be no downstream decrease in streamflow, impact to water quality, change in timing of diversion or return flows, effects on legal users of water, or change in the purposes of use authorized by License 2685 during the period of the proposed temporary transfer.

This Order requires MID to comply with a reservoir refill agreement with DWR ensuring that future refill of any storage space in Lake McClure created by the transfer will not reduce the amount of water that DWR or other downstream water users could otherwise divert under their water rights

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

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

Water Code section 1729 exempts temporary changes involving transfer of water from the requirements of the CEQA (Pub. Resources Code, § 21000, et seq.). However, the State Water Board may approve a temporary change due to a transfer of water only if it determines that the proposed

temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).)

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

MID has entered into Agreement No. 12-WC-20-4319 (Agreement) with Reclamation regarding this proposed water transfer. MID will coordinate with Reclamation and a representative from the U.S. Fish and Wildlife Service regarding the schedule of releases for rediversion at the East Bear Creek Unit Pumping Plant. The proposed releases related to this transfer are in addition to MID's existing downstream requirements and commitments.

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

5.0 STATE WATER BOARD 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. The Deputy Director for Water Rights redelegated this authority by memorandum dated July 6, 2012. This Order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2010-0029 and the subsequent redelegation by the Deputy Director's memorandum.

6.0 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:

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

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change in the place of use and point of diversion under License 2685 (Application 1224) of MID for the transfer of 1,500 af of water to the SLNWR is approved.

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

1. The transfer is limited to the period commencing on the date of this Order and continuing for one year.
2. Only water that would have been stored absent the transfer within Lake McClure may be transferred. Water shall not be provided to the SLNWR by direct diversion.
3. The place of use under License 2685 is temporarily expanded to include the East Bear Creek Unit of the SLNWR in order to facilitate the transfer of water. The proposed additional place of use includes approximately 3,677 acres located within portions of Sections 6 – 9, 17 – 20, and 29, T8S, R11E, MDB&M, and portions of Sections 12 and 13, T8S, R10E, MDB&M, as identified on the map accompanying the petition
4. The East Bear Creek Unit Pumping Plant on Bear Creek shall be temporarily added as a point of diversion to License 2685, located as follows: N: 1,914,452 feet, E: 6,480,299 feet, California Coordinate System Zone 3, NAD 83, being within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 8, T8S, R11E, MDB&M.
5. Water may not be transferred through the East Bear Creek Unit Pumping Plant until Licensee has implemented a Refill Agreement with DWR to address potential refill concerns in Lake McClure which shall also account for any transfer conducted by MID in 2013 as well as any refill obligations from prior year transfers. The executed Refill Agreement must be acceptable to DWR. Documentation that an acceptable Refill Agreement has been agreed to by DWR and Licensee shall be submitted to the Division within 15 days of the date of execution of the agreement.
6. Licensee shall comply with the License 2685 instream flow requirements at all times while transferring water pursuant to this Order.
7. Licensee shall maintain continuous records of water released from storage and record the quantities diverted at the temporary point of diversion. If recorded data on the diversion is not available, the quantities diverted shall be documented using an alternative methodology acceptable to the Deputy Director for Water Rights. Daily diversions shall not exceed reservoir releases minus losses.
8. Within 90 days of completion of the transfer, but not later than November 30, 2014, the Licensee shall provide to the Deputy Director for Water Rights a report describing the transfer authorized by this Order. The report shall include the following information:
 - a. the quantity of water (in af) delivered to the SLNWR pursuant to Condition 3 of this Order;
 - b. The average daily release rates and corresponding volume of water released from Lake McClure as a result of this transfer (reported on a daily basis) pursuant to this Order; and

- c. The value of the Refill Reservation as defined in the Refill Agreement (reported on a daily basis).

Should the value of the Refill Reservation exceed zero at the time of this report, Licensee shall submit subsequent reports by July 1 of each year until the Refill Reservation equals zero. These reports shall include the daily values of the Refill Reservation.

9. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change Order, including method of diversion, method of use, and quantity of water diverted are subject to the continuing authority of the State Water Board in accordance with law and in the interest of 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 the Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.
10. This Order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this temporary transfer, the licensee shall obtain authorization for any incidental take prior to commencing transfer of water. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.
11. I reserve jurisdiction to supervise the transfer, exchange and use of water under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: SEP 13 2013