

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001-25-DWR

**TEMPORARY CHANGE INVOLVING THE TRANSFER OF
UP TO 25,000 ACRE-FEET OF WATER FROM
MERCED IRRIGATION DISTRICT
TO THE CALFED ENVIRONMENTAL WATER ACCOUNT,
UNDER MERCED IRRIGATION DISTRICT'S
LICENSE 11395 (APPLICATION 16186)**

ORDER AUTHORIZING TEMPORARY CHANGE IN PLACE OF USE,
POINTS OF REDIVERSION, AND PURPOSE OF USE
BY THE CHIEF OF THE DIVISION OF WATER RIGHTS

1.0 SUBSTANCE OF PETITION

On July 23, 2001

Merced Irrigation District
c/o Ross Rogers
P.O. Box 2288
Merced, CA 95344

filed with the State Water Resources Control Board (SWRCB), a Petition for Temporary Change under Water Code section 1725, et seq. If approved, Merced Irrigation District (MID) would transfer up to 25,000 acre-feet of water (af) to the CALFED Environmental Water Account (EWA). Transferred water would then be used within the service areas of the Central Valley Project (CVP) and the State Water Project (SWP). The proposed place of use would also include the Merced River, the San Joaquin River, and the San Francisco Bay/Sacramento - San Joaquin Delta Estuary (Delta) for the purpose of preservation and enhancement of fish and wildlife resources in accordance with Water Code section 1707. If approved, the temporary change would be effective for a period not to exceed one year.

1.1 Description of the Transfer MID proposes to transfer up to 25,000 af of water under License 11395 (Application 16186) to EWA for use within the Delta and the CVP and SWP service areas. Water will be released from Lake McClure into the Merced River to augment stream flows in the Merced River and the San Joaquin River. Flow reaching the Delta may provide for protection of the fish of the Delta or the water may be pumped by either the CVP or the SWP to replace project water supplies interrupted by fishery related changes to CVP/SWP project operations. The water made available to CALFED EWA from Lake McClure will be released during October 2001 through September 2002. In the absence of the transfer, 25,000 af of water would remain in storage within Lake McClure or would have been released for use by MID customers.

1.2 **Additional Information** During the public comment period for the proposed temporary change, the SWRCB commenced an investigation of the proposed transfer in accordance with Water Code section 1726 (e). SWRCB staff reviewed the material submitted with the petition; the *Merced Water Supply Plan, Phase III Report Implementation Plan* (MWSP), dated August, 1995; the *Merced Irrigation District Groundwater Management Plan*, adopted January 9, 1997; the *Merced Groundwater Basin, Groundwater Management Plan – Final Draft*, and other evidence contained in its files. Based on this review, staff determined that MID had yet to establish a prima facie case that the proposed temporary change would not injure any legal user of water or would not unreasonably affect fish, wildlife, or other instream beneficial uses. By letter dated August 31, 2001, the SWRCB requested specific information regarding MID's proposed groundwater substitution plan and its effects on the Merced Groundwater Basin and on flows in the Merced River. In response, MID submitted the following information:

- a. A map showing the extent of the Merced Groundwater Basin and beginning and end of season groundwater elevation data for MID's wells between 1959 and April, 2001;
- b. MID's annual groundwater pumping totals from 1959 through 2000. The average annual pumping by MID from 1959 through 2000 was about 69,000 af, and the annual totals varied from about 8,000 af to 215,000 af. However, between 1993 and 2000, MID has pumped an average of about 9,800 af per year. The average pumping for the non-drought period of 1978 through 1987 was about 27,000 af per year;
- c. The projected extraction totals and locations of the wells intended for pumping due to the proposed temporary change. MID has identified 114 groundwater wells spread throughout MID's service area for additional pumping. The projected additional pumping totals for each well varies from about 47 af to 446 af;
- d. A map showing the locations of the wells proposed for additional pumping;
- e. A technical memorandum prepared by CH2M HILL discussing the potential impacts of the proposed groundwater substitution program on the Merced Groundwater Basin and flows in the Merced River. The memorandum stated that with the proposed groundwater substitution plan, MID has scheduled 33,000 af for pumping in 2001, which is below the 56,000 af of groundwater pumped on average by MID from 1970 through 1999. The memorandum also indicated that while groundwater elevations within MID fell throughout the late 1980's and early 1990's, groundwater elevations have generally risen or stabilized since then due to MID's reduced groundwater pumping. The memorandum also indicated that based on a review of groundwater modeling, the maximum rate of net groundwater discharge to the Merced River was 65 cubic feet per second (cfs), occurring in 1970, and the maximum rate of seepage from the Merced River to the groundwater aquifer was 18 cfs, occurring in 1992. The memorandum stated that CH2M HILL did "not believe that any significant change in groundwater discharge to or from the Merced River will occur as a result of pumping an additional 25,000 af dispersed throughout MID."
- f. A description of some of the measures taken by MID since 1993 to reduce groundwater pumping. The MWSP indicated that some of the factors which resulted in an increase in agricultural use of groundwater within MID during the 1970's and 1980's was the quality

and reliability/timing of surface water supplies. MID stated that it had made improvements to its surface water supply system and had installed water filtration systems. MID estimated that these improvements have resulted in an increase in the amount of surface water used on lands which had previously been irrigated with groundwater. MID estimated it had reduced groundwater pumping by about 200,000 af since 1993 as a result of these measures; and

- g. MID stated that it had not pumped any groundwater as a result of its participation in VAMP or the transfer approved by SWRCB ORDER WR 2000-14 DWR.

MID concluded that due to its recent efforts to reduce groundwater pumping and CH2M HILL's opinion that the proposed groundwater substitution plan should not have a significant effect on flows in the Merced River, the proposed groundwater substitution plan would not result in injury to other legal users of water.

2.0 BACKGROUND

2.1 Substance of MID's License License 11395 (Application 16186) authorizes the diversion to storage of up to 605,000 af of water from the Merced River between October 1 and July 1. The points of diversion for License 11395 are located at the New Exchequer Dam and the McSwain Dam. The water is used for irrigation, domestic, recreational, fish culture, and wildlife enhancement purposes within the authorized place of use identified by the "Official map of MID-1973" on file with the SWRCB.

2.2 Place of Use and Purposes of Use under the Proposed Transfer The service areas of the SWP (as shown on maps 1878-1, 2, 3, & 4 on file with Application 5629) and CVP (as shown on map 214-208-12581 on file with Application 5626) would be temporarily added to the place of use of License 11395. In addition, the Merced River, San Joaquin River and the Delta would be added to the place of use of License 11395 for the purpose of preservation and enhancement of fish and wildlife resources in accordance with Water Code section 1707. Municipal, industrial, salinity control, stockwatering, and water quality control would be temporarily added as additional purposes of use under License 11395.

2.3 Points of Rediversion under the Proposed Transfer The proposed temporary change would add the Banks Pumping Plant and the Tracy Pumping Plant as points of rediversion for License 11395.

3.0 AVAILABILITY OF WATER FOR TRANSFER

The water proposed for transfer is currently stored in Lake McClure under the conditions of License 11395. In the absence of the proposed transfer, the water would remain in storage within Lake McClure or would have been released for use within MID's service area.

Based on the additional information submitted, MID has shown the following:

1. Groundwater elevations within MID have stabilized or risen since 1993; .
2. MID has reduced its groundwater pumping by about 200,000 af since 1993; and
3. CH2M HILL has stated that it does not believe the proposed groundwater substitution plan will have a significant impact on flows in the Merced River.

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

4.0 ENVIRONMENTAL CONSIDERATIONS

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

The water proposed for transfer has already been stored under the provisions of MID's License 11395. Based on the *Agreement for Temporary Transfer of Water from Merced Irrigation District to the Department of Water Resources*, dated August 15, 2001, the release schedule for water transferred pursuant to this order will be developed in consultation with the United States Fish and Wildlife Service and the California state Department of Fish and Game to ensure that no adverse impacts to fish, wildlife, or other instream beneficial uses occur. The agreement also provides for an alternate release points to the Merced River for the water transferred under this agreement to avoid attracting spawning salmon to areas that will be dewatered upon the conclusion of the transfer.

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

5.0 COMMENTS RECEIVED ON THE PROPOSED TRANSFER/EXCHANGE

Timely comments on the proposed transfer were submitted to the SWRCB by the South Delta Water Agency (SDWA), Delta Water Users Association (DWUA), The United States Bureau of Reclamation (USBR), Stockton East Water District (SEWD), and Pacific Gas & Electric (PG&E). These comments and the SWRCB responses are summarized below.

South Delta Water Agency

SDWA offered comments on behalf of itself, as well as the Central Delta Water Agency, Alex Hildebrand and Lafayette Ranch. SDWA's comments contained numerous points, which are separately summarized and responded to below.

1. SDWA requested that the SWRCB conduct a hearing regarding the proposed temporary change prior to any approval.

SWRCB Response: The SWRCB has determined that, with the additional information submitted by MID, it has enough evidence in its files to make the required findings to approve the proposed temporary change. Per Water Code section 1727 (c) the SWRCB may make the determinations required to approve a temporary change without holding a hearing.

2. SDWA asserted that Water Code section 1629 prohibits the sale of any license or portion thereof for profit.

SWRCB Response: CDWA made a similar argument with respect to a previous proposed temporary change. See SWRCB ORDER WR 2000-16-DWR for the SWRCB's response.

3. SDWA stated that Water Code section 1725 specifies that a temporary transfer may occur if the water transferred only involves the amount of water that would have been consumptively used or stored in the absence of the change. SDWA asserts that Water Code section 1725 should be interpreted to mean that temporary changes which result in a net increase in consumptive use should not be approved by the SWRCB. Since MID proposes to pump groundwater as a result of this proposed temporary change, SDWA asserts that the transfer will result in a net increase in consumptive use by MID, and thus should not be approved.

SWRCB Response: Water Code sections 1726 (e) and 1727 (c) delineate the requirements which must be met for the SWRCB to approve a petition for temporary change. These requirements are as follows:

- 1) The water proposed for transfer would have been consumptively used or stored in the absence of the transfer;
- 2) Would not injure any legal user of water during any potential hydrologic condition that the SWRCB determines is likely to occur during the proposed change, through significant changes in water quantity, timing of diversion or use, consumptive use of water, or reduction in return flows; and
- 3) Would not unreasonably affect fish, wildlife, or other instream beneficial uses.

These conditions do not require the petitioner to maintain a constant level of consumptive use if the petitioner provides evidence which supports the necessary findings.

4. SDWA commented that SWRCB Decision 1641 (D-1641) concludes that the Merced groundwater basin is in a state of overdraft and that surface flows in the Merced River and groundwater levels within the basin are interconnected. SDWA asserted that if the proposed temporary change results in additional groundwater pumping, the increased pumping could then cause a reduction in flows in the Merced River and San Joaquin River. This reduction in flows would be an injury to legal users of water within SDWA. SDWA also noted that D-1641 requires MID to submit to the SWRCB a plan for groundwater recharge if MID used groundwater substitution while supplying its portion of flows for the Vernalis Adaptive

Management Plan (VAMP). SDWA inquired whether any such plan has been submitted to the SWRCB.

SWRCB Response: See Sections 1.2 and 3.0 of this Order for a summary of the impacts of the proposed groundwater substitution plan.

5. SDWA recommended that the petition should be denied due to a lack of environmental review. SDWA asserted that though temporary transfers are exempt from the requirements of CEQA, MID has engaged in numerous similar transfers over the past ten years and the cumulative effects of these transfers are possibly significant.

SWRCB Response: Per Water Code section 1729, temporary changes in place of use are exempt from the requirements of CEQA. See Section 4.0 of this Order for a discussion of impacts to fish, wildlife, and other instream beneficial uses.

6. SDWA noted that D-1641 requires the USBR and Department of Water Resources (DWR) to develop and implement a water level response plan with respect to diversion of water from the Delta for CVP and SWP operations. This plan is intended to ensure that diversions/ rediversions from the Delta at the Banks Pumping Plant and the Tracy Pumping Plant do not reduce water levels in the southern Delta area and thus adversely affect users of water within this area. SDWA stated that the current water level response plan was approved for one year as of October 23, 2001, and thus it is unlikely that a new plan will be in place during the initial period of the proposed transfer. SDWA recommended the petition be denied pending the development of a new water level response plan.

SWRCB Response: Rediversion of water at either Banks Pumping Plant or Tracy Pumping Plant under this Order is conditioned upon an approved water level response plan being in place. The present plan expires on October 6, 2001. No rediversion of water at either location is authorized by this Order unless an approved water level response plan is in place.

7. SDWA stated that Alex Hildebrand and Lafayette Ranch are diverters located within the southern Delta area with both appropriate and riparian rights to water within the Delta. SDWA also stated that 75 members of SDWA currently hold water appropriate water rights to flows within the Delta, 65 of those rights being senior to MID's License 11395. SDWA asserted that in D-1641 the SWRCB found that during certain times of the year the San Joaquin River inflow to the southern Delta area is often insufficient to meet the needs of users within that area. Thus, if the proposed transfer were to cause a reduction in flows in the Merced River due to increased groundwater pumping, it would harm southern Delta divertors.

SWRCB Response: Based on the additional information submitted by MID (summarized in Section 1.2 of this Order), the SWRCB has determined that the proposed groundwater substitution plan will not result in significant reduction in flow in the Merced River and thus not injure any legal user of water.

8. SDWA asserted that since the petitioner does not intend to implement conservation measures to replace the quantity of water transferred, the proposed temporary change will result in MID either directly diverting or storing an amount of water in excess of its future needs.

SDWA recommends that the SWRCB determine if MID is diverting water in excess of its needs in order to support its multiple transfers, prior to approving the proposed transfer.

SWRCB Response: As stated above, the Water Code does not require a petitioner maintain a constant level of total consumptive use as a result of a temporary transfer. Additionally, the terms of MID's License 11395 limit the quantity of water which may be diverted to storage and the quantity of water which may be withdrawn in any one season. The amount of water transferred is included in the total amount of water withdrawn for beneficial use, and therefore would not result in MID losing any portion of the value of their license as a result of nonuse.

Delta Water Users Association

DWUA joined and supported the comments submitted by SDWA. DWUA stated that it believes that if the proposed temporary change is approved it will have detrimental effects on agricultural interests within the central and southern portions of the Delta.

SWRCB Response: See above for a summary of SDWA comments and the SWRCB responses.

United States Bureau of Reclamation

USBR stated that it had reviewed a copy of an agreement between MID and DWR regarding the proposed temporary change (*Agreement for the Temporary Transfer of Water from Merced Irrigation District to the Department of Water Resources*, dated July 25, 2001) and based on that review it has determined that the proposed temporary transfer will not adversely affect the operations of the CVP. USBR requested that the order approving the proposed temporary change note that MID has entered into this agreement.

USBR also commented that the proposed place of use for the Water Code section 1707 portion of the transfer was noticed as "the Merced and San Joaquin Rivers and the Delta." USBR asserted that transfer water which enters the Delta and is not rediverted from the Delta should remain available for diversion by the CVP or other legal users of water. USBR recommended that the instream place of use should only include the Merced River and the San Joaquin River to the entrance to the Delta.

SWRCB Response: This Order contains a term which requires MID to adhere to the *Agreement for the Temporary Transfer of Water from Merced Irrigation District to the Department of Water Resources*, dated July 25, 2001. With respect to the instream place of use, the entire quantity of water transferred pursuant to this Order will be dedicated to instream use within the Merced River and the San Joaquin River to Vernalis. Beyond Vernalis, although the transferee has indicated the majority of the water will be rediverted from the Delta, the transferee may choose to use some of the transfer water for maintaining Delta standards or outflow requirements. Therefore, the inclusion of the entire Delta to the instream place of use is appropriate.

Stockton East Water District

SEWD's comments were materially similar to those made by SDWA's comment 4. SEWD also noted that D-1641 placed additional requirements of MID with respect to replenishing stored water

or foregone diversions for the SJRA when Water Right Standard Term 93 is in effect. SEWD requested that a similar term be placed in any order approving the proposed temporary change.

SWRCB Response: See Sections 1.2 and 3.0 for a discussion of the impacts of MID's groundwater substitution program. Since MID is using groundwater substitution to supply its own customers, there will be no changes in the storage quantity in Lake McClure as a result of this transfer. Therefore, no additional requirements on MID's refill of Lake McClure are required as a result of the proposed temporary change.

Pacific Gas & Electric

PG&E asserted that the proposed temporary change "may be adverse to PG&E's downstream water rights and to PG&E's contractual rights with MID."

SWRCB Response: Under the proposed transfer, MID will release the same amount of water from Lake McClure. The proposed transfer will only affect the release pattern of this water. Since the water proposed for transfer consists of stored water, PG&E does not have rights to a specific release pattern of this water by MID. With respect to PG&E's claimed contractual rights with MID, any obligations of MID under these contracts are part of private agreements between MID and PG&E and not under the jurisdiction of the SWRCB.

6.0 TRANSFER ALLOCATION

The amount authorized for transfer under the submitted petition is 25,000 acre-feet. The temporary changes in place of use, purpose of use, and points of rediversion are effective from the date of this Order through September 30, 2002. The transfer of water prior to the date of this Order or after September 30, 2002 is not authorized.

7.0 SWRCB'S DELEGATION OF AUTHORITY

On April 29, 1999, the SWRCB adopted Resolution 99-031, continuing the delegation of authority to approve petitions for temporary change to the Chief of the Division of Water Rights, provided the necessary statutory findings can be made.

8.0 CONCLUSIONS

The SWRCB has adequate information in its files to make the evaluation required by Water Code section 1727; and therefore I conclude that, based on the available evidence:

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

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change in the place of use under the Merced Irrigation District's Licensed Application 16186 for the transfer of up to 25,000 af of water is approved.

All existing terms and conditions of License 11395 remain in effect, except as temporarily amended by the following provisions:

1. The transfer/exchange is limited to the period commencing on the date of this Order and continuing through September 30, 2002.
2. For the purpose of transferring up to 25,000 af of water, the place of use under License 11395 is temporarily changed as follows:

MID's Licensed Application 16186 -- The authorized place of use is expanded to include the service areas of the SWP (as shown on maps 1878-1, 2, 3, & 4 on file with Application 5629) and CVP (as shown on map 214-208-12581 on file with Application 5626). In addition, the Merced River, San Joaquin River and the Delta are added to the place of use of License 11395 for the purpose of preservation and enhancement of fish and wildlife resources in accordance with Water Code section 1707. The entire quantity of water transferred pursuant to this Order will be dedicated to instream use within the Merced River and the San Joaquin River to Vernalis. Water which is not exported from the Delta for use within the SWP or CVP may be dedicated for instream use within the Delta.

3. Municipal, industrial, salinity control, stockwatering, and water quality control are temporarily added as additional purposes of use under License 11395.
4. The Banks Pumping Plant and the Tracy Pumping Plant are temporarily added as additional points of diversion under License 11395. Water diverted at either the Banks Pumping Plant or the Tracy Pumping Plant pursuant to with this order shall comply with the standards set forth in Table 1, 2, and 3 of Water Right Decision 1641. Additionally, diversion of water pursuant to this order shall comply with the current Water Level Response Plan submitted by DWR and USBR and approved by the Executive Director of the SWRCB. Since the current Water Level Response Plan expires on October 6, 2001, no diversion of water at either the Banks Pumping Plant or the Tracy Pumping Plant pursuant to this Order shall be allowed unless a Water Level Response Plan approved by the Executive Director of the SWRCB is in place.
5. MID shall adhere to the *Agreement for the Temporary Transfer of Water from Merced Irrigation District to the Department of Water Resources*, dated July 25, 2001.

6. Within 60 days of the completion of the transfer/exchange, but no later than February 1, 2003, the Licensee shall provide the Chief of the Division of Water Rights a report describing the use of the water transferred pursuant to this Order. The report shall include a summary showing the monthly amounts of water actually transferred under this Order.

The report should include the following information:

1. The monthly amounts of water released from Lake McClure;
 2. The monthly amounts of water rediverted at either Banks Pumping Plant or Tracy Pumping Plant;
 3. The locations of the groundwater wells used for groundwater substitution as a result of this transfer and the monthly amounts of water pumped from each well;
 4. The beginning and end of season groundwater elevations in each of the wells specified in number 3. referenced above; and,
 5. The general locations where water transferred under this Order was put to use.
7. 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 SWRCB 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 SWRCB 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.

8. 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 (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 change, the Licensee shall obtain authorization for an incidental take permit prior to construction or operation. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this order.
9. 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.



Edward C. Anton, Chief
Division of Water Rights

Dated: OCT 05 2001