

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF WATER RIGHT PERMIT 13856 (APPLICATION 18085)
OF PLACER COUNTY WATER AGENCY**

**PETITION FOR TEMPORARY CHANGE INVOLVING THE TRANSFER OF UP TO
21,053 ACRE-FEET OF WATER TO EAST BAY MUNICIPAL UTILITY DISTRICT**

SOURCES: Duncan Canyon, North Fork American River, Middle Fork American River,
Rubicon River

COUNTIES: Placer and Sacramento

ORDER APPROVING TEMPORARY CHANGES

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 OVERVIEW

On May 24, 2022, Placer County Water Agency (Placer CWA or Petitioner) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a petition for temporary change (Petition) involving the transfer of water under water right Permit 13856 (Application 18085), pursuant to Water Code section 1725 et seq. Under the proposed transfer, up to 21,053 acre-feet (af) of water will be transferred to East Bay Municipal Utility District (EBMUD).

1.1 BACKGROUND

The Middle Fork American River Project (MFP)

Placer CWA owns and operates the MFP and holds appropriative water rights for the MFP under Permits 13856 and 13858 (Applications 18085 and 18087). The permits allow for a total direct diversion amount of 2,025 cubic feet per second (cfs) from November 1 of each year to July 1 of the succeeding year from North Fork American River and for a combined diversion to storage of 315,000 af per annum of MFP water held in two storage reservoirs (French Meadows Reservoir and Hell Hole Reservoir). The MFP is a multi-purpose project designed to conserve waters of the Middle Fork American River (MFAR), the Rubicon River, and tributaries for domestic, municipal,

industrial, recreational, and irrigation uses, as well as for hydroelectric power generation. The MFP's principal project features include French Meadow Reservoir and Hell Hole Reservoir (French Meadows Reservoir is located on the Middle Fork American River and Hell Hole Reservoir is located on the Rubicon River), five associated diversion dams (Duncan, North Fork Long Canyon, South Fork Long Canyon, Middle Fork Interbay, and Ralston Afterbay), and five power plants (French Meadows, Hell Hole, Middle Fork, Ralston, and Oxbow).

Placer CWA has determined that it has at least 21,053 af of surplus water stored in the MFP. The determination was reached by reviewing current MFP reservoir storage levels, projected inflow, and modeled project operations data for 2022. As of May 23, 2022, Placer CWA had approximately 271,000 af of water (102 percent of average year-to-date) held in storage in its MFP reservoirs.

Placer CWA would be solely exercising Permit 13856 for the proposed transfer of up to 21,053 af of water to EBMUD.

East Bay Municipal Utility District

EBMUD is a public utility formed in 1923 under the Municipal Utility District Act of 1921. EBMUD's service area encompasses 332 square miles in Alameda and Contra Costa counties. According to information provided in the Petition, EBMUD is interested in augmenting its water supply with Placer CWA's transfer water because the ongoing drought has resulted in low water supply storage levels in Pardee Reservoir and EBMUD's request for Central Valley Project (CVP) dry-year contract deliveries only resulted in Public Health and Safety allocations. The additional water would supplement EBMUD's customer demands during the EBMUD-declared, district-wide Stage 2 Drought.

2.0 TRANSFER TYPE

Petitioner proposes to make water available by releasing water that would otherwise be stored in Hell Hole Reservoir and French Meadows Reservoir under Permit 13856.

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 if the transfer were not to occur. The transfer proposed by Placer CWA involves water currently stored in Hell Hole Reservoir and French Meadows Reservoir. Following the transfer, the reservoirs may have additional storage capacity that will result in diversions that would not occur in the absence of the transfer, referred to as a reservoir refill. Reservoir refill has the potential to injure other legal users of water if it occurs when the

Delta is in balanced conditions¹ or there is limited streamflow in the channel from which the water is being transferred. The Draft Technical Information for Preparing Water Transfer Proposals (Draft Technical Information), dated December 2019, prepared by the DWR and the U.S. Bureau of Reclamation (Reclamation) describes data and criteria for ensuring that reservoir refill does not impact other users of water, including the CVP and State Water Project (SWP). Section 4 of the Draft Technical Information and Appendix B outline the information used to develop refill criteria.

Refill criteria developed in conjunction with Reclamation can ensure that future refill of the reservoir space made available in Hell Hole Reservoir and French Meadows 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

To facilitate the transfer, Placer CWA proposes to temporarily add the following to Permit 13856:

- 1) The Freeport Regional Water Authority Intake (Freeport Intake) as a point of rediversion, located within SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected Section 11, T7N, R4E, MDB&M;
- 2) Service area of EBMUD as an additional place of use.

Placer CWA proposes to transfer up to 21,053 af of water (“transfer water”) currently stored in the MFP, which includes Hell Hole Reservoir on the Rubicon River and French Meadows Reservoir on the Middle Fork American River, to EBMUD. The transfer water would be released from Hell Hole Reservoir, through Middle Fork Powerhouse, and rediverted to Ralston Afterbay and released to the Middle Fork American River via the Oxbow Powerhouse. Water from Oxbow Powerhouse flows down the Middle Fork American River to the North Fork American River and into Folsom Reservoir. Water from French Meadows Reservoir would be conveyed to Hell Hole Reservoir via the French Meadows – Hell Hole Tunnel for release from Hell Hole Reservoir.

¹ The Delta is in balanced conditions when the SWP and 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.

Subsequent release of the transfer water at Folsom Reservoir would be scheduled by Reclamation in cooperation with EBMUD so that the proposed transfer would not disrupt normal CVP and SWP operations and would adhere to all required flow standards for the Lower American River (LAR).

After release from Folsom Reservoir, the transfer water would flow down the lower American and Sacramento Rivers and be rediverted at the Freeport Intake, and then delivered to the EBMUD service area.

For the purposes of the proposed transfer, Placer CWA will be solely exercising Permit 13856, which is described in Section 3.2. In absence of this transfer, the total 21,053 af of water would remain in storage in Placer CWA's MFP reservoirs.

3.2 Summary of Placer CWA's Permit

Permit 13856, which has a priority date of April 7, 1958, authorizes direct diversion and combined storage/consumptive use of MFP water as follows: (a) direct diversion of 1,225 cfs from November 1 of each year to July 1 of the succeeding year from North Fork American River; (b) 25,000 af by offstream storage, at a maximum rate of diversion of 400 cfs, from November 1 of each year to July 1 of the succeeding year from Duncan Creek to French Meadows Reservoir; (c) 95,000 af by storage from November 1 of each year to July 1 of the succeeding year from the Middle Fork American River at French Meadows Reservoir; and (d) 129,000 af by storage from November 1 of each year to July 1 of the succeeding year from the Rubicon River at Hell Hole Reservoir. The authorized purposes of use include irrigation, municipal, industrial, recreational, and incidental domestic use. The authorized place of use is shown on Placer CWA's map set dated July 31, 1996 and as amended by an order dated May 24, 2000. Permit 13856 expired on December 1, 2007 and on January 7, 2008, Placer CWA filed a petition for extension of time. The petition for extension of time is currently pending before the State Water Board.

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 3, 2022 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 20, 2022.

Timely comments on the transfer were received from: 1) the California Department of Fish and Wildlife (CDFW); 2) the Central Delta Water Agency (CDWA); and

3) Reclamation. Petitioner provided responses to timely comments by letter and email to the Division dated July 5, 2022; the responses are available in the record for Permit 13856.

4.1 Comments of CDFW

By letter dated June 16, 2022, CDFW commented on the proposed transfer. CDFW stated concerns over the potential cumulative adverse impacts on the sensitive anadromous and/or resident fisheries within the LAR from water transfer changes to the quantity, timing, and duration of flow. CDFW indicated that releases out of the Folsom Reservoir can substantially influence conditions, including temperature, in the LAR. Similarly, CDFW stated increasing reservoir releases in spring may encourage emigration of juvenile salmonids and improve survival whereas a transfer completed in summer or fall may cause rearing steelhead to redistribute to less desirable habitats. CDFW recommended working closely with Reclamation and regulatory agencies on optimizing releases to provide stable flows across summer and fall months at a targeted release rate that minimizes warming in Lake Natoma.

CDFW indicated the alteration of volume, timing, and temperature of stream flow associated with the marginal increase of water released into the MFAR and, ultimately, the North Fork American River under this transfer could impact foothill yellow-legged frog (FYLF) during vulnerable life stages. CDFW stated tadpole rearing sites require protection from unpredictable scouring flows and appropriate ramp-down rates to prevent stranding and desiccation, and that lower water velocity and shallower water depth habitats are more suitable for tadpole rearing sites. CDFW acknowledges that the Placer CWA petition states the release of transfer water from Oxbow Powerhouse will maintain the range of flows that occur normally in the MFAR in summer months while maintaining ramping rates and conditions consistent with the MFAR Federal Energy Regulatory Commission (FERC) Project No. 2079-069 license conditions. However, CDFW requested that the release of transfer water also comply with Conditions 3(E) and 4(A) of the State Water Board's 2019 Water Quality Certification (WQC) for the MFAR Project to minimize impacts on aquatic and terrestrial species, including the FYLF. If the transfer schedule does not follow WQC Condition 3(E), CDFW further requested that transfer release ramping rates should be developed in coordination with CDFW and that Placer CWA should conduct pre, during, and post-transfer FYLF and temperature monitoring.

Placer CWA Response:

Regarding CDFW's concerns about the effect of the transfer on flow and temperature conditions in the LAR, Placer CWA indicated that transfer would increase the inflow of cold water into Folsom Reservoir and, therefore, increase the cold/cool water resources available for release into the LAR. In addition, Placer CWA stated that the magnitude of releases from Folsom Reservoir for the transfer in July, August, and September would

be low and steady, and much lower in magnitude than Reclamation's projected baseflow releases from Folsom for those months. Placer CWA concludes that the temperature benefits and steady, low-flow releases would not negatively affect sensitive anadromous fish species habitat in the LAR below Folsom Reservoir.

Regarding CDFW's concerns about the effects of the transfer on FYLF, Placer CWA describes ongoing surveys conducted as part of the agency's new FERC license monitoring plans. Placer CWA states that FYLF are found upstream of Ralston Afterbay and Oxbow Powerhouse, but are not present on the mainstem MFAR and North Fork American River downstream of Oxbow Powerhouse, except anecdotally in the vicinity of tributary streams with FYLF populations present, such as North Fork, Middle Fork American River, Otter Creek, Gas Canyon Creek, and American Canyon Creek.

Placer CWA states that the transfer water, once released from Hell Hole Reservoir, moves through a series of tunnels, penstocks, powerhouses, and afterbays as it travels to Oxbow Powerhouse. Placer CWA, therefore, concludes that FYLF upstream of Ralston Afterbay would not be affected by the transfer because the water is not conveyed in the streams. Placer CWA also states that operations in the MFAR and North Fork American River downstream of Oxbow Powerhouse, including baseline MFP releases for July through September and conditions in the agency's FERC license (Project No. 2079-069), are designed to balance resource interests as negotiated and supported by multiple stakeholders including CDFW.

Finally, regarding CDFW's request that, in addition to conditions in Placer CWA's FERC license, the release of transfer water also comply with Conditions 3(E) and 4(A) of the State Water Board's 2019 WQC for the MFAR Project, Placer CWA identifies that the referenced conditions from the WQC are already incorporated in the FERC license (Project No. 2079-069). Therefore, Placer CWA concludes that the request is already being satisfied.

State Water Board Response:

The Order is conditioned to require that Placer CWA coordinate with Reclamation regarding the transfer and ongoing real-time operations of the CVP, and that Placer CWA notify the Deputy Director for Water Rights of any concerns and data identified by Reclamation that the transfer will result in increased risks of negative impacts to the cold-water pool at Folsom Reservoir. As summarized in the FERC Order Issuing New License for Project No. 2079-069 dated June 8, 2020, Placer CWA prepared the *Supplemental Biological Assessment on the Potential Effects of the Placer County Water Agency's Middle Fork American River Project on Sierra Nevada Yellow-legged Frog* (Supplemental BA). The transfer is conditioned to require compliance with all existing regulatory requirements, which include conditions in Placer CWA's FERC license for Project 2079-069. CDFW's request that Placer CWA comply with Conditions 3(E) and 4(A) of the State Water Board's 2019 WQC for the MFAR Project is already

being met, as those conditions are functionally identical to conditions in the FERC license for Project 2079-069.

4.2 Comments of CDWA

By letter dated June 20, 2022, 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 D-1641 requirements, without temporary urgency changes, will be met.
2. CDWA believes that the release of water from storage is not necessarily water to which others are entitled in preference to Delta landowners' diversion 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. CDWA believes that statements made in the petition characterizing the supply to be transferred as "stored water" should be supported with a demonstration that the water was, indeed, stored within the terms and conditions of Placer CWA's permits.
3. CDWA describes that Placer CWA's petition indicates the refill agreements for their 2020 and 2021 transfers have not been met due to dry conditions. CDWA suggests that the State Water Board limits the current transfer volume to water that is surplus to the present and future needs within the Delta Watershed, including the needs of fish, wildlife, and groundwater sustainability.
4. CDWA believes the State Water Board has prioritized SWP and CVP deliveries for export over the Board's obligation to protect the Public Trust.
5. CDWA suggests that the transferred water be allowed to flow through the Delta to contribute to outflow and water quality standards, and that the point of rediversion should occur at EBMUD's intertie with Contra Costa Water Agency at either Victoria Canal, Rock Slough or EBMUD's intake at Werner Cut.
6. CDWA believes that the State Water Board analyzes petitions for temporary changes 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.

Placer CWA and State Water Board Response:

1. The April 4, 2022 TUCP approval Order applies only to Reclamation and DWR water rights and does not involve Placer CWA's Permit 13856. 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 2022 drought emergency. Reclamation and DWR did not file the TUCP to address potential impacts from Placer CWA's proposed transfer. Therefore, the State Water Board cannot deny Placer CWA'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.

In Placer CWA's July 5 response, Placer CWA indicated that the Petition is consistent with §81-5(a) of the Placer CWA Act. Pursuant to §81-5(a) of the Placer CWA Act, on June 2, 2022, the Placer CWA Board of Directors adopted Resolution No. 22-14 declaring a surplus of MFP water for 2022. Placer CWA claimed that all water stored in Placer CWA's MFP reservoirs pursuant to water right Permit 13856 prior to June 30, 2022, was lawfully diverted to storage and consistent with the Water Code. Placer CWA further indicated that absent the proposed transfer, the water would remain in storage for future use by Placer CWA and would not be available to other downstream water users.

As discussed in Section 7.1 below, the State Water Board believes adequate information has been included in the Petition, and Placer CWA's Reports of Permittee for Permit 13856, to indicate that Placer CWA has adequate stored water to allow a transfer of up to 21,053 af to EBMUD.

3. Reclamation requires parties proposing stored water transfers to develop a reservoir refill agreement to ensure that the refill of stored water that is transferred will not adversely affect downstream water users if the refill is done at a time when other downstream legal users of water could have utilized reservoir releases. Reclamation refill criteria generally restrict transferees' refill periods to when the refill quantity is in excess of the needs of any legal user of water downstream of the point of diversion. Reports of Permittee provide diversion and use information as required by California Code of Regulations (CCR), title 23, section 925, which requires specific accuracy standards in measurement and

certification by the Permittees of meeting those standards. As discussed in Section 7.1 below, the State Water Board has no reason to question the validity of the recent storage quantities under Permit 13856 reported by Placer CWA.

4. Permit 13856 is not subject to Reclamation and DWR's 2021 TUCP request to change terms and conditions of CVP and SWP water rights.
5. Permit 13856 does not require, and there are no other State Water Board orders in place that require, Placer CWA to release (and abandon) its water previously diverted to storage to provide water for downstream Delta diverters.
6. 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. The State Water Board believes each transfer will be evaluated appropriately as required pursuant to Water Code section 1725 et. seq.

4.3 Comments of Reclamation

By letter dated June 17, 2022, Reclamation commented on Placer CWA'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 American River and CVP.

1. The transfer shall be contingent on a refill agreement being signed and adopted between Placer CWA and Reclamation.
2. The transfer shall be carried out in compliance with all existing regulatory constraints in the Delta and shall not cause harm to other legal water users or impact water quality, including the conditions contained in the State Water Board's April 4, 2022 Order for the Temporary Urgency Change Petition (TUCP) submitted jointly by Reclamation and California Department of Water Resources.
3. Placer CWA shall coordinate with Reclamation on the Folsom operations schedule as part of on-going real-time operations for the CVP. No water can be transferred unless Reclamation concurs that the transfer will not result in increased risks of negative impacts to the cold-water pool at Folsom Reservoir resulting from incoming transfer water.
4. Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.
5. If necessary, EBMUD will execute a Warren Act contract with Reclamation prior to transfer of water under Permit 15836 into Folsom Reservoir.

Placer CWA Response:

Placer CWA responded to the first three numbered items above as follows.

1. Placer CWA acknowledged the need for a refill agreement with Reclamation and stated that the Order should identify general principles for refill terms as well as the need for proof of injury or impact if claimed. Placer CWA stated that they should not be obligated to enter into a refill agreement with DWR since the transfer releases occur from reservoirs upstream of a CVP facility and because it is the responsibility of Reclamation to coordinate and enter into agreements that do not conflict or violate the Coordinated Operation Agreement (COA).
2. Placer CWA requested that the Order include similar “no injury” conditions as was used in prior orders for similar transfers, consistent with Water Code section 1727.
3. Placer CWA agreed to closely coordinate the transfer releases with Reclamation. Rather than the prior concurrence requested by Reclamation, Placer CWA requested Reclamation provide evidence of a potential injury or impact.

State Water Board Response:

To avoid injury to the water rights and operations of the CVP, this Order includes a requirement for Placer CWA to obtain a reservoir refill agreement with Reclamation prior to initiating the transfer. Additionally, the Order includes a condition requiring Placer CWA to coordinate with Reclamation during the transfer period and to transmit to the Deputy Director for Water Rights any concerns and data raised by Reclamation regarding negative impacts to the cold water pool at Folsom. Further, this Order includes a condition that requires EBMUD to ensure that any required Warren Act contract with Reclamation is executed prior to transfer of water into Folsom Reservoir. This Order also includes conditions requiring that the transfer take place only during balanced conditions in the Delta.

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 absence of the proposed transfer, Placer CWA indicated the transfer water would have remained in storage in Hell Hole Reservoir and French Meadows Reservoir. Placer CWA indicated that its combined end-of-year storage target is 132,683 af in 2022 without the proposed transfer.

The State Water Board conducted an independent evaluation of its records. The combined annual use under Permit 13856 was 25,384 af, 24,435 af, 25,509 af, 25,189 af, 48,438 af, and 70,499 af during 2016, 2017, 2018, 2019, 2020 and 2021, respectively. The maximum authorized storage is 249,000 af under Permit 13856. According to the Petitioner, in 2022 the combined end-of-year storage in the absence of the transfer would be 132,683 af. The end-of-year storage target with the transfer is 111,630 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 Hell Hole Reservoir and French Meadows Reservoir pursuant to Permit 13856. In the absence of the proposed transfer, the water would remain in storage for future use by Placer CWA and would not be available to other water users. Further, the release of the water from storage at Hell Hole Reservoir and French Meadows 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 the refill of Hell Hole Reservoir and French Meadows Reservoir resulting from the proposed transfer. Pursuant to the criteria, any refill occurring during balanced conditions in the Delta is subject to repayment to Reclamation, according to a schedule agreed to by Placer CWA and Reclamation.

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

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 Control Board (Central Valley Water Board) with a copy of the petition in accordance with CCR, title 23, section 794, subdivision (c). 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. CDFW provided comments regarding water quality and FYLF, which are discussed in Section 4.2 of this Order; the conditions of the Order are consistent with avoiding the potential impacts raised by CDFW.

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 be subject to all applicable federal and State ESA requirements, including applicable Biological Opinions, Incidental Take Permits, court orders, and any other conditions imposed by other regulatory agencies applicable to diversions. The transfer will also be subject to the conditions of the FERC license for Project No. 2079-069, which includes the Placer CWA facilities relied upon for the transfer.

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 petition filed for temporary change for the transfer of up to 21,053 acre-feet (af) of water under Placer County Water Agency's (Placer CWA or Petitioner) Permit 13856 is approved.

All existing conditions of Permit 13856 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 to one year from the date of this Order. Reservoir releases will be limited to the date of this Order through September 30, 2022.
2. The following point of diversion is temporarily added to Permit 13856:

Freeport Regional Water Authority Intake (Freeport Intake):

California Coordinate System of 1983 (CCS83), Zone 3, North
2,360,440 feet and East 6,273,500 feet, being within SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected
Section 11, T7N, R4E, MDB&M.

3. The place of use under Permit 13856 is temporarily expanded to include the service area of East Bay Municipal Utility District (EBMUD) as shown in Attachment C submitted with the Petition.
4. During the period of transfer, Petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies, including applicable conditions in the Federal Energy Regulatory Commission license issued for Project No. 2079-069. 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. Transferrable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.
7. Diversion of water is subject to compliance by Reclamation with all applicable Biological Opinions and court orders and any other conditions imposed by regulatory agencies applicable to these operations.

8. Petitioner shall ensure that EBMUD has executed a Warren Act contract with Reclamation prior to transferring water into Folsom Reservoir under this Order, unless Reclamation states a Warren Act contract is not required. Petitioner shall provide confirmation from Reclamation and EBMUD 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.
9. Water may not be transferred through the Freeport Intake until Placer CWA has executed a Refill Agreement between Reclamation and Placer CWA to address potential refill concerns in Hell Hole Reservoir and French Meadows Reservoir. Documentation that an acceptable Refill Agreement has been agreed to by Reclamation and Placer CWA shall be submitted to the Division within 15 days of the date of execution of the agreement. The documentation shall include as an attachment all information identified by Section 4 and Appendix B of the Draft Technical Information that was used during development 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. Placer CWA 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 Reclamation.
10. Petitioner must coordinate with Reclamation on the Folsom operations schedule as part of on-going real-time operations for the CVP. Petitioner shall transmit to the Deputy Director for Water Rights any concerns and data identified by Reclamation that the transfer will result in increased risks of negative impacts to the cold water pool at Folsom Reservoir resulting from incoming transfer water. The Deputy Director may modify the conditions of this transfer to address the risk of negative impacts to the cold water pool at Folsom Reservoir.
11. By December 15, 2022, Placer CWA shall provide 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 the water delivered to EBMUD pursuant to this Order;
 - b. The average daily release rates and corresponding volumes of water released from Hell Hole Reservoir and French Meadows Reservoir as a result of this transfer (reported on a daily basis);

- c. For each day of the transfer, the average daily release rates and corresponding volume of water released from Folsom Reservoir as a result of this transfer (reported on a daily basis);
- d. For each day of the transfer, the daily average rate of water diverted and daily volume of water diverted at the Freeport Intake pursuant to this Order;
- e. The daily amounts of water delivered to EBMUD pursuant to this Order;
- f. The amount of the Refill Reservation as defined in the Refill Agreement (reported on a daily basis); and
- g. Recognizing that reservoir refill will occur after the transfer ends, monthly reporting of reservoir refill is not required during the transfer period. However, Placer CWA 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 or Reclamation and has not been provided to Placer CWA in time for inclusion in a monthly or annual report, Placer CWA shall provide the information to the Deputy Director for Water Rights within 30 days of receipt.

12. 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.
13. 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.
14. 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.

15. 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
JULÉ RIZZARDO, for

*Erik Ekdahl, Deputy Director
Division of Water Rights*

Dated: July 22, 2022