

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 THE MERCED IRRIGATION DISTRICT**

**PETITION FOR TEMPORARY CHANGE
IN PLACE OF USE INVOLVING THE TRANSFER
OF UP TO 25,000 ACRE-FEET OF WATER**

SOURCE: Merced River

COUNTIES: Mariposa and Merced

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On June 15, 2023, the 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 section 1725 et seq. Pursuant to the petition, MID proposes to transfer up to 25,000 acre-feet (af) of water from August 1 through November 1, 2023 to the following agencies: Chowchilla Water District, Le Grand-Athlone Water District, Sphere of Influence (SOI) Landowners, Turner Island Water District, East Side Water District, Lone Tree Mutual Water Company, and Red Top Area, (collectively "Transferees"). Temporary changes under Water Code section 1725 may be effective for a period of up to one year.

1.1 Description of the Transfer

MID proposes to transfer up to 25,000 af of stored water under its License 2685 to irrigate land that is currently not included as a place of use under the license. MID is petitioning to increase the place of use covered by License 2685 in order to supply previously stored surface water for use on Transferees' land. The majority of the SOI Lands have historically received surface water from MID during years that MID's Board of Directors determines water is available under MID's pre-1914 appropriative right claims, provided that adequate natural flow is available from the Merced River. During months when surface water is not available under the pre-1914 appropriative right claims for delivery to the SOI Lands, the individual landowners meet their demands

through alternate supplies, such as groundwater. The landowners in the nearby water districts would also meet demands through alternate supplies.

The Sustainable Groundwater Management Act (SGMA) directs the Department of Water Resources (DWR) to develop groundwater basin priorities and identify groundwater basins and subbasins in conditions of critical overdraft. The proposed additional place of use overlies the Merced Subbasin and the Turlock Subbasin, which have been identified as high-priority for the purposes of SGMA implementation. The Merced Subbasin has also been designated as experiencing critical overdraft. MID estimates that by August 25, 2023, natural flow from the Merced River per MID's pre-1914 water right will not be available for SOI Lands for the remainder of the year.

In 2007 and 2011, MID petitioned and received approval from the Division for a temporary water transfer to deliver surface water to SOI Lands under License 2685. In 2016, MID petitioned to deliver surface water to SOI Lands as well as provide surface water supplies to the portions of Le Grand-Athlone Water District, Lone Tree Mutual Water Company, East Side Water District, San Luis Canal Company, and Chowchilla Water District located in Merced County. In 2017, MID petitioned to deliver surface water to the same agencies as in the 2016 transfer, with the exception of the San Luis Canal Company. In 2018, MID petitioned to deliver surface water to the same agencies as the 2017 transfer with the addition of the Red Top Area.

In the absence of the proposed temporary change, the 25,000 af of water would remain in storage within Lake McClure pursuant to MID's License 2685.

1.2 Reservoir Reoperation

The transfer involves water currently stored in Lake McClure. Refill criteria developed in coordination with DWR and the U.S. Bureau of Reclamation (Reclamation) are required to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the State Water Project (SWP) or the Central Valley Project (CVP). Pursuant to the criteria, any refill occurring during balanced conditions in the Sacramento-San Joaquin Delta Estuary¹ (Delta) is subject to repayment of water to DWR and Reclamation according to a schedule agreed to by MID, DWR, and Reclamation.

¹ The Delta is considered to be in balanced conditions when the SWP and CVP agree that releases from the 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.

This transfer only involves release of water from storage in Lake McClure for redirection through the Northside Canal and the Main Canal, upstream of the Crocker-Huffman Diversion Dam. Therefore, flow in the Merced River downstream of the Crocker-Huffman Diversion Dam will not be impacted by the proposed transfer and will be identical to what it would have been absent the proposed transfer. MID will manage releases from Lake McClure and Crocker-Huffman Diversion Dam in compliance with its water rights, downstream release obligations, and other regulatory requirements.

2.0 BACKGROUND

2.1 Substance of MID's License

Water Rights License 2685

License 2685 was issued to MID on August 11, 1944, pursuant to Application 1224, which has a priority date of March 26, 1919. 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 and throughout the remainder of the year for domestic purposes. License 2685 also allows the diversion from the Merced River to storage of 266,400 af per annum (afa) in Lake McClure 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 redirection downstream of New Exchequer Dam – Merced Falls Diversion Dam for the Northside Canal and Crocker-Huffman Diversion Dam for the Main Canal. Water redirected through the Northside Canal and the Main Canal is used for irrigation and domestic purposes on 164,395 gross acres within the boundaries of MID, and municipal purposes on 1,900 acres within the Mariposa Town Planning Area (MTPA). Effective February 16, 1995, License 2685 was modified 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 MTPA. Storage under License 2685 is reduced by the amount of water diverted to the MTPA, up to a maximum of 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 MTPA 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 redirection and modify the place of use resulting from MID's consolidation with the El Nido Irrigation District. The new point of redirection is located approximately 24 miles downstream of New Exchequer Dam on Duck Slough. Water redirected through Duck Slough is used for irrigation purposes on 9,418.6 acres within the boundaries of El Nido Irrigation District.

2.2 Proposed Temporary Changes

In order to facilitate the transfer, the service areas of Chowchilla Water District, Le Grand-Athlone Water District, SOI Landowners, Turner Island Water District, East Side Water District, Lone Tree Mutual Water Company, and Red Top Area would be temporarily added to the place of use of License 2685 to facilitate the temporary water transfer to the participating Transferees. The location of these agencies is shown on the map submitted with the petition titled “Merced Irrigation District Map to Accompany Petition for Temporary Transfer under License 2685 (Application 1224) Proposed Addition to Place of Use”.

2.3 Water Available for Transfer

MID proposes to deliver previously stored surface water to the Transferees. The quantity of surface water proposed to be delivered by MID to the Transferees will be made available by releases of up to 25,000 af from water currently stored in Lake McClure. This transfer of previously stored surface water will involve the delivery of water to Transferees and refill of the reservoir, which normally occurs during periods of high runoff. Under the proposed transfer, releases of stored water would be increased compared to conditions in the absence of the proposed temporary transfer.

3.0 PUBLIC NOTICE AND COMMENTS ON THE PROPOSED TEMPORARY CHANGE

On June 23, 2023, public notice of the petition for temporary change was provided by posting on the Division’s website and via the State Water Board’s electronic subscription mailing list and mailed via first-class mail to interested parties. Timely comments regarding the proposed temporary change were submitted by Reclamation, DWR, and Mr. Anthony M. Roggero. These comments and the State Water Board’s response are briefly summarized below.

3.1 Comments of Reclamation and DWR

Reclamation and DWR provided similar comments during the public notice period on July 12, 2023 and July 21, 2023, respectively. Reclamation and DWR stated that a refill agreement is necessary in order for the proposed temporary change to not have an adverse impact on the water rights or operations of the CVP and SWP. Reclamation and DWR requested that MID enter into a reservoir refill agreement containing conditions, criteria, and procedures that ensure that CVP and SWP operations and water rights are not adversely impacted by future refill following the release of transfer water. The agreement must protect CVP and SWP water rights and operations from injury regarding Reclamation’s ability to meet all applicable water quality standards cited in Permits 16597, 20245, and 16600 (Applications 14858A, 14858B, and 19304) for

New Melones Reservoir pertaining to the San Joaquin River and the Delta. The agreement will also protect Reclamation's water right Permits 11315, 11316, 11967, 11968, 11969, 11971, 11973, 12364, 12721, 12722, 12723, 12727, 12860, and 15149 (Applications 13370, 13371, 5628, 15374, 15375, 16767, 17374, 17376, 5626, 9363, 9364, 9368, 15764, and 21542) and operations for the Jones Pumping Plant, including Reclamation's ability to meet San Joaquin River flow and Old and Middle River flow requirements of the Biological Opinions issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service for the long-term operations of the CVP and SWP.

Reclamation is currently reevaluating the language contained in refill agreements that have conditioned refill by various transferors. Reclamation stated it therefore reserves the right to propose new language in refill criteria relative to any and all future transfer proposals.

DWR recommended that MID submit a complete transfer proposal using DWR's Water Transfers Information Management System online database <https://info.water.ca.gov/wtims/>. DWR also requested that MID provide them a copy of all reports pursuant to the State Water Board order and monthly refill accounting reports after the transfer is complete.

State Water Board Response:

As stated in Section 1.2 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. The transfer is conditioned that MID is subject to a refill criteria agreement with DWR and Reclamation ensuring that future refill of any storage space in Lake McClure created by the transfer will not reduce the amount of water that DWR, Reclamation, or other water users, could divert under their water rights. This Order requires MID to comply with the refill criteria.

3.2 Comments of Anthony M. Roggero

By email dated July 14, 2023, Anthony M. Roggero commented on the proposed transfer and followed up on his comments per a phone conversation on August 7, 2023. Mr. Roggero stated that MID informed him in 2022 that, due to drought conditions, his groundwater allocation would be limited to 1.1 acre-feet per year (afy). He indicated that the 1.1 afy limit is inadequate for his community and should be increased. He noted that due to an influx of atmospheric rivers in early 2023, MID subsequently announced unlimited surface water availability to its water users. Mr. Roggero requested that the State Water Board, in future years, ensure that no restrictions are imposed on current water users whenever water is transferred from MID to external districts.

State Water Board Response:

The scope of the requested change is a transfer involving the release of 25,000 af of water from Lake McClure, which would have been consumptively used or stored in the absence of the transfer. MID states that it will continue to make available the same surface water supplies 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 on the Merced River below the inlet to its Main Canal. Therefore, the water transfer is not anticipated to cause injury to downstream legal users of water.

The State Water Board shall not place conditions on a temporary change to avoid or mitigate impacts not caused by the temporary change (Water Code section 1728 (e)). MID's surface water commitment to its water users should not be impacted by this transfer. In addition, groundwater allocations are made by the Groundwater Sustainability Agency for the underlying subbasins, which is a process that occurs independently from this transfer. There is not a correlation between the groundwater allocations and MID's surface water deliveries to its customers. Therefore, the State Water Board cannot condition MID's transfer for current or future conditions as requested.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Water Code section 1729 exempts petitions for temporary changes involving a transfer of water from the requirements of CEQA. The State Water Board will issue a Notice of Exemption for this project following the issuance of this Order.

5.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

Pursuant to Water Code section 1725, "a permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would involve only the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses." (Wat. Code, §1725 and 1725.5.)

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 return flows.
- b. The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(Wat. Code, § 1728, 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, § 1725.5.) “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 1728, subdivision (b)(2).

6.0 REQUIRED FINDINGS OF FACT

6.1 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, 1725.5, 1726.) Water Code section 1725.5 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. As of August 13, 2023, Lake McClure held 886,665 af of water in

storage, which is 87% of the reservoir's capacity and 143% of the historical average for this date. The petition states that in the absence of the proposed change, the 25,000 af of water proposed for transfer would remain in storage in Lake McClure. Under License 2685, MID can both directly divert and collect water to storage. MID would not provide water by direct diversion under License 2685 to the Transferees.

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.

6.2 No Injury to Other Legal Users of the Water

Before approving a temporary change due to a transfer or exchange of water pursuant to Article 1 of Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would not injure any legal user of the water during any potential hydrologic condition that the 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 §1728, subd. (b)(1).)

This Order requires MID to comply with refill criteria to ensure that future refill of the reservoir space made available in Lake McClure from this transfer does not adversely impact the SWP or CVP. MID has indicated it has sufficient supply to 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; this approval does not change those obligations. Therefore, there will be no downstream change of the streamflow, water quality, timing of diversion, 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.

In light of the above, I find in accordance with Water Code section 1728, subdivision (b)(1) that the proposed temporary transfer will not injure any legal user of the water.

6.3 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 California Environmental Quality Act (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, § 1728, subd. (b)(2).)

The overall impact of this transfer will be a temporary increase in flows in a portion of the Merced River. This will correspondingly decrease storage in Lake McClure by the same volume of water. In general, reservoir storage release transfers result in incremental increase in instream flows between MID'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 other impacts such as false fish attraction flows to streams not suited for fish rearing. Since the transfer would occur in the canals upstream of Crocker-Huffman Diversion Dam there would be no concern of false fish attraction flows and/or significant change in instream temperatures in the Merced River. CDFW reviewed the petition and had no comments. The transfer will deplete reservoir storage; thus it is appropriate to consider if the transfer would preclude MID from fully meeting its required instream flows such as the minimum instream flows pursuant to License 2685, the FERC License (2179-043), and the Davis-Grunsky Contract. MID is required to meet these commitments with or without the transfer.

Lake McClure is currently at 87 percent capacity with storage of 886,665 af (as of August 13, 2023) which is well above the minimum pool of 115,000 af. The storage in Lake McClure at the end of the irrigation season, October 31, is projected to be approximately 650,000 af with the proposed transfer.

In light of this supplemental information, and in context of the transfer of 25,000 af consisting of a small portion of the overall current storage in Lake McClure, there appears to be no evidence indicating that minimum pool levels will not be maintained during the period of the transfer.

In light of the above, I find in accordance with Water Code section 1728, subdivision (b)(2) that the proposed transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

7.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to the Deputy Director for Water Rights the authority to act on petitions for temporary change if the State Water Board does not hold a hearing. This Order is adopted pursuant to the delegation of authority in Section 4.4.2 of Resolution 2012-0029 and the Deputy Director for Water Rights redelegation of authority dated April 20, 2023.

8.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1728; and therefore, I find as follows:

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

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change in the place of use under License 2685 (Application 1224) of Merced Irrigation District (MID or Licensee) for the transfer of 25,000 af of water to the Transferees 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 date of Order issuance through November 1, 2023.
2. Only water previously stored in Lake McClure may be transferred. Water shall not be provided to the Transferees by direct diversion.
3. The place of use under License 2685 is temporarily expanded to include the service areas of Chowchilla Water District, Le Grand-Athlone Water District, Sphere of Influence Lands, Turner Island Water District, East Side Water District, Lone Tree Mutual Water Company, and Red Top Area (as shown on the map submitted with the petition, titled "Merced Irrigation District Map to Accompany Petition for Temporary Transfer under License 2685 (Application 1224) Proposed Addition to Place of Use").
4. During the period of the transfer, MID shall comply with applicable terms and conditions imposed by other regulatory agencies. This Order shall not be construed as authorizing the violation of any agreement entered into by MID.

5. Water may not be transferred through existing canals and facilities until MID has executed a refill criteria agreement for the 2023 water transfer between DWR, Reclamation, and MID. Documentation that acceptable refill criteria have been agreed to by DWR, Reclamation, and MID shall be submitted to the Deputy Director for Water Rights within 15 days of the date of execution of the agreement. The refill criteria shall govern the conditions under which refill of the water released pursuant to this Order occurs, including the conditions under which refill impacts may accrue and how MID shall rectify any impacts. At the conclusion of refilling water in Lake McClure for the water released pursuant to this Order, if a refill impact has occurred, MID shall release the amount of water identified in the refill criteria to DWR and Reclamation in a manner and on a schedule agreed to between MID, DWR, and Reclamation. Any release required pursuant to this paragraph shall be conducted in a manner that does not injure any legal user of water and does not unreasonably affect fish, wildlife, or other instream beneficial uses.
6. Within 90 days of completion of the transfer, the Licensee shall provide to the Deputy Director for Water Rights, and the Deputy Director for DWR, SWP a report describing the transfer authorized by this Order. The report shall include average daily release rates and corresponding volume of water released from Lake McClure as a result of this transfer (reported on a daily basis).
7. Licensee shall provide a report to the Deputy Director for Water Rights, and the Deputy Director for DWR, SWP by April 1, 2024 describing its refill of the transferred amount of water pursuant to this Order. For periods of refill or refill impacts, including any releases made by the Licensee to address a refill impact, the report shall include the daily values for these periods. The report shall be referred to as the "2023 water transfer" and be included in the Licensee's annual report as an attachment. If reservoir refill or releases for refill impacts are not complete by April 1, 2024, subsequent reports shall be attached to Licensee's annual report and be submitted by April 1 of each year until completion of refill. This report shall include a discussion of any measures and/or methods taken to ensure that releases made to satisfy and be consistent with the refill criteria pursuant to Condition 5 were conducted in a manner that did not injure any legal user of water and did not unreasonably affect fish, wildlife, or other instream beneficial uses.
8. MID shall comply with the License 2685 instream flow requirements at all times while transferring water pursuant to this Order.
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. The State Water Board reserves 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:

*Erik Ekdahl, Deputy Director
Division of Water Rights*

Dated: AUG 18 2023