

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WR 2014-0020-EXEC

In the Matter of the Petitions for Reconsideration by
**United States Board of Water Commissioners for the Walker River
and
Mono County**

Regarding Walker River Irrigation District's Petitions for Temporary Transfer and
Change

SOURCE: East and West Walker Rivers

COUNTY: Mono

**ORDER DENYING RECONSIDERATION AND MODIFYING THE DIVISION'S
ORDER CONDITIONALLY APPROVING THE PETITIONS**

BY THE EXECUTIVE DIRECTOR¹:

1.0 INTRODUCTION

On February 21, 2014, the State Water Resources Control Board's (State Water Board), Division of Water Rights (Division), through its Deputy Director for Water Rights, conditionally approved the Walker River Irrigation District's (District) two petitions for temporary change involving the transfer of water and instream flow dedication under Water Code section 1725 et seq. and section 1707.² The District

¹ State Water Board Resolution 2002-0104 delegates to the Executive Director the authority to conduct and supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the board, the Executive Director's consideration of petitions for reconsideration of a staff decision or order falls within the scope of the authority delegated under Resolution 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider the decision or order, deny the petition, set aside or modify the decision or order, or take other appropriate action. (Cal. Code Regs., tit. 23, § 770.)

² The Division's February 21, 2014 Order Approving Temporary Changes is referred to herein as the "Order." Pursuant to authority delegated by the State Water Board in Resolution 2012-0029, the Deputy Director for Water Rights may perform the duties that are the subject of this proceeding.

submitted the petitions under License 6000 for Topaz Reservoir on the West Walker River and License 9407 for Bridgeport Reservoir on the East Walker River. The United States Board of Water Commissioners for the Walker River and the Water Master/Chief Deputy Water Commissioner for the Walker River (collectively, USBWC) and Mono County timely filed petitions for reconsideration of the Division's Order, alleging that the Order is not supported by substantial evidence and contains error in law. Mono County further alleged that irregularity in the proceedings, or any ruling, or abuse of discretion, prevented the County from having a fair hearing. I find that the Division's Order was appropriate and proper, except that certain clarifying amendments should be made. The petitions for reconsideration of Mono County and the USBWC are denied.

2.0 GROUNDS FOR RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a water right decision or order on any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence that, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the regulations. (*Id.*, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 BACKGROUND OF PROCEEDING

The Division's Order contains a detailed description of the legal, factual, and procedural background in this proceeding that need not be repeated at length here. In sum, on February 28, 2013, the District filed petitions for temporary change involving the transfer of water and an instream flow dedication under Licenses 6000 and 9407 with the State Water Board pursuant to Water Code section 1725 et seq. and section 1707. The purpose of the proposed changes is to assist in implementation of the Walker Basin Restoration Program (Restoration Program), which is administered by the National Fish and Wildlife Foundation (NFWF) for the primary purpose of restoring and maintaining Walker Lake in Nevada. In 2012 the District entered into an amended grant agreement with NFWF to administer and manage a three-year water leasing demonstration program in the Walker River Basin to increase Walker Lake inflows and to obtain information regarding a longer-term leasing program.³ The project includes a Stored Water Program (SWP), under which individual farmers within the District may voluntarily dedicate a portion of their stored water supply in Topaz or Bridgeport Reservoirs for instream uses to and including Walker Lake. On February 21, 2014, the Division conditionally approved the District's proposed changes.

In addition, a summary of the unique legal framework governing this proceeding is helpful in understanding the issues raised in the USBWC's petition for reconsideration. The proposed changes involve waters of the Walker River that have been adjudicated by the United States District Court for the District of Nevada in *United States of America v. Walker River Irrigation District, et al.*, In Equity No. C-125. The adjudication resulted in a final judgment, Decree C-125 (the Walker River Decree), entered on April 14, 1936, and amended on April 24, 1940.

The USBWC and the Chief Deputy Water Commissioner (known as the Water

³ First Amendment to [NFWF] Grant Agreement (Nov. 2012) for Project 2010-0059-101 (Water Leasing Demonstration Program in the Walker River Basin).

Master) are charged with apportioning and distributing the waters of the Walker River and its tributaries under the Walker River Decree. The Walker River Decree provides the Water Master with the authority to adopt rules “as may be necessary and proper for the enforcement of this decree and for the carrying out of its purposes and objects and the proper apportionment and distribution . . . of the waters of said Walker River among and to the persons entitled thereto” (*Walker River Decree*, ¶ XV, pp. 74-75.) Accordingly, in administering the Walker River Decree, the Water Master operates under the *Rules and Regulations for the Distribution of Water on the Walker River Stream System under the Provisions of Paragraph 15 of Decree in Equity, No. C-125*, which were approved by the District Court on September 3, 1953 (1953 Rules).

Pursuant to the District Court’s orders, the State Water Board is responsible for reviewing proposed changes in the point of diversion, place of use, or purpose of use, in the exercise of rights to use the waters of the Walker River and its tributaries within California that have been established by the Walker River Decree. On April 9, 1990, the District Court appointed the State Water Board as special master in the Walker River action with respect to such changes. (*Order of Appointment of California State Water Resources [Control] Board as Special Master* (Order of Appointment), In Equity No. C-125, Dock. 161, Ex. B.) In addition, the State Water Board processes change petitions pursuant to the *Administrative Rules and Regulations Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water of the Walker River and Its Tributaries and Regarding Compliance with California Fish and Game Code Section 5937 and Other Provisions of California Law*, as amended through June 3, 1996 (Administrative Rules).⁴

⁴ The Administrative Rules and Order of Appointment refer to “change applications.” “Change applications” are essentially the same mechanism for making changes to water rights as “change petitions” under California law. The Administrative Rules define “change applications,” as applications to change the point of use, purpose of use, and place of use of water rights under the Walker River Decree. (Administrative Rules, § 1.1(b).) In California, such requests for change are made through a petition process and referred to as “change petitions.” (See, e.g., Wat. Code, § 1726, subd. (a)(1) [a person proposing a temporary change shall submit a petition to the State Water Board].) The Administrative Rules also address “compliance applications,” which are not at issue in this proceeding.

Because the District's water rights for Topaz and Bridgeport Reservoirs are recognized in the Walker River Decree, as well as being licensed under California law, the Division acted on the change petitions pursuant to the Order of Appointment and Administrative Rules, and in accordance with California law and procedure.⁵

4.0 USBWC'S PETITION FOR RECONSIDERATION

The USBWC alleges that the Division's Order is not supported by substantial evidence, and constitutes error in law. As discussed herein, the USBWC's claims are without merit.

4.1 California Law Applies to Changes in California Water Rights

The USBWC's primary contention concerns the applicability of California law to changes in California water rights adjudicated in the Walker River Decree. Section 7.0 of the Division's Order notes that the State Water Board proceeds under California law in this proceeding. The USBWC disagrees, asserting that the changes to the federally adjudicated California water rights are instead controlled by the Walker River Decree and 1953 Rules and Regulation and that nothing incorporates California law as the relevant substantive law for such change petitions.

The State Water Board concludes that it is reasonable to apply California law to California permitted or licensed water rights that are adjudicated under the Walker River Decree. Paragraph X of the Walker River Decree provides that "parties shall

⁵ In accordance with paragraph 7 of the Order of Appointment, the Division announced its Order as the draft Report of special master. The Division's Order constitutes the main substance of the draft report of special master by setting forth determinations of law and fact regarding the District's petitions. In accordance with the State Water Board's practice and procedures, the Division's Order constitutes the agency action that must be taken with one year after the date of the initial filing, as provided in section 6.1 of the Administrative Rules.

Pursuant to the Order of Appointment, the Division provided parties with an opportunity to file objections to the draft report. To be considered as a request for reconsideration by the State Water Board, however, any objection that was filed must have met the requirements for reconsideration under the State Water Board's statutes and regulations. Only the USBWC and Mono County filed petitions for reconsideration. No other requests for reconsideration or objections were received.

be entitled to change the manner, means, place or purpose of use or the point of diversion of the [waters of the Walker River] or any thereof *in the manner provided by law*, so far as they may do so without injury to the rights of other parties hereto . . .” (Italics added.) The Walker River Decree does not specify which law—state or federal—is to be applied in considering changes to federally adjudicated water rights.

The Administrative Rules and Order of Appointment, however, make it clear that proceedings involving change petitions filed on rights based on state law claims adjudicated by a federal court are to be conducted in accordance with the state agencies’ practices and procedures. In part, the Administrative Rules and Order of Appointment were intended to establish a process for changes in California similar to that in Nevada, where an appropriator wishing to change a Nevada water right would first obtain approval from the State Engineer and then apply to the United States District Court for modification of the Walker River Decree consistent with the ruling of the State Engineer. (*United States of America v. Walker River Irrigation Dist., et al.*, In Equity No. C-125 (Dock. 109, May 17, 1988), pp. 2-4.) In California, the State Water Board has approval authority over changes to post-1914 appropriative water rights, but generally does not have such authority over appropriative rights established prior to the enactment of the Water Commission Act in 1914. (But see Wat. Code, § 1707 [authorizing State Water Board consideration of changes filed under any basis of right for fish and wildlife purposes].) Absent additional procedures, persons holding pre-1914 California appropriative rights would be required to appear directly before the United States District Court to have the changes approved and the Decree modified. (*United States of America v. Walker River Irrigation Dist., et al.*, In Equity No. C-125 (Dock. 109, May 17, 1988), at p. 3.) The Administrative Rules were proposed to provide a process in California, similar to that already existing in Nevada, whereby the State Water Board would be appointed as special master for purposes of resolving the change petitions filed under decreed rights in California. (*Id.*, at pp. 3-4.) Thus, “[t]he upshot of the adoption of these proposed rules is that water right holders in both Nevada and

California would be required to follow essentially the same procedures for securing changes in the system” (*Id.*, at p. 4), including evaluating the effects of the proposed change on the rights of other users of water.

The current Administrative Rules state that unless otherwise expressly provided by the rules, “all proceedings before an agency with respect to change applications and compliance applications shall be in accordance with the practice and procedure of that agency.” (Administrative Rules, § 5.1.) The Administrative Rules clearly contemplate that state procedures are to be followed.

Similarly, the Order of Appointment acknowledges the applicability of California law in proceedings before the State Water Board. The Order of Appointment sets forth the duties of the State Water Board as special master in acting on “any and all changes proposed in point of diversion, manner of use, or place of use, in exercise of those rights to the use of waters of the Walker River and its tributaries within the State of California established by the final decree in this action and any decree supplementary thereto.” (Order of Appointment, ¶ II.) The special master may hold any hearings and conduct any investigations necessary to carry out its duties as special master and in doing so, has the powers conferred on masters by the Federal Rules of Civil Procedure and by the laws of the State of California. (*Id.*, ¶ V.) The special master must submit a report to the District Court, which may contain “such opinion *upon the law* and facts as the Special Master deems appropriate in view of the issues presented.” (*Id.*, ¶ VI, italics added.) The special master must adopt its report “*pursuant to the laws of the State of California governing the taking of action* by the Special Master as California State Water Resources Control Board.” (*Id.*, ¶ VI.8.a., italics added.)

Any attempt to parse the Administrative Rules and Order of Appointment as merely requiring a formulaic application of state law procedures and precluding the application of state law principles is without merit. A special master serves a function of the court by rendering an opinion on law and facts in light of the issues

presented, and in this proceeding, by providing an opinion to the court on whether decreed rights may be changed.⁶ (*Id.*, ¶ VI; Wat. Code, §§ 2075, 2076.) The State Water Board accepted the appointment as special master believing that, as the agency responsible for administration of water rights in California, it should act as the “forum of first instance” on proposed water right changes. (State Water Board Res. 90-57, Whereas No. 7.)⁷ As a “forum of first instance,” the State Water Board must exercise its full responsibilities in evaluating change petitions, including rendering opinions on the applicable law and facts.

In this proceeding, where there is no rule to the contrary, it would make no sense to require that state procedures, but not state law principles, be followed when the special master renders an opinion on the facts and the law. The District certainly expected that the State Water Board’s decision would be based on state law when it adopted Regulation No. 14, which governs temporary changes to stored water rights under the SWP, stating that the decision of the State Water Board on a change petition “shall be based on the applicable provisions of California law” (Regulation No. 14, Temporary Changes to Stored Water Rights for Beneficial Use at Walker Lake, adopted by District Resolution on Jan. 6, 2012, § 5.2.) The administrative procedures adopted by the District Court ensure that water right change petitions be first considered by the state agencies that would otherwise adjudicate them absent the decree.

4.2 Application of State Law in Considering the Change Petitions

Citing to the 1953 Rules, USBWC notes that it appears that the Division’s Order did not consider the terms of the Walker River Decree and historic practices for the administering and distributing waters under the decree in determining issues regarding injury or return flows. As discussed above, the argument that the change

⁶ In contrast to the adjudicative function of the special master, the Water Master’s role is to administer the waters of the Walker River in accordance with the Walker River Decree. (Walker River Decree, ¶ XV, pp. 73-75.)

⁷ State Water Board Res. 90-57 may be viewed at http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1990/rs1990_0057.pdf (as of April 30, 2014).

petitions should be evaluated under the provisions of the 1953 Rules to the exclusion of state law principles is neither supported by the Walker River Decree, the Administrative Rules, nor the Order of Appointment. Nor is it supported by the plain language of the 1953 Rules themselves.

The 1953 Rules cited by the USBWC address the availability of water, not legal injury. The questions of legal injury and water availability are distinct issues, as the Division notes in section 7.2 of its Order. In determining water availability,

the Water Master shall determine the total amount of water entering the Walker River Stream System through natural channels. He shall add to this accumulated total of natural flow water the amount of return flow he computes to be returning to the stream system through seepage, drain canals or any other sources. The sum total of water from these two sources shall be considered to be the total amount of water available to serve the vested rights under the decree and the year of priority to be served shall be determined daily by the Chief Deputy Water Commissioner from this information.

(1953 Rules, p. 4.)

This rule appears to confirm a principle of western water law that priority attaches to natural and abandoned return flows. The rule does not establish a priority right to water diverted to storage or released from storage for downstream diversion. Such a rule would be inconsistent with appropriative water right law. (See *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal. App.4th 555, 570 [when stored water is released for use, it is not part of the river's natural flow and does not count toward the appropriator's allocation of water]; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 736-743 [a riparian or appropriator has no right to water stored by others and cannot be injured by changes in that use of water]; *Application of Filippini* (1949) 66 Nev. 17, 21 [202 P.2d 535, 537] ["[t]he term 'water right' means generally the right to divert water by artificial means for beneficial use from a natural spring or stream"]; N.R.S. 533.055 [stored water turned into natural channel or watercourse by any person entitled to the use may be claimed for beneficial use below, subject to existing rights].)

As discussed in section 7.2 of the Division's Order, the California courts have rejected the argument that downstream water users could show injury by alleging that changes in releases would adversely affect them, without showing that the change infringed on any right of those downstream users. It is not enough for a person to show that he or she may receive less water. A person who claims an injury from a proposed change must demonstrate that he or she has a right to use the water and that the change will interfere with that right. (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at p. 805; State Water Board Decision 1651 (2012), p. 22.)⁸ The proposed changes only involve previously stored water to which the downstream users have no right. Thus, downstream users cannot be injured by changes in releases of that stored water. (Division Order, p. 14.)

The USBWC notes that granting the petitions for the full duty of the stored water used for irrigation, and not just the consumptive use portion of the changed storage right, will affect the amount of water available for water users and the year of priority under the Walker River Decree. Unlike a temporary transfer involving an amount of water consumptively used,⁹ a stored water transfer under Water Code section 1725 is not limited to the consumptive use portion of the water right. (State Water Board Draft Guide to Water Transfers (July 1999) (Transfer Guide), p. 6-7.)¹⁰ Again, however, as discussed above and in the Division's Order, a downstream water user who does not have a right to stored water cannot be injured by changes in releases of the stored water.

⁸ State Water Board Decision 1651 may be viewed at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1650_d1699/wrd1651.pdf (as of April 30, 2014).

⁹ 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."

¹⁰ The State Water Board's Draft Guide to Water Transfers is available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/water_transfers/docs/watertransferguide.pdf (as of April 22, 2014).

According to the USBWC, certain downstream water users have a legal right to water stored outside the irrigation season under the Walker River Decree (November 1 to March 1), when only stockwater and domestic uses are being met, which then can be used to meet demands after March 1. In other words, if more water is stored outside the irrigation season, then more water is available to water users during the irrigation season. The provisions of part VIII of the Walker River Decree cited by the USBWC, however, make it clear that the District has the sole right to store flood waters in its reservoirs from November 1 to March 1 "irrespective of the rights and priorities hereby adjudged," with an exception for stockwatering and domestic uses. Thus, the right is held by the District. As the Division explains in section 7.2 of its Order, a junior appropriator has no legal right to releases of stored water that has not been abandoned. (See Division Order, p. 15, and citations therein.) Put another way, a senior appropriator cannot be required to make or withhold releases from storage to make water available to a junior appropriator at a different time of year. Nonetheless, while I conclude that the Division's Order is supported by substantial evidence, I will amend condition 6 to better help ensure that the temporary changes will not injure any legal user of water by requiring verification that any required consultation has taken place and by providing a forum for dispute resolution by the Deputy Director of Water Rights.

The USBWC expresses concern that the application of state law to change petitions and applications, instead of the provisions of the Walker River Decree or the 1953 Rules and Regulations, could result in inconsistent holdings for similar change petitions or applications depending on whether the request is filed in California or Nevada. This concern, however, does not support the conclusion that California law does not apply to California-issued water rights in the Walker River adjudication. Moreover, while there are differences in California's and Nevada's administration of water rights, the two states still hold certain principles of appropriative water law in common, including the requirement that temporary changes in water rights must not adversely affect the rights of others. (See, e.g., Wat. Code section 1727, subd. (b)(1) [temporary change must not injure any legal

user of water; NRS 533.345 [temporary change must not impair water rights held by others].) Further, the Administrative Rules require each state agency to notify the other when a change application is filed, thereby giving each state an opportunity to inform the other of any concerns regarding a proposed change. Thus, the processing of such changes can be conducted in accordance with principles of interstate comity.¹¹

4.3 Construction of the Walker River Decree

In criticizing sections 8.3 and 8.4 of the Division's Order, which conclude that Walker Lake is part of the Walker River Basin and that water rights under the Walker River Decree do not depend on land ownership, the USBWC asserts that if the State Water Board is going to construe the Walker River Decree, then the rules of construction relating to a federal decree should be applied. (Letter from Karen A. Peterson, USBWC, to Kathy Mrowka, State Water Board (Mar. 24, 2014), p. 5.) According to the USBWC, the Walker River Decree is a hybrid decree in which stipulations of the parties have been incorporated into the litigated decree, and thus certain rules of interpretation apply. (*Id.*, at pp. 5-6.) The USBWC, however, fails to proffer any stipulation incorporated into the Walker River Decree, much less one that would support its interpretation of the decree as excluding Walker Lake. Instead, in its 2013 comments on the change petition, in which the USBWC first mentioned a 1932 stipulation in the Walker River action, the USBWC merely noted that "[c]omments made at the time by the attorneys for various parties acknowledged that there was no beneficial use of water that went to Walker Lake." (Letter from Karen A. Peterson, USBWC, to Kate Gaffney, State Water Board

¹¹ In addition, the USBWC's concern about inconsistent holdings is belied by California and Nevada's rulings in the Walker River Basin to date. Thus far, the State Water Board and the Nevada State Engineer independently have reached the same conclusions regarding certain legal issues by the USBWC raised in connection with state water right proceedings involving the Restoration Program. For example, like the Division, the Nevada State Engineer concluded that Walker Lake is part of the Walker River Basin and that the Walker River Decree does not require an owner of a water right to also own the land or place of use where the water will be used. (In the Matter of Protested Application 80700 of NFWF, Office of the State Engineer of the State of Nevada, Interim Order and Notice of Hearing (July 17, 2012) (Interim Order), p. 12, XII, Item Nos. 2, 3; Division Order, pp. 18-19.) The Interim Order may be viewed at <http://water.nv.gov/hearings/past/nfwf/browseabledocs/Notices%20and%20Interim%20Orders/07-17-2012%20Interim%20Order%20and%20Notice%20of%20Hearing%20Application%2080700.pdf> (as of April 30, 2014).

(May 9, 2013), pp. 3-4.) The USBWC's reliance on comments made by attorneys for certain parties in 1932 does not support the USBWC's contention regarding the construction of federal decrees that incorporate stipulations. Further, as the Division concluded in section 8.3 of its Order, any such comments do not support the interpretation that the Walker River Decree prohibits water from being put to beneficial use at Walker Lake, particularly when the decree expressly provides that parties may change the place of use of decreed rights.

The USBWC also asserts that if the State Water Board is going to consider California law in making its determination, then it should consider California Water Code section 5976, which adopts the provisions of the California-Nevada Interstate Compact, including a provision defining "Walker River Basin," to mean: "the area which naturally drains into the Walker River and/or Walker Lake upstream from the intersection of the river and/or lake in Mineral County, Nevada, with the northern township line of Tier 10 North, Mount Diablo Base Line." (Wat. Code, § 5976, art. II.F.) Presumably, the USBWC cites this definition to support its argument that Walker Lake is not part of the Walker River Basin. As the USBWC acknowledges, however, although the Compact was adopted by California and Nevada, it was not ratified by the United States Congress and never took effect. Thus, the definition in Water Code section 5976 is not in effect. (Wat. Code, § 5975, see *id.*, § 5976, art. XXII.) Even if the provision was in effect and could be arguably construed as an implied limitation on water right changes, however, it would still allow a change in the place use to include at least a portion of Walker Lake because the northern township line of Tier 10 North includes the northern portion of the lake.

The USBWC attempts to incorporate by reference its brief in the Nevada State Engineer's hearing regarding NFWF's Application 80700, filed on February 3, 2012, which addresses issues identified in sections 8.3 and 8.5 of the Division's Order. Although the USBWC provided a web link to the Nevada State Engineer's website, the brief could not be located at the link provided or in a search of filings associated with the NFWF hearing on the website. To the extent that the USBWC has

attempted to raise issues or arguments in its 2012 brief in the Nevada proceeding that are not presented in its March 24, 2014 petition for reconsideration, its petition for reconsideration is deficient as to those issues or arguments.

I find that the issues raised by the USBWC in its petition for reconsideration are without merit. The Division's Order is supported by substantial evidence and does not contain error in law.

5.0 MONO COUNTY'S PETITION FOR RECONSIDERATION

Mono County expresses concern for the protection of recreational, scenic, wildlife, and public trust values associated with Bridgeport and Topaz Reservoirs and downstream river reaches.¹² It believes that these values will be unreasonably harmed if the change petitions "are approved without an understanding of the scope and nature of the proposed changes to water storage and releases" and the imposition of appropriate mitigation. (County of Mono's Memorandum of Points and Authorities in Support of Request for Reconsideration, (Mar. 19, 2014) (hereinafter Mono County Memorandum), p. 2.) Mono County contends that the District's failure to provide information in the change petitions that is required by law, and the Division's issuance of the Order without that information, constitutes an irregularity in the proceeding and abuse of discretion by the State Water Board that has prevented the County's concerns from being heard, thereby depriving the County of a fair hearing. It also alleges that the Division's Order is not supported by substantial evidence and contains error in law.

Mono County requests that the State Water Board vacate the Division's Order and require the District to resubmit the petitions with the missing information. Alternatively, Mono County requests that the State Water Board amend the

¹² The recreational, scenic, wildlife, and public trust values associated with Topaz and Bridgeport Reservoirs and downstream river reaches that are identified by Mono County generally fall within the fish, wildlife, and other instream beneficial uses that the State Water Board must consider pursuant to Water Code section 1727, subdivision (b)(2).

Division's Order as follows: (1) amend condition 9 of the Division's Order, which governs scheduling of reservoir releases, to set forth clear parameters for releases under the SWP that will protect fishery, wildlife, and other instream beneficial uses, including public trust values, in the reservoirs and downstream;¹³ and (2) amend condition 6 of the Division's Order, which requires the District to consult with the Water Master, NFWF, and the Tribe in the development of the release schedule, to (a) include Mono County and the California Department of Fish and Wildlife (DFW) as entities that must be consulted by the District in the development of a schedule of releases; (b) require the District to provide consulting entities with information regarding historic releases, storage, and reservoir elevations to assist in consultation, and (c) prohibit the District's adoption or implementation of a schedule of releases over the objection of any of the consulting entities.¹⁴ (Mono County Memorandum, p. 20.)

5.1 Opportunity for Fair Hearing

Mono County claims that it could not meaningfully comment on the proposed changes, and thus was deprived of a fair hearing, because the change petitions did not contain information required by Water Code section 1726 and California Code of Regulations, title 23, section 794, subdivision (a). These provisions require a change petition to include a description of the proposed changes and any effects, including changes in water storage, water quality, and release and return flow schedules if stored water is involved, and any effects on other known users of water, and fish, wildlife, and other instream beneficial uses. (Wat. Code, § 1726, subd. (b)(2); Cal. Code Regs., tit. 23, § 794, subd. (a)(1)-(12).) Additionally, without

¹³ Condition 9 of the Division's Order states: "During the transfer period, the District shall schedule reservoir releases to be made during the irrigation season (April 1 through October 31) to be within the historic range of releases during the irrigation season. The District may release stored water either (i) during the irrigation season in amounts exceeding the historic range of releases during the irrigation season, or (ii) after the irrigation season ends, if the District first consults with DFW and Mono County to avoid harm to fish and wildlife and downstream habitat. Such consultation shall include the establishment of a flow ramping schedule to avoid harm through rapid fluctuations in instream levels."

¹⁴ Condition 6 of the Division's Order states: "The District shall develop and operate to a schedule of releases for the transfer in consultation with the Water Master, NFWF, and the Tribe. The District shall promptly inform these parties of any changes to the release schedule."

the required information, Mono County asserts that the State Water Board cannot make the necessary findings that the proposed changes will not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).)

In considering this allegation and others raised in Mono County's request for reconsideration, it merits reviewing the purpose and procedural framework of the temporary change provisions of Water Code section 1725 et seq. Through this statute, the Legislature has provided for the expedited review of transfers of one year or less that involve water that would have been consumptively used or stored absent the proposed change.¹⁵ These short-term transfers are exempt from the requirements of the California Environmental Quality Act (CEQA) and are subject to an abbreviated public notice, comment, review, and decision-making schedule. (Wat. Code, §§ 1726-1727, 1729.) The expedited review procedures may be justified because transfers involving water that would have been consumptively used or stored are generally unlikely to harm other legal users of water or unreasonably affect fish, wildlife, or instream beneficial uses. (See State Water Board Order WR 99-12, p. 15.)¹⁶ This accelerated review process also makes possible transfers that take advantage of "specific water supply or water needs that develop in a given year and can be transient in nature" and that could not be approved on a timely basis under the procedures for longer term changes. (Transfer Guide, p. 6-1.) The State Water Board may condition its approval of a temporary change only to mitigate or avoid the impacts caused by the temporary change. (Wat. Code, § 1727, subd. (e).)

¹⁵ The temporary change provisions also apply to water conserved under Water Code section 1011, which is not applicable here. (Wat. Code, § 1726, subd. (e).)

¹⁶ State Water Board Order WR 99-12 is available at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1999/wro99-12.pdf (as of April 22, 2014).

Given the context of the proceeding before me, I do not find grounds for reconsideration. In response to similar comments regarding the level of detail contained in the change petitions, the District explained that in this first year of the SWP, it does not know which individual landowners will participate in the program or what the exact schedule of releases will be. The Division's Order recognized the limitations associated with the first year of a demonstration program. Recognition of those limitations does not constitute an acknowledgment, as Mono County contends, that the statutory information requirements have not been met or have been deferred to later years. Nor does it improperly shift the burden of proof from the petitioner to interested persons. Rather, the Division's Order reflects an agency's discretion to evaluate what is appropriate in light of the circumstances governing the proposed project and the applicable statutory framework. Thus, given the nature of the first-year pilot program and the statutory framework requiring expedited review of stored water transfers, I do not conclude that the Division erred by accepting the change petitions. I do, however, anticipate any future change petitions will be refined as a result of additional relevant information made available through the implementation of the first year's program.¹⁷

Mono County alleges that instead of requiring the requisite information to be provided before approving the changes, the Division's Order requires the District to develop some of the information "after-the-fact." Mono County cites to condition 6 as an example, which requires the development of a schedule of releases in consultation with the Water Master, Tribe, and the NFWF. Additionally, Mono County criticizes condition 6 because it affords no control to the consulting entities over the schedule of releases ultimately implemented. (Mono County Memorandum, p. 8.) Mono County misconstrues the purpose of condition 6. As

¹⁷ Mono County disputes the expectation set forth in the Division's Order that information developed during the first year of the water leasing program will inform the program's implementation in future years because it believes that challenges that exist in the first year – namely, the uncertainty regarding participation by the farmers and hydrologic conditions – will exist every year. (Mono County Memorandum, p. 13.) Mono County, however, misconstrues the Division's Order. As discussed above, the Division has not improperly deferred the submission of required information to future years. Moreover, there is no reason to believe that any interannual variations will unduly impede the development of relevant information through the monitoring and reporting program that can be used in the implementation of the SWP in future years.

discussed below, the Division already had the necessary information before it to conclude that the proposed changes would not injure a legal user of water. The District had proposed to coordinate releases with certain entities and the Division concluded that condition 6 was necessary to “avoid potential injury and to ensure that other water users can identify the waters subject to the temporary changes.” (Division Order, p. 16.) The imposition of a consultation requirement does not mean that the requisite information supporting the Division’s finding did not exist in the first instance; instead, the condition helps to ensure that no injury will occur and that other water users are aware that the releases are being made. Because Mono County has not alleged any potential injury to its water rights, there is no need to amend condition 6 to require the District to consult with the County.

Moreover, absent an agreement between parties, it is not the State Water Board’s practice to give an entity control over a petitioner’s proposed changes. If the record supports imposition of conditions affecting a possible release schedule, then those conditions will be imposed in a State Water Board order or at least subject to the Division’s oversight. Here, the Division reasonably concluded that the proposed changes would not injure a legal user of water and that it was sufficient to require consultation with the Water Master, NFWF, and the Tribe.

Other conditions in the Division’s Order cited by Mono County as requiring “after-the-fact development” of information required by Water Code section 1726 are either conditions similar to those with which the District already must comply under its grant agreement with NFWF (condition 8) or conditions imposed to ensure compliance with the Division’s Order (condition 10). (Mono County Memorandum, p. 7, fn. 7.) Requiring monitoring and reporting of the amount of water ultimately transferred does not mean that information supporting approval of the transfer was not available in the first place. To the contrary, the Water Code recognizes that such monitoring and reporting may occur. (See Wat. Code, § 1728 [“one-year period does not include any time required for monitoring, reporting, or mitigation before or after the change is carried out”].) These conditions do not constitute

evidence that the submission of information was improperly deferred, but instead constitute oversight of compliance. Moreover, because approval of the change is permissive—there is no requirement that all of the water authorized to be transferred actually be transferred—monitoring and reporting is necessary to determine what use was made of the transfer order and the water involved.

Mono County claims that without the additional information it seeks, it was prevented from providing timely and meaningful input on the proposed changes. The Water Code allows any interested party to file a written comment regarding a temporary change petition with the State Water Board. (Wat. Code, § 1726, subd. (f).) The State Water Board must evaluate and consider all timely filed comments. (*Ibid.*) This is what happened here. Mono County had the opportunity—and took that opportunity—to comment on the potential effects of the proposed changes. Even if Mono County did not have all of the information it desired before submitting its comments, it was able to comment with specificity on resources that could be affected by the proposed changes. I do not find any irregularity in the proceedings, or any ruling, or abuse of discretion, by which Mono County was prevented from having a fair hearing.

5.2 Substantial Evidence Supports the Division's Order

Mono County contends that the Division's determination that proposed temporary changes would not unreasonably affect fish, wildlife, or other instream beneficial uses was not supported by substantial evidence. Pursuant to Water Code section 1727, subdivision (b), the State Water Board shall approve a temporary change if a preponderance of the evidence shows both that the proposed change will neither injure any legal user of water nor unreasonably affect fish, wildlife, or other instream beneficial uses. In applying these standards, the State Water Board "shall not deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change." (Wat. Code, § 1727, subd. (e).) Thus, in making its findings, the State Water Board must consider to what extent impacts

result from the proposed change (instead of the underlying water right permit or license) and to what extent any impacts may be avoided or mitigated.

As a threshold matter, the purpose of the Restoration Program is to restore and maintain Walker Lake, which includes conducting the water leasing demonstration program to improve flows for the benefit of Walker River and Walker Lake. This purpose, while it does not constitute substantial evidence by itself, provides the context for the State Water Board's consideration of the proposed project, as does the fact that this is the first year of a pilot program in which information about the program's long-term effectiveness, administration, and impacts is being developed. This is not to suggest that well-intentioned activities, such as environmental restoration projects, cannot have adverse environmental impacts. They can. But in determining whether a change *unreasonably* affects fish, wildlife, or other instream beneficial uses, both benefits and adverse effects should be taken into consideration. Here, the record supports the conclusion that the proposed temporary changes, as conditioned, will not unreasonably affect fish, wildlife, or other instream beneficial uses, even without giving substantial weight to the benefits of the changes.

The scope of the change petitions establishes the scope of the State Water Board's review. (Wat. Code, § 1727, subs. (d), (e).) In this case, the proposed changes are limited. The change petitions only propose changes in the purpose of use and place of use under Licenses 6000 and 9407. Approval of these changes would allow the historic schedule of storage releases to be altered because storage releases could be made after the irrigation season ends on October 31. The change petitions do not propose any physical changes in the District's diversion and conveyance system. Nor do the petitions propose any change in the diversions to storage in Topaz or Bridgeport Reservoirs or existing bypass or minimum pool requirements. Thus, the State Water Board's review is limited to impacts resulting from changes in the purpose of use, the place of use, and consequently, the historic storage release schedule.

According to the District, stored water released during the irrigation season (April 1 through October 31) will be in accordance with the historic pattern of releases. To avoid unreasonably affecting fish, wildlife, or other instream uses, the Division imposed condition 9, which limited releases of stored water during the irrigation season to the historic range of reservoir releases during the irrigation season. Mono County contends that condition 9 is ambiguous and does not protect the resources it is intended to benefit. (Mono County Memorandum, p. 14.) In particular, Mono County questions how the “historic range of releases” will be determined. (*Id.*, p. 15.) It appears that Mono County’s concern is based on past events in which the District dewatered Bridgeport Reservoir, thereby harming fish and instream beneficial uses in the reservoir and downstream, although the County acknowledges that such action could not legally occur today.

While I conclude that the Division’s Order is supported by substantial evidence, I agree that condition 9 should be modified to better help ensure that any unreasonable effects on fish, wildlife and instream beneficial uses are avoided or mitigated. I will amend condition 9 to better define the historic range of releases, to require a plan for identifying the historic range of releases, and to strengthen the provisions for consultation with Mono County and DFW. As conditioned, the temporary changes will not unreasonably affect fish, wildlife, or other instream beneficial uses.

5.3 No Error in Law

Mono County asserts that the State Water Board committed an error in law by improperly limiting its conditions of approval based on the legal theory that the board is prohibited under Water Code section 1727, subdivision (e) from conditioning its approval to avoid potential harms resulting from the temporary changes that could also occur under the existing licenses. According to Mono County, if the District releases water pursuant to the SWP, then any impacts resulting from those releases are caused by the temporary changes, and it is

irrelevant whether the same types of impacts could have been caused by releases for irrigation purposes under the existing licenses. In contrast, the District suggests that the relevant inquiry in evaluating impacts to fish, wildlife, and instream beneficial uses requires a comparison of what is presently allowed to what will be allowed under the proposed changes. The District states that Bridgeport and Topaz Reservoirs will be operated in accordance with their existing requirements. (Letter from Gordon DePaoli, District, to Kate Gaffney, State Water Board (Nov. 22, 2013), p. 10.) It further notes that farmers are currently allowed to call for stored water any time for irrigation purposes during the irrigation season and that there is no limitation on that call. In other words, “nothing prevents early drawdown of reservoir or fluctuating releases during the irrigation season.” (*Id.*, p. 11.)

In essence, Mono County is asking the State Water Board to attribute any impacts of stored water releases in the irrigation season to the proposed changes in purpose of use and place of use under the temporary change petitions, and not to existing reservoir operations. But, to the extent the releases occur in accordance with existing reservoir requirements and operations, and within the historic range of releases, the impacts would be similar. In this proceeding, and with the conditions imposed in the Division’s Order (as amended herein), I cannot conclude that any impacts to fish, wildlife or instream beneficial uses are unreasonable. There is no error in law.

Additionally, Mono County reiterates its position that environmental review under CEQA is required before approval of the proposed temporary changes. Although Water Code section 1729 exempts temporary changes from CEQA, Mono County asserts that the exemption does not apply because the SWP is a three-year water leasing program and the temporary changes requested by the District are for the first year of the three-year program. Thus, Mono County contends, treating the changes as one-year temporary changes exempt from CEQA violates CEQA because it constitutes improper piecemealing. (See *Topanga Beach Renters Assn. v. Dept. of General Services* (1976) 58 Cal.App.3d 188, 195–196 [CEQA cannot be

avoided by subdividing a single project into smaller subprojects to avoid considering the environmental effects of the project as a whole].)

I find that the Division appropriately addressed this issue in section 8.1 of its Order. Without exception, Water Code section 1729 provides a statutory exemption from the requirements of CEQA. The rules against piecemealing do not preclude combining CEQA exemptions where together the exemptions cover the entire activity. (*Surfrider Foundation v. California Coastal Com.* (1994) 26 Cal.App.4th 151, 156.) Moreover, the CEQA exemption for short-term transfers is a statutory exemption, which applies without regard to whether there are significant adverse impacts. (See generally *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 909.) [“[T]he very purpose of statutory CEQA exemptions is to avoid the burden of the environmental review process for an entire class of projects, even if it there might be significant environmental effects.”].) Thus, it doesn’t matter if the multiple short-term transfers have a significant impact, cumulatively, because the transfers would be exempt even if each of them had a significant impact individually. Mono County’s CEQA argument has no merit.¹⁸

6.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that the Division’s Order conditionally approving the water right change petitions was appropriate and proper. There was no irregularity in the proceedings, or any ruling, or abuse of discretion, by which a person was prevented from having a fair hearing. Further, the decision is supported by substantial evidence and does not contain error in law. The USBWC’s and Mono County’s petitions for reconsideration are denied. The Division’s Order is affirmed as modified by this order.

¹⁸ Mono County also continues to suggest that the District is a responsible agency under CEQA even though the District is organized under Nevada law. As the Division’s Order recognizes, however, even if the District is a public agency under CEQA, the statutory exemption for short-term transfers under Water Code section 1729 still would apply.

To the extent that this order does not address all of the issues raised in the petitions for reconsideration, the State Water Board finds either that the requirements for a petition for reconsideration under California Code of Regulations, title 23, section 770 have not been met, the issues raised are insubstantial, or the issues are appropriately addressed in the Division's Order.

ORDER

IT IS HEREBY ORDERED THAT, for the foregoing reasons, the petitions for reconsideration of USBWC and Mono County are denied, and the Division's Order is affirmed except as modified below. Conditions 6 and 9 of the Division's Order are amended as follows:

1. Condition 6 on page 21 is amended as follows:

The District shall develop and operate to a schedule of releases for the transfer in consultation with the Water Master, NFWF, and the Tribe. Within 30 days after consultation, the District shall provide verification to the Division of Water Rights that such consultation has occurred and information regarding any actions taken or that will be taken as the result of the consultation. The District shall promptly inform ~~these parties~~ the Water Master, NFWF, the Tribe, and the Division of Water Rights of any changes to the release schedule.

If any dispute arises during consultation regarding potential injury to legal users of water, the Deputy Director for Water Rights shall decide the matter. Consultation is required only when necessary to carry out this transfer; unless otherwise required by law, consultation is not required for releases of stored water for purposes unrelated to the transfer, such as irrigation, flood control, and dam safety.

2. Condition 9 on page 21 is amended as follows:

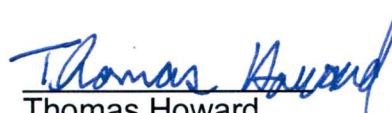
During the transfer period, the District shall schedule reservoir releases to be made during the irrigation season (April 1 through October 31) to be within the historic range of releases during the irrigation season. The historic range of releases are those releases that have taken place under existing license conditions, including any requirements for reservoir surface water elevation, minimum pool, bypass flows, or ramping schedules. At least one month prior to the transfer period, the District must develop a plan that identifies the historic range of releases during the irrigation season and that evaluates whether water to be transferred during the irrigation season is within the historic range of releases. The District shall provide the plan to the Division of Water Rights and make the plan publically available.

In order for the District may to release stored water either (1) during the irrigation season in amounts exceeding the historic range of releases during the irrigation season, or (2) after the irrigation season ends, if the District first shall consults with DFW and Mono County to identify potentially unreasonable impacts avoid harm to fish and wildlife and downstream habitat instream beneficial uses and to develop measures to avoid or mitigate any such impacts. Such consultation shall include (a) development of a schedule of releases for each reservoir; (b) the establishment of a flow ramping rates; (c) establishment of stream flow release limitations, if necessary; and (d) development of a monitoring plan for implementation to ensure that release of stored water under (1) or (2) does not result in unreasonable impacts to fish, wildlife, or instream beneficial uses. schedule to avoid harm through rapid fluctuations in instream levels. The monitoring plan shall focus on specific fisheries concerns during the periods of release under (1) or (2) above. A monthly monitoring report shall be submitted to DFW, Mono County, and the Deputy Director for Water Rights and a

final report of the results of the monitoring submitted no later than 90 days after the transfer period ends.

Within 30 days after consultation, the District shall provide verification to the Division of Water Rights that such consultation has occurred and information regarding any actions taken or that will be taken as the result of the consultation. If any dispute arises during consultation regarding unreasonable impacts to fish, wildlife, and other instream beneficial uses, or measures to avoid or mitigate such impacts, the Deputy Director for Water Rights shall decide the matter. Consultation is required only when necessary to carry out this transfer; unless otherwise required by law, consultation is not required for releases of stored water for purposes unrelated to the transfer, such as irrigation, flood control, and dam safety.

Dated: 5/16/14


Thomas Howard
Executive Director