



July 16, 2021

Kathryn Gaffney
Division of Water Rights
State Water Resources Control Board
kathryn.gaffney@waterboards.ca.gov
Via electronic filing

Re: Comments in opposition and objection to proposed water transfer from South San Joaquin Irrigation District and Oakdale Irrigation District to Westlands Water District under water rights license 2012, application 1081

Dear Ms. Gaffney:

The California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance (hereinafter, CSPA et al.) comment in opposition and object to the proposed 2021 water transfer of up to 100,000 acre-feet of water from South San Joaquin Irrigation District and Oakdale Irrigation District (hereinafter, Districts) to Westlands Water District under water rights license 2012, application 1081. The State Water Resources Control Board (hereinafter, State Water Board) noticed this proposed transfer on July 1, 2021, and issued an amended notice on July 12, 2021. For the reasons set forth below, the proposed transfer is contrary to law, will have adverse environmental impacts, and is not in the public interest. Therefore, the State Water Board should disallow the proposed transfer.

Background

On June 22, 2021, Ernest Conant, Regional Director of the Bureau of Reclamation (hereinafter, Reclamation) sent a letter to Tim O’Laughlin, counsel to the Districts, regarding the proposed transfer by the Districts of 100,000 acre-feet of water sourced in New Melones Reservoir to Westlands Water District. More specifically, Mr. Conant advised Mr. O’Laughlin that Reclamation viewed the Districts’ “conservation account” in New Melones Reservoir, the proposed source of the water, was available to the Districts only for diversion at Goodwin Reservoir for in-District use. Mr. Conant stated:

However, with respect to the Districts’ 2021 transfer proposal to use up to 100,000 acre feet out of the Districts’ conservation account under the 1988 Agreement, Reclamation cannot support such a transfer. The 1988 Agreement contemplates diversion by the Districts only at Goodwin Dam in satisfaction of the Districts’ irrigation rights and use of the conservation account only in drought years on District lands. It does not currently

provide for any circumstance for releases by the Districts, nor quantify any reasonable transferrable amount under California law. In addition, Reclamation supports transfers only to the extent such transfers pose no harm to the CVP [Central Valley Project]. Reclamation remains concerned that the Districts' proposed transfer could injure the rights of the CVP.

We have appended Mr. Conant's letter to these comments.

Discussion

1. The Districts misidentify the source of water.

The Districts' previous 2021 transfer proposal treated the source of the water to be transferred as New Melones Reservoir, held in storage in New Melones Reservoir by Reclamation for the Districts under the "conservation account" identified in clause 4 of the 1988 Agreement and Stipulation between the District and Reclamation on the operation of New Melones Reservoir.

The present transfer proposal, on the contrary, claims that the source of water for transfer from the Districts to Westlands will be "Old Melones Reservoir," which was inundated by the Central Valley Project's (CVP) New Melones Reservoir and (along with Old Melones Dam) remains entirely contained within New Melones Reservoir. The Districts' petition at pdf p. 8 argues: "The conservation account was created in recognition of the Districts' storage rights at Old Melones and Tulloch. The Districts' rights at the two reservoirs totals 198,000 Acre Feet. The Districts have continually used and reported their storage and use of water from Old Melones."

Working backwards through the Districts' argument: it is not true that the Districts have reported their "storage and use of water from Old Melones." Old Melones does not exist as a distinct facility capable of storing water unless New Melones is drawn down to a point where Old Melones Dam physically separates water impounded behind it from water downstream of it. Otherwise, Old Melones Dam does not release water from storage, because any water that might pass through the outlet works at Old Melones Dam is physically backfilled by water stored in New Melones Dam. Thus, unless and until the top of Old Melones Dam is exposed and Old Melones Dam actually impounds water, the water released through New Melones Dam is water released from New Melones Dam, not Old Melones Dam. Old Melones Dam remains full.

The Districts' petition is correct in stating that the "conservation account was created in recognition of the Districts' storage rights at Old Melones and Tulloch." It is, very precisely, an account. The account replaces the storage previously available in Old Melones and Tulloch. What the Districts have been reporting is not their "storage and use of water from Old Melones," but their storage and use of water in New Melones Reservoir under their Old Melones water right.

There is a related issue that deals with the movement of water through Old Melones Dam. First, the Districts have not made a showing that the outlet works in Old Melones Dam are open

and able to pass water. Assuming that they are, it is nonetheless not clear, during conditions of complete inundation under substantial water in New Melones Reservoir, how much water if any can or does pass through the Old Melones outlet works. It is entirely possible that there is little or no movement of water through Old Melones Dam while there is a pressure equilibrium on both sides of those outlet works. The Districts make no showing that they could actually move water through that outlet at a rate that would allow the movement of the requested amount of water in the time allotted for the transfer.

In a telling clerical inconsistency on pdf p. 6 of their Petition, the Districts state in response for a requirement for photographs: “- N/A - Release from storage at New Melones, re-diverted at Jones.” This single part of the petition, at least, correctly identifies the source of water.

2. The State Water Board must evaluate the effects of the transfer as transfer of water sourced in New Melones Reservoir, part of the Central Valley Project.

As Mr. Conant’s June 22 letter describes at p. 2, “New Melones reservoir was the only CVP reservoir with near-average level storage in May, and the Eastside Division contractors are the only CVP contractors with 100% contract allocations.” In addition, Reclamation is relying in part on New Melones releases for Delta outflow, which Reclamation, consistent with case law, regards as an in-basin use. *Id.*

Mr. Conant further points out that Reclamation considers the operation of New Melones in the context of the operation of the CVP as a whole:

The authorizing legislation limits New Melones project diversions by subordinating them to “in-basin” demands. Among other limitations, this provision limits Reclamation’s authority to contract for beneficial uses out of the Stanislaus River basin, in lieu of contracts for in-basin demands. It is not a limitation on the use of New Melones stored water for environmental uses in the Delta. *Id.* at pp. 2-3.

The Districts’ petition, however, considers only impacts from the potential transfer in the context of the direct effects on the ability of Reclamation to meet requirements that specifically attach to New Melones, and does not evaluate those impacts in the context of overall storage in the CVP and the SWP. “End of month storage in September 2021 (EOMSS) at New Melones is projected to be 900,000 Acre Feet. There is sufficient water in New Melones to meet Reclamation's regulatory requirements in 2022.” Petition at pdf p. 8.

The fact of the matter is that Reclamation is not meeting the CVP’s requirements today, and is likely to be unable to meet them until at least well into water year 2022. Reclamation is operating under a State Water Board June 1, 2021 Order in response to Reclamation’s temporary urgency change petition. This Order has moved compliance points for Delta water quality upstream from key compliance points stated in water rights Decision 1641. (*See State Water Board (Jun. 1, 2021), Order Conditionally Approving a Petition For Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions,*

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2021/20210601_swb_tuco.pdf). In addition, Reclamation is constrained from exporting water from its Jones pumping plant in the Delta beyond what is required to meet demands of San Joaquin Settlement Contractors and health and safety purposes. However, the Districts' proposed transfer would not be subject to such constraints. *Id.* at p. 15-16. Thus, the Districts' transfer has the effect of avoiding the minimal protections of the June 1 Order regarding exports of CVP water.

CVP storage (and storage in the State Water Project, SWP) are at or approaching record lows. Because, as described by Mr. Conant and quoted above, New Melones has relatively more storage than other CVP reservoir, Reclamation is relying on New Melones in part to meet Delta outflow and water quality requirements and maintain salinity control. If water year 2022 is dry or critically dry, conditions are likely to be unprecedented. Reclamation will need to again rely on storage in New Melones to meet its environmental and water quality commitments. It will not be able to count on storage in other CVP reservoirs. The bottom line is that the additional 100,000 acre-feet that the Districts propose to remove from New Melones under the proposed transfer will be 100,000 acre-feet of water that will not be available to meet Delta outflow and water quality requirements and salinity requirements in water year 2022.

3. The proposed transfer is contrary to law.

Water Code § 1726 (b) requires: "A petition [for a temporary change] shall include: ... (b) "A written description of the changes in water storage" Since, as discussed above, the Districts' petition inaccurately describes the proposed transfer as changing storage to Old Melones Reservoir, and since storage in Old Melones Reservoir would not change under the proposed transfer, the petition does not meet Water Code § 1726(b)(2) and is contrary to law.

In addition, as described by Mr. Conant, the petition may violate the 1988 contractual agreement between Reclamation and the Districts. However, it is likely that resolution of such violation lies with Reclamation and/or federal courts.

Considering the dire condition of storage in CVP reservoirs in this moment, the Districts' proposed transfer would also violate the prohibition on the unreasonable use of water, Article X, Section 2 of the California Constitution, Water Code § 275.

4. The proposed transfer will have unreasonable effects on fish and wildlife.

As described above, the proposed transfer will reduce storage in CVP reservoirs by 100,000 acre-feet. This is at a time when the Order on Reclamation and DWR's TUCP has weakened water quality requirements in the Delta in order to conserve in CVP and SWP reservoirs only 60,000 to 120,000 acre-feet (see Order, *op. cit.* at p. 27). If granted, the transfer will have the effect of negating any ascribed benefits of the Order on the TUCP.

The effects of the transfer will cascade to every cold water fishery downstream of every CVP and SWP dam throughout the Central Valley. The loss of New Melones storage will further strain the ability of Reclamation and DWR to meet protective water temperatures for

these fisheries. The effects of the transfer will also require release of water from gravely depleted storage in these dams to meet Delta water quality and outflow requirements and associated fisheries. These effects will occur in 2021 and even more extremely in 2022 if 2022 is dry or critically dry.

To protect Central Valley fisheries in 2021 and 2022, it is critically important to maintain as much storage as reasonably possible in CVP and SWP reservoirs. The Districts' transfer will create a 100,000 acre-foot hole in that effort.

5. The proposed transfer is not in the public interest.

The Districts have created a business model of selling water in almost every water year in order to support their financial positions. This business model that privatizes water needed to protect and recover public trust resources is as a general matter not in the public interest. It is high time for the State Water Board to find a way to put a stop to it.

The specific implementation of this business model in 2021 is egregious. It is particularly not in the public interest for the State Water Board to allow transfer of water from a CVP reservoir at a time when the entire CVP-SWP system is strained and incapable of meeting regulatory requirements and of operating in a manner that is even marginally protective of fish. The CVP expects large-scale pre-spawn mortality of salmon in the Sacramento, American and Feather rivers this year, at minimum. It is particularly not in the public interest at this desperate moment to allow the Districts' monetary interests to override protections of public trust resources.

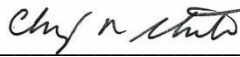
6. Conclusion

The State Water Board should disallow the Districts' request for transfer.

Respectfully submitted,



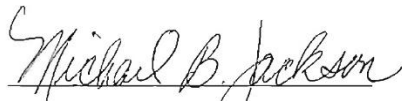
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cc: South San Joaquin Irrigation District and Oakdale Irrigation District, c/o Tim O'Laughlin
(via electronic mail): tim@olaughlinplc.com

Appendix:

Letter from Ernest Conant

Regional Director, Bureau of Reclamation

To

Tim O’Laughlin

Counsel to

South San Joaquin Irrigation District

And

Oakdale Irrigation District

June 22, 2021



United States Department of the Interior

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IN REPLY REFER TO:

CGB-100
2.2.4.21

VIA ELECTRONIC MAIL ONLY

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Subject: New Melones Operations

Dear Mr. O’Laughlin:

This letter is in response to a series of recent communications from Oakdale Irrigation District and South San Joaquin Irrigation District (the Districts)¹ to the Bureau of Reclamation (Reclamation) regarding 2021 New Melones Operations. I appreciate our ongoing partnership on the operations of New Melones and the Stanislaus River.

The Districts sent Reclamation a letter on June 4, 2021, expressing the Districts’ concern about use of New Melones stored water to meet the State Water Resources Control Board (SWRCB) Delta outflow requirement for the Central Valley Project (CVP) and the State Water Project (SWP) in SWRCB Decision 1641 (D-1641). Reclamation and the Districts had a follow-up meeting on June 10, 2021, at which time the Districts stated their position that they would not seek legal action against the alleged unauthorized use of New Melones stored water for Delta outflow if Reclamation would not object to the Districts’ use of its conservation account in New Melones to transfer up to 100,000 acre feet to CVP contractors south of the Delta (*i.e.*, San Luis and Delta Mendota Water Authority).

In response, Reclamation reiterated its position that it could not support this proposed transfer without reaching agreement in principle to amend the 1988 Agreement between the Districts and Reclamation, to, among other things, address transferable water. In an e-mail dated June 12, 2021, the Districts declined to work toward an amendment to the 1988 Agreement and requested that Reclamation reconsider the Districts’ proposed 2021 transfer. The Districts also reiterated their position that they could take legal action to remedy the releases for Delta outflow.

¹ The Districts hold senior pre-New Melones project, pre-1914 adjudicated appropriative rights for irrigation use and pre-project, post-1914 storage rights on the Stanislaus River. Reclamation entered into an operations agreement to settle claims of injury when it sought water rights from the SWRCB for the New Melones project. The current version of that agreement is commonly called, “the 1988 Agreement.”

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As explained in Reclamation's letter to New Melones Eastside Division CVP contractors, Stockton East Water District (SEWD) on May 26, 2021, this year is an extreme drought year and a Drought Emergency has been declared for the Sacramento-San Joaquin Delta Watersheds on May 10, 2021. In addition, 2021 has unfolded with unique hydrologic conditions, such that snowpack levels, while low, have actually fared better than rain amounts, making the normal relationship between snowpack runoff and reservoir inflow unusually low. This has adversely affected end-of-May storage levels in Central Valley Project (CVP) reservoirs north of the Delta, especially Shasta and Folsom Lakes.

New Melones reservoir was the only CVP reservoir with near-average level storage in May, and the Eastside Division contractors are the only CVP contractors with 100% contract allocations. This circumstance is rare. New Melones rarely has more storage reserves than other CVP reservoirs, especially those North of the Delta in extreme critically dry years. This year, most other CVP agricultural contractors have been reduced from an initial 5% allocation to 0% as of May 26. All other CVP municipal and industrial (M&I) contractors have been reduced to just 25% allocations, with a consideration for public health and safety needs. Yet, neither the Districts' entitlements under the 1988 Agreement nor the Eastside Division's 100% allocation have been disturbed, even when considering the New Melones releases for Delta outflow. Shasta Lake releases are significantly reduced to maintain cold water pool and Folsom Lake is significantly below normal storage levels. While New Melones is rarely, if ever, used to meet Delta outflow, in 2021, it is an available source legally available to enable the CVP to meet Delta outflow requirements for the project. It is not anticipated that New Melones would be a regularly relied upon source to meet Delta outflow requirements.

The Districts assert that use of New Melones stored water for Delta outflow was not authorized by Congress. Reclamation does not agree. The Districts rely on a clause from the authorizing legislation that states "[t]hat before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley Project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined ...". The Districts argue that this language prohibits use of New Melones stored water for Delta outflow obligations imposed by the SWRCB, because Delta outflow, it is asserted, would be an out-of-basin need. This clause has been construed by the courts as a limitation on contracting for consumptive use, not the instream water quality uses of New Melones imposed by the SWRCB.² The authorizing legislation limits New Melones project diversions by subordinating them to "in-basin" demands. Among other limitations, this provision limits Reclamation's authority to contract for beneficial uses out of the Stanislaus

² "In addition to complying with the requirements of the Water Control Board, the United States Department of the Interior ("Interior") was required by the Flood Control Act of 1962 to "determine the quantity of water required to satisfy all existing and anticipated future needs within the [Stanislaus River] [B]asin" Pub.L. No. 87-874, § 203, 76 Stat. 1173. The in-basin needs were deemed superior to other uses for the water. *Id.* *Stockton East Water Dist. v. U.S.* (Fed. Cl. 2006) 70 Fed.Cl. 515, 519, *on reconsideration in part* (Fed. Cl. 2006) 72 Fed.Cl. 141, and *judgment entered* (Fed. Cl. 2007) 75 Fed.Cl. 321, *modified in part* (Fed. Cl. 2007) 76 Fed.Cl. 470.

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River basin, in lieu of contracts for in-basin demands. It is not a limitation on the use of New Melones stored water for environmental uses in the Delta.

The authorizing legislation also requires “[t]hat the Secretary of the Army give consideration during the preconstruction planning for the New Melones project to the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control.” Instream flow requirements in California are established by the SWRCB under its water quality control authorities, and the Delta is downstream from the Stanislaus River.³ Therefore, contrary to the Districts’ statement, the authorizing legislation for New Melones does not prohibit, and, in fact, contemplates, use of New Melones storage for instream flow needs downstream from New Melones and does not limit “downstream” to amounts measured at Vernalis only.

In addition, the authorizing legislation for New Melones subjects it to the federal Reclamation laws and makes it an integral part of the CVP as a whole. 76 Stat. 1191 (1962). Reclamation has broad authority to operate Reclamation reservoirs⁴ and to take all “necessary and proper” actions under the federal Reclamation laws.⁵ Moreover, as you are aware, “[u]nder section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), [Reclamation] is required to comply with state law and to acquire water rights for diversion and storage of water by the CVP. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 106, 227 Cal.Rptr. 161; see also *California v. United States* (1978) 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 [a state may impose any condition on control, appropriation, use or distribution of water in a federal reclamation project which is not inconsistent with clear congressional directives respecting the project].)”⁶

Reclamation’s water right licenses and permits for the CVP, including its permits for New Melones (Permits 16597, 16600, and 20245), are conditioned on the requirement to meet Delta outflow objectives. Decision 1641, p. 146. While the Delta outflow requirement is not mandated by name in any particular CVP division, unit or source, it is a mandate on the CVP, including New Melones, nonetheless. The 2021 New Melones operation is in response to a rare circumstance, and is the result of unusually dry conditions, low inflows to North of Delta reservoirs, and unusually near normal storage in New Melones. Under these unique and rare circumstances, use of New Melones stored water to meet Delta outflow objectives does not conflict with congressional directives respecting New Melones in the authorizing legislation.

³ In addition, the Delta has been held by the California Court of Appeal to be within the same “area of origin” as the Stanislaus River, in response to an argument that using New Melones for instream flow needs beyond the Stanislaus River would violate California’s “area of origin” statutes. *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 758-760.

⁴ Section 6 of the Reclamation Act of 1902 (43 U.S.C. § 491, 498).

⁵ “The Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of this Act into full force and effect.” Section 10 of the Reclamation Act of 1902 (43 U.S.C. § 373).

⁶ *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 692–693.

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In these extreme drought conditions, Reclamation is very supportive of facilitating transfers throughout the CVP area. For many contractors, transfers are their only supply for this year, and Reclamation is accommodating several transfers this year across the project.

However, with respect to the Districts' 2021 transfer proposal to use up to 100,000 acre feet out of the Districts' conservation account under the 1988 Agreement, Reclamation cannot support such a transfer. The 1988 Agreement contemplates diversion by the Districts only at Goodwin Dam in satisfaction of the Districts' irrigation rights and use of the conservation account only in drought years on District lands. It does not currently provide for any circumstance for releases by the Districts, nor quantify any reasonable transferrable amount under California law. In addition, Reclamation supports transfers only to the extent such transfers pose no harm to the CVP. Reclamation remains concerned that the Districts' proposed transfer could injure the rights of the CVP.

We look forward to working with the Districts in the future on amendments to the 1988 Agreement, which, in addition to other things, could provide for transfers and possibly address issues necessary for a successful voluntary agreement and maintaining a sustainable operation for New Melones in lieu of implementation of the Board's 2018 Bay-Delta Water Quality Control Plan Update.

Sincerely,

Ernest A. Conant
Regional Director