State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. BOX 2000, Sacramento, Ca. 95812-2000
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PROTEST – (Petitions)

BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS

TEMPORARY CHANGE PETITION INVOLVING THE TRANSFER OF 45,000 ACRE-FEET OF WATER UNDER LICENSE 2685 (APPLICATION 1224) OF MERCED IRRIGATION DISTRICT

We, Chris Shutes, Water Rights Advocate, California Sportfishing Protection Alliance, 1608 Francisco St., Berkeley, CA 94703, blancapaloma@msn.com, (510) 421-2405; Cindy Charles, Board Member, (CSPA), 1140 Rhode Island Street, San Francisco, CA 94107, cindy@ccharles.net, (415) 860-0070, Bill Jennings, Executive Director, CSPA, 3536 Rainier Ave, Stockton CA 95204, deltakeep@me.com, (209) 464-5067

have read carefully a notice relative to a petition for Temporary Change Involving the Transfer of up to 45,000 Acre-Feet of Water under License 2685 (Application 1224) of the Merced Irrigation District.

It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:

(1) not best serve the public interest	**x**
(2) be contrary to law	**x**
(3) have an adverse environmental impact	**x**

State Facts, which support the foregoing allegations:

Background

On March 27, 2020, Merced Irrigation District (Merced ID) filed a petition for temporary change to transfer up to 45,000 acre-feet of water pursuant to California Water Code section 1725 et seq. Merced proposes to transfer the water from July 2020 through September 2020 to the following agencies: Santa Clara Valley Water District, Belridge Water Storage District, Berrenda Mesa Water District, Dudley Ridge Water District, Lost Hills Water District, and Wheeler Ridge-Maricopa Water Storage District. Changes include: (1) add the State Water Project's (SWP) Harvey O. Banks Pumping Plant and San Luis Reservoir as additional points of rediversion; and (2) add a portion of the SWP's service area as an additional place of use as shown on Maps 1878-2 and 1878-3 on file with the State Water Resources Control Board, Division of Water Rights under Application 5630.

The April 1, 2020 update of the Department of Water Resources Bulletin 120 Water Supply Forecast shows the forecast of annual unimpaired flow for the Merced River at 395 thousand acre-feet, only 40% of average for the water year.[1] The San Joaquin Index at 75% exceedance for April 1, 2020 was 2.1, indicating a Critically Dry water year type.[2]

The Board of Directors of the Merced Irrigation District is well aware of the likelihood of very low inflows to its reservoirs, as documented in Board Meeting Minutes from several meetings in 2020. In addition, Merced ID's approved fiscal 2021 budget states that Lake McClure is anticipated to be at minimum pool level at the conclusion of the 2020 irrigation season.

- At the Feb. 18, 2020 Merced ID Board Meeting, General Manager Mr. Sweigard presented the Board with a draft FY 2021 Budget review, stating: "this is not a typical year with such poor hydrology, making it necessary for the Board to contemplate some variables and potentially adopt or discuss an interim water rate so Merced ID may begin diverting water beginning March 1st." (*Merced ID Board of Directors Unapproved Minutes, Feb. 18, 2020,* p. 6 of *March 9, 2020 MID Board Meeting Agenda & Background Information*).[3]

- At the March 9th Board Meeting, Mr. ElTal, Deputy General Manager, Water Rights/Supply, "provided a Water Resources hydrology update, discussing the current extremely dry conditions, reservoir elevation levels and the recent changes in weather patterns occurring. Mr. ElTal continued to provide a visual comparison of hydrology from recent years versus this year. Mr. ElTal noted, staff is hopeful for significant storms throughout March." (*MID Board of Directors Unapproved Minutes, March 9, 2020,* p. 45 of *April 7, 2020 MID Board Meeting Agenda & Background Information*).[4]

- Merced ID's Final Fiscal 2021 Budget states, "Lake McClure remains near its maximum operating level for this time of year, and the irrigation season is well underway with an unrestricted water allocation for 2020. Meanwhile, MID continues delivering highly reliable public power to our community at affordable and competitive rates. The in-District water rate for the coming irrigation season is set at $50 per acre foot for all MID growers. Neighboring growers in our groundwater basin may have access to a limited amount of temporarily available transferred surface water at $180 per acre foot." (*Merced ID Final Fiscal Year 2021 Budget,* p. v).[5]

[1] http://cdec.water.ca.gov/b120.html
[2] http://cdec.water.ca.gov/reportapp/javareports?name=WSI
[3] http://www.mercedid.com/default/assets/File/03-09-2020%20MID%20Board%20Meeting%20agenda%20%26%20Background%20Info.pdf
[4] http://www.mercedid.com/default/assets/File/April%207%2C%202020%20MID%20Board%20Mtg%20Agenda%20%26%20Background%20Information.pdf
[5] http://www.mercedid.com/default/assets/File/FY%202021%20Budget%20Book%20page%20number.pdf

- Merced ID's Final Fiscal 2021 Budget further states, "With a below average snowpack in 2020, Lake McClure is anticipated to be at minimum pool level at the conclusion of the 2020 irrigation season*"* (*Id.*)

Merced Irrigation District will sell water in the Critically Dry 2020 water year to make up for budget shortfalls.

- During the Feb. 18, 2020 Board Meeting, "Mr. Sweigard presented the Water Resources portion of the FY 2021 budget. Mr. Sweigard discussed revenue and expense assumptions for FY 2021. Expense assumptions were highlighted, noting use of approximately $8M from the Merced ID line of credit to balance the budget." (*Merced ID Board Meeting Minutes, Feb. 18, 2020,* p. 7)

- "Mr. Sweigard discussed the hydroelectric department and how the hydro net revenues have supported District budgets in the past, however in FY 2020 the hydroelectric department received historically low market energy rates and did not attain projected revenues." (*Id.*)

- "Mr. Sweigard noted approvals from the State Water Resources Control Board and other state agencies before the District is permitted to move the water through the Delta in hopes of obtaining the approximately $15M in revenue, if the Board so directs." (*Id.*)

- During the March 9 Board Meeting, Mr. McMurray [Merced ID General Counsel], "reported the Board took action in closed session regarding the potential sale of water to water users outside of District boundaries." (specific action was not recorded in the Board Meeting Minutes) (*Merced ID Board Meeting Minutes March 9, 2020,* p. 1)

- The March 9 Board Meeting Minutes report "there was a significant amount of discussion regarding hydrology, in-District water pricing and pricing of water to be made available for transfer. Mr. ElTal provided an in-depth reviewed of the hydrology conditions facing the District in the region this year, noting the extremely dry winter and early spring conditions. Mr. ElTal summarized his expectation for water availability under the Districts pre-1914 water rights, clarified for discussion his expectation of water available for in-basin transfer under post-1914 rights. For water that potentially could be made available under post-1914 rights, the District has already submitted an application to the State Water Board for approval in 2019, and approval has been obtained should the Board determine to make it available for transfer." (*Merced ID Board Meeting Minutes March 9, 2020,* p. 46)

Merced Irrigation District overlies a critically overdrafted groundwater basin. In a 2017 letter to the State Water Board opposing the update of the Bay-Delta Water Quality Control Plan, Merced ID argued that increasing flows in the lower Merced River would worsen the conditions of the groundwater basin. Merced ID's 2017 letter quoted from Merced ID's 2015 Agricultural Water Management Plan, adding the emphases shown:

> "The Merced Groundwater Basin has just been declared a **Critically Overdrafted Basin by the state for purposes of SGMA**. Although the basins condition has been ongoing for some time, continued out-of-District agricultural development and its related groundwater extraction has put a strain on it. Groundwater pumping from the confined aquifer along the San Joaquin River in the Chowchilla Groundwater Basin **has resulted in subsidence**, particularly southwest of the District. As a result, overall effective groundwater capacity of MID existing wells during the typical dry year irrigation season is currently approximately 60,000 AF, versus 190,000 AF in 1977. Additionally, **the saline sink under the San Joaquin River is migrating easterly into the agricultural and urban area,** impacting lands in the southwestern portion of the District. MID's growers converting to low volume, high efficiency irrigation systems has significantly reduced deep percolation, adding to the strain."[6]

The Merced River's median and average annual runoff are 721 and 884 thousand acre-feet (TAF) respectively. Average annual diversions by Merced Irrigation District are 445 TAF.[7] Storage capacity in Lake McClure, Merced ID's only major storage reservoir, is 1024 TAF.

In the Merced River watershed, there are relatively high annual demands compared both to the average annual yield of the watershed and to project storage. Any dry-year sequence of two years or more significantly stresses the system.

Discussion

Merced ID's proposed out-of-district water sales for 2020 are not in the public interest, are contrary to law, and will adversely affect the environment.

By petitioning for a water transfer to out-of-district buyers, Merced ID is gambling that next year's precipitation will backfill storage in Lake McClure. Merced ID acknowledges it will deplete to minimum pool by the end of the irrigation season (*Merced ID Final Fiscal Year 2021 Budget,* p. v, quoted above).

I. Recent experience shows that Merced ID's proposed transfer is unreasonably risky.

In 2012-2014, Merced similarly gambled that precipitation in a following year would backstop depletion of its stored water. Following decisions on how much water to deplete from storage in 2012 and 2013, Merced ID was left with almost no water to deliver in 2014; Merced ID applied for a variance to its instream flow requirements and carryover storage minimum in Lake McClure, and had to rescue the remaining *O. mykiss* (rainbow trout/steelhead) in the lower

[6] Letter from John Sweigard to State Water Board, "*Comment Letter – 2016 Bay-Delta Plan Amendment and SED*," p. 191. Available at: https://www.waterboards.ca.gov/public_notices/comments/2016_baydelta_plan_amendment/john_sweigard2.pdf

[7] SWRCB 2018, *Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the Bay-Delta: San Joaquin River Flows and Southern Delta Water Quality*, pp. 2-10 to 2-15. https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2018_sed/docs/ch_02_water.pdf

Merced River as water temperatures reached lethal conditions there. This experience demonstrates that Merced ID's proposed transfer in 2020 is not a reasonable use of water.

Like 2019, 2011 was a copiously wet water year, and flood releases into the lower Merced River persisted through June. 2012 was a Dry water year under San Joaquin Index. Merced Irrigation District planned a reduced irrigation schedule in early spring, but elected to make full irrigation deliveries after late inflows. Following large runoff events in November and December of 2012, calendar year 2013 was one of the driest on record, making water year 2013 a Critically Dry year.[8] Merced ID made 75% irrigation deliveries in calendar year 2013. In 2014, there was almost no inflow until February, and Merced ID added little over 100,000 acre-feet of storage in Lake McClure. Merced ID planned as late as May to deliver 30% of full deliveries, but in early June slightly increased the amount to 36% of full deliveries.[9]

In April, 2014, the Merced River Hatchery released all of its fish into the lower river following a disease outbreak, due in part to high water temperatures of water released to the hatchery from Lake McClure. In April, Merced ID also released, following an agreement with California Department of Fish and Wildlife, a pulse flow of 5000 AF to attempt to move surviving salmonids in the lower Merced out of the river.[10] In the summer of 2014, the California Department of Fish and Wildlife (CDFW) required Merced ID to work with the Department to rescue fish from the river downstream of Crocker-Huffman Dam, where water temperatures were likely to become lethal for juvenile and adult *O. mykiss*.[11] CDFW captured 60 trout/steelhead downstream of Merced ID's Crocker-Huffman Dam and relocated them to the Merced River Fish Hatchery, where CDFW installed chillers to keep the fish alive in holding tanks. CDFW held these fish for 18 months, since 2015 was also a critically dry water year.

In addition, Merced ID applied for and received in 2014 a flow variance from the Federal Energy Regulatory Commission and a Temporary Urgency Change from the State Water Board.[12] The Board's Temporary Urgency Change Order (p. 6) allowed Merced ID to: "[c]hange MID's April and May compliance obligation at Shaffer Bridge to be 60 cfs daily average flow, rather than 60 cfs instantaneous flow (with an instantaneous flow of not less than 40 cfs at Shaffer Bridge during this two-month period); and 2) Reduction in the minimum pool requirement for Lake McClure from 115,000 af to 85,000 af."

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[8] http://cdec.water.ca.gov/cgi-progs/iodir/WSIHIST

[9] *See* http://www.sacbee.com/2014/06/03/6455458/growers-to-receive-increased-water.html#storylink=cpy

[10] *Id*. The water for this pulse flow was sold at $1000 an acre-foot, delivered through the South Delta state or federal pumps.

[11] *See* https://wildlife.ca.gov/Drought/Projects/Merced-Rescue-Summary. *See also: Lower Merced River Rainbow Trout and Fall-run Chinook Salmon Rescue Plan, https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14388027*
DFW proposed capturing and relocating salmonids to ponds near Crocker-Huffman Dam, presumably at the Merced River Fish Hatchery or the adjacent private Calaveras Hatchery, and equipping the ponds with chillers.

[12] *See* 147 FERC ¶ 62,081, *Order Granting Extension of Temporary Variance of Minimum Flow and Minimum Pool Requirements under Articles 40 and* 44, May 2, 2014, available at: https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13537000. *See also* SWRCB, *Order Approving Temporary Urgency Changes Including Transfer of Water and Instream Flow Dedication*, May 22, 2014, available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_orders/docs/mid_temp_order_mod052214.pdf

Draining Lake McClure to minimum pool in the fall of 2020 will mean that a second dry or critically dry year will create the need for another Temporary Urgency Change. It will also place salmon and *O. mykiss* in the lower Merced River downstream of Crocker-Huffman Dam in imminent danger for mortality due to thermal stress and crowding conditions to due lack of flow.

II. Selling water from an overallocated surface and groundwater system is an unreasonable means of balancing a budget.

Although Merced ID increased the cost of irrigation water from $40 to $50 an acre-foot in early 2020, Merced Irrigation District farmers still receive water at costs below the costs of delivery. This is clearly demonstrated as cited above by the fact that a decrease in hydropower revenues is in part the cause of Merced ID's budget shortfall (*Merced ID Board Meeting Minutes, Feb.18, 2020,* p. 7). Thus, Merced ID seeks to sell water to buyers far outside the District to fill the budget gaps at the risk of depleting storage and water supply to dangerously low levels.[13]

The hydrology and irrigation management of Merced ID in 2012-2014 as described above showed the limitations of the Merced River water supply system. Merced ID should not transfer 45,000 AF far out of basin and drain its reservoir to minimum pool in Critically Dry water year 2020. On the contrary, wise water management in 2020 would require Merced ID to reduce the already promised full irrigation deliveries in its service area and/or reduce water transfers to entities within the same groundwater basin as the Merced ID service area. Merced ID should retain water in carryover storage to have some water for irrigation next year and to better assure that aquatic resources in the lower Merced River will be protected in 2021.

The immediate issue that caused Merced ID's budget shortfall (declining prices for its hydropower) is a likely a structural issue and not a one-year anomaly. The FY 2021 Merced ID budget predicts no increase in hydropower revenues in FY 2021 over FY 2020. (*Merced ID Final Fiscal Year 2021 Budget,* p. 35). Rather than relying on risky water sales to correct this structural deficit, Merced ID should bring its water delivery costs into line in order to cover its budgetary shortfall.

Summary

I. The proposed transfer of water will not best serve the public interest.

The proposed transfer will take water out of a critically overdrafted groundwater basin in a Critically Dry year. This will increase groundwater overdraft or at least fail to use local water resources to correct overdraft, contrary to the public interest. The proposed transfer will allow sale of water out of an overallocated surface water system in a Critically Dry year. This will encourage overallocation of water, contrary to the public interest. The proposed transfer will deplete carryover storage to the greatest allowed degree. This will support a business model for

[13] In times of low water, Merced ID has increased the irrigation water rate. The 2014 irrigation water rate was set to $75 per acre-foot by the Board on June 3, 2014. (*FY 2015 Merced ID Annual Report,* p. 30*). See also Merced Irrigation District Pursues Cost Increases for Farmers* (Feb 4, 2014), https://www.mercedsunstar.com/news/local/article3285218.html

drought planning that does not plan ahead for likely shortages, contrary to the public interest. This will also increase reliance on regulatory variances and waivers during dry year sequences as an accepted business practice, contrary to the public interest.

II. The proposed transfer of water will be contrary to law.

Article 10 Section 2 of the California Constitution prohibits the unreasonable use of water. Selling stored water under circumstances in which storage is unlikely to meet future needs is not a reasonable use of water.

III. The proposed transfer of water will have an adverse environmental impact.

If water year 2021 is a Dry or Critically year, Merced ID will likely not have sufficient water to meet its instream flow needs or to maintain water temperatures in Lake McClure sufficient to keep fish in the lower Merced River in good condition downstream of Crocker-Huffman Dam.

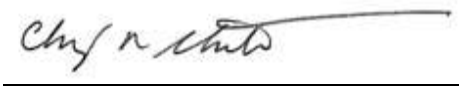
Under what conditions may this protest be disregarded and dismissed?

1. To mitigate impacts to aquatic biota in the lower Merced River and to reduce the likelihood of flow or carryover storage variance requests in 2020, the State Water Board must require Merced ID to reduce surface water deliveries to preserve carryover storage in Lake McClure to 200 TAF at the end of October 2020.
2. To mitigate impacts to groundwater resources, Merced ID must enforce land fallowing in 2020 sufficient to offset the loss of 45 TAF of transfer water and 85 TAF of water required for additional storage to meet the 200 TAF carryover storage target.

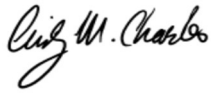
A true copy of this protest has been served upon the petitioners by e-mail (see below).

Date April 30, 2020

Chris Shutes, Water Rights Advocate
California Sportfishing Protection Alliance



Cindy M. Charles, Board of Directors
California Sportfishing Protection Alliance



Bill Jennings, Executive Director
California Sportfishing Protection Alliance

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