

State of California

Before the State Water Resources Control Board

California Department of Water Resources, Petitioner

Water Right Permit 16482

Water Right Application 17512

**State Water Project
FERC Projects 2100 and 2426**

Feather River Watershed thence Oroville Dam thence Feather River thence Sacramento River thence Italian and Indian Sloughs thence Sacramento-San Joaquin Delta Channels thence Bay Delta Estuary thence State Pumps thence California Aqueduct thence San Luis Reservoir thence Westlands Water District thence Tulare Lake Basin Water Storage District thence Empire West Side Irrigation District et al

Notice of Petition for Temporary Change Involving The Transfer of Up To 10,000 Acre-Feet to Areas Within the Westlands Water District under California Department of Water Resources Permit 16482 (Application 17512)

Formal Project and Objections by the California Fisheries and Water Unlimited

Pursuant to Section 1703.2 of the California Water Code, the California Fisheries and Water Unlimited hereby filed a formal protest and objections against the approval of the Temporary Change Petition in the above shown matter.

The California Fisheries and Water Unlimited is a California non-profit corporation. The president of the California Fisheries and Water Unlimited is Robert J. Baiocchi. The agent for the California Fisheries and Water Unlimited is also Robert J. Baiocchi. His mailing address is: P.O. Box 1035, Blairsden, California 96103. His e-mail address is: rbaiocchi@gotsky.com

The Petitioner is the California Department of Water Agency. The agent for the California Department of Water Resources is Chief Nancy Quan, Program Development and Water Supply and Transfers and her e-mail address is: nquan@water.ca.gov The mailing address of the California

Department of Water Resources is: P.O. Box 942836, Sacramento, CA 94236-001.

This formal protest et al is being forwarded to the State Water Board, its staff, and to the California Department of Water Resources via electronic mail. Electronic filings are acceptable to the State Water Board and its staff. Should the State Water Board staff finds the electronic filing not acceptable, we require sufficient time to forward the formal protest and objections to the petitioner by first class mail so that our formal protest and objections are not denied.

This formal protest and the objections are based on legal and environmental grounds as shown below.

The Proposed Project and Water Transfer

According to the notice by the Division of Water Rights, State Water Project (SWP) water is stored in San Luis Reservoir under the provisions of Permit 16482 (Application 17512) and held for use in the service areas of SWP contractors including the Tulare Lake Basin Water Storage District (Tulare) and the Empire West Side Irrigation District (Empire). Newton Farms and Hansen Ranches/Vista Verde Farms are farming interests that hold lands in both Tulare and WWD. Newton and Brooks Farms are farming interests that hold lands in both Empire and WWD. These parties have requested that a total of up to 10,000 acre-feet (af) of SWP water currently scheduled for use on their lands (8,000 af from Tulare and 2,000 af from Empire) be transferred for use on their lands located within WWD. The petitioner indicated that no additional groundwater would be pumped within Tulare or Empire as a result of this transfer. The proposed temporary change would be effective for a period of one year from the date of this order. DWR submitted this petition for temporary change in place of use to facilitate this exchange. In the absence of the proposed temporary change, the aforementioned parties on their lands located within Tulare or Empire would use the water.

The grounds for the California Fisheries and Water Unlimited objections and formal protest are as follows:

- 1. The petition is not in compliance with the provisions of the federal Endangered Species Act, the provisions of the State of California Endangered Species Act; and the provisions of the California Fish and Game Code, including the provisions of the California Water Code. See Section 1701.3 (b) (2) of the California Water Code. Consequently, as shown below, pursuant to Section 1701.4 of the California Water Code, the State Water Board and must cancel the petition.**

- 2. Water for the proposed water transfer from the State Water Project is pumped from the Delta State Pumps in the Bay Delta Estuary to the California Aqueduct and thence San Luis Reservoir. The State Water Board and its staff must deny the proposed water transfer because the water transfer would unreasonable affect endangered spring-run Chinook salmon species at the State Pumps and consequently violate Section 1727 (b) (2) of the California Water Code and also violate the provisions of the federal Endangered Species Act and the provisions of the California Endangered Species Act. See attachment.**
- 3. Water for the proposed water transfer from the State Water Project is pumped from the State Pumps in the Bay Delta Estuary to the California Aqueduct and thence San Luis Reservoir. The State Water Board and its staff must deny the proposed water transfer because the transfer would unreasonable affect threatened steelhead trout species at the State Pumps and consequently violate Section 1727 (b) (2) of the California Water Code and also violate the provisions of the federal Endangered Species Act and the provisions of the California Endangered Species Act. See attachment.**
- 4. Water for the proposed water transfer from the State Water Project is pumped from the State Pumps in the Bay Delta Estuary to the California Aqueduct and thence San Luis Reservoir. The State Water Board and its staff must deny the proposed water transfer because the transfer would unreasonable affect non-listed Chinook salmon species at the State Pumps and consequently violate Section 1727 (b) (2) of the California Water Code. See attachment.**
- 5. Water for the proposed water transfer from the State Water Project is pumped from the State Pumps in the Bay Delta Estuary to the California Aqueduct and thence San Luis Reservoir. The State Water Board and its staff must deny the proposed water transfer because the transfer would unreasonable affect striped bass species at the State Pumps and consequently violate Section 1727 (b) (2) of the California Water Code. See attachment.**
- 6. Water for the proposed water transfer from the State Water Project is pumped from the State Pumps in the Bay Delta Estuary to the California Aqueduct and thence San Luis Reservoir. The State Water Board and its staff must deny the proposed water transfer because the transfer would unreasonable affect Delta Smelt species and Longfin Smelt species and their habitat in the Bay Delta Estuary and consequently violate Section 1727 (b) (2) of the California Water Code and also violate the provisions of the federal Endangered Species Act.**

- 7. Water diverted to San Luis Reservoir is pumped from the State Pumps through the California Aqueduct. There are fish losses at the State Pumps where the water will be transferred. The California Department of Water Resources must secure a "take permit" from the US NOAA Fisheries and also a "take" permit from the California Department of Fish and Game for the subject water transfer pursuant to the provisions of the state and federal Endangered Species Acts to prevent harm and injury to endangered and threatened fish species protected under the state and federal ESA at the State Pumps.**
- 8. The California Fisheries and Water Unlimited has formally notified the staff of the Division of Water Rights of fish losses at the State Pumps resulting from water transfers in past years. The staff has ignored the fish losses at the State Pumps and the subsequent violation of Section 1727 (b) (2) of the California Water Code and approved water transfers regardless of the unreasonable effects and losses to fish species at the State Pumps as shown in the attachment. We reference objections and formal protests filed by the California Fisheries and Water Unlimited and the California Salmon and Steelhead Association.**
- 9. The Tulare Lake Basin Water Storage District will use the water transferred and diverted to San Luis Reservoir from the State Pumps. The State Water Board and its staff must determine whether the Tulare Lake Basin Water Storage District has a water right permit to store and use the state's water. Secondly, the Tulare Lake Basin Water Storage District must be required by the State Water Board and its staff to prepare and implement an irrigation conservation management plan pursuant to Section 10800 et seq of the California Water Code because the District has overused its water supply.**
- 10. The Empire West Side Irrigation District will use the water transferred and diverted to San Luis Reservoir from the State Pumps. The State Water Board and its staff must require Empire West Side Irrigation District to prepare and implement an irrigation conservation management plan pursuant to Section 10800 et seq of the California Water Code because the District has overused its water supply.**
- 11. If the Empire West Side Irrigation District is the West Side Irrigation District, pursuant to Order WR-0012 EXEC, the District has included municipal, domestic, and industrial uses under License 1631. Pursuant to Section 10620 et seq of the California Water Code the District must also be required to prepare and implement an urban water Management plan because of overuse. The District must also**

be required to prepare and implement a groundwater conservation plan pursuant to Section 10753 of the California Water Code.

12. The Newton Farms will use the water transferred and diverted to San Luis Reservoir from the State Pumps. The State Water Board and its staff must determine whether Newton Farms has a water right permit to store the state's water for other uses. Secondly, the State Water Board and its staff must require Newton Farms to prepare and implement an irrigation management plan conservation plan pursuant to Section 10800 et seq of the California Water Code because it has overused its water supply.
13. Hansen Ranches and Vista Verde Farms will use the water transferred and diverted to San Luis Reservoir from the State Pumps. The State Water Board and its staff must determine whether Hansen Ranches and Vista Verde Farms have water right permits to use the state's water for other uses. Secondly, the State Water Board and its staff must require Hansen Ranches and Vista Verde Farms to prepare and implement irrigation conservation management plans pursuant to Section 10800 et seq of the California Water Code because of shown it has overused its water supply.
14. Westlands Water District will use the water transferred and diverted to San Luis Reservoir from the State Pumps. The State Water Board and its staff must determine whether the Westlands Water District has a "conditioned" water right permit to use the state's water for other its uses. Secondly, the State Water Board and its staff must require Westlands Water District to prepare and implement an irrigation conservation management plan pursuant to Section 10800 et seq of the California Water Code because it has overused its water supply.
15. The proposed water transfer is foreign water. The transferred water cannot be used for riparian diversions in the areas where the water will be transferred and beneficially used. Case law determined that riparian rights do not apply to foreign water. See *E. Clemens Horst Co. v. New Blue Point Mining Co.*, 177 Cal.631. 171 P. 417; *Crane v. Stevinson*, 5 cal. 2d 387, 54 P.2d 1100; *Rancho Santa Margarita v. Vail* 11 Cal. 2d 501, 81 P. 2d 533. Consequently, no parties that will receive the transferred water can use the foreign water for riparian rights and diversions, provided the State Water Board and their staffs enforce the laws governing foreign water in the State of California.

- 16. Water Right Permit 16482 does not have specific terms and conditions that protect public trust fisheries in the Bay Delta Estuary aside from claiming that the California Department of Water Resources must comply with the state and federal Endangered Species Act, which is never enforced or complied with by the State Water Board.. The permit further requires minimum protection notification and protection for salmon affected by the pumping of water from the State Pumps to the California Aqueduct and thence to San Luis Reservoir. The Division of Water Rights amended the permit in 2009 that required minimum protection standards for California salmon affected by the State Pumps. A CEQA document was not prepared for the amendment to Water Right Permit 16482. The staff of the Division of Water Rights used the change petition process to avoid compliance of CEQA and its Guidelines when it amended Water Right Permit in 2009 without public participation. See attachment.**
- 17. Water Right Permit 16482 must be amended by the State Water Board and its staff to include specific terms and conditions that protect endangered spring-run salmon and threatened steelhead trout species resulting from pumping at the State Pumps in the Bay Delta Estuary pursuant to CEQA and its Guidelines.**
- 18. Water Right Permit 16482 must be amended by the State Water Board and its staff to include specific terms and conditions that protect Delta Smelt and Longfin Smelt species resulting from pumping at the State Pumps in the Bay Delta Estuary pursuant to CEQA and its Guidelines.**
- 19. Water Right Permit 16482 must be amended by the State Water Board and its staff to include specific terms and conditions that protect non-listed fall-run Chinook salmon species resulting from pumping at the State Pumps in the Bay Delta Estuary pursuant to CEQA and its Guidelines.**
- 20. Water Right Permit 16482 must be amended by the State Water Board and its staff to include specific terms and conditions that protect striped bass species resulting from pumping at the State Pumps in the Bay Delta Estuary pursuant to CEQA and its Guidelines.**
- 21. The amendments to Water Right Permit 16482 must be prepared pursuant to the California Environmental Quality Act and its Guidelines with full public review and opportunity for comments from the public.**

- 22. The State Water Project operates under two (2) FERC Licenses. The Oroville Project is FERC Project 2100 and operates under the license requirements of a federal license. The Delta State Pumps is FERC Project 2426 and operates under the license requirements of a federal license. The California Department of Water Resources must obtain the expressed approval of the Federal Energy Regulatory Commission for changes to the operations of FERC Project 2426 (California Aqueduct Project) because of water transfers and the resulting fish losses to endangered and threatened species at the federally licensed State Pumps. It has been established for many years that the California Department of Water Resources, Licensee of FERC 2426, has avoided consulting with and obtaining the expressed approval from FERC of changes to the operations of FERC Project 2426. The State Water Board must not approve this water transfer until FERC approves the project, subject to public review and comments in the FERC process.**
- 23. We are requesting the Deputy Director of the Division of Water Rights to take administrative actions to review and monitor compliance of the terms and condition of Water Right Permit 16482 to determine whether the California Department of Water Resources is in compliance with the terms and conditions of its license, which includes the quantities of water in said permit. See attachment.**
- 24. The State Water Board and its staff must honor and comply with the provisions of the federal Endangered Species Act of 1973 in their final decision on this water transfer. The amendment by the Division of Water Rights to Permit 16482 of 2009 violates the federal ESA. This matter must be addressed in the final Order for this water transfer.**
- 25. The State Water Board and its staff must honor and comply with Section 7 and Section 9, and 50 CFR Section 402.1(a) of the federal Endangered Species Act in their final decision on this water transfer. The amendment by the Division of Water Rights of 2009 to Permit 16482 violates the federal ESA. The matter of compliance of Sections 7 and 9 of the federal ESA must be addressed in the final Order for this water transfer.**
- 26. The State Water Board and its staff must honor and comply with the State of California Endangered Species Act in their final decision on this water transfer. The amendment by the Division of Water Rights of 2009 to Permit 16482 violates the state ESA. This matter must be addressed in the final Order for this water transfer.**

- 27. The State Water Board and its staff must honor and comply with California Code of Regulations Title 14; Section 783.1, California Fish and Game Code Sections 86 and 2080 of the State of California Endangered Species Act in their final decision on this water transfer.**
- 28. Because the US NOAA Fisheries and the California Department of Fish and Game may not submit formal comments to the Board's staff regarding the subject water transfer, their failure to respond does not exempt the State Water Board, its staff, and the Petitioner from compliance of the federal ESA and the state ESA as shown above.**
- 29. The State Water Board and its staff must honor and comply with the Mono Lake Decision and the Public Trust Doctrine in the final decision on this water transfer. The matter of the public trust assets under the Public Trust Doctrine and the Mono Lake Decision must be addressed in the final Order for this water transfer.**
- 30. The State Water Board and its staff must honor and comply with the provisions of Section 401 of the federal Clean Water Act in the final decision on this water transfer. The matter of water quality at two FERC licensed project (FERC 2426) must be addressed in the final Order for this water transfer.**
- 31. Our request to order terms and conditions in Permits 16482 for the protection and maintenance of the endangered Chinook salmon; threatened steelhead trout; non-listed fall-run Chinook salmon; striped bass, Delta Smelt, and Longfin Smelt must be acted upon by the State Water Board and its staff. Our request to amend the water right permits would be in the public interest since the people own the public trust fishery resources of California and the State Water Board and its staff have a duty and responsibility, without exception, to protect the trust assets owned by the people of California in the water rights permitting process. The Division violated the people trust when the Division of Water Rights used the change in place petition process that does not require a CEQA document to amend Water Right Permit 16482 that affected the anadromous fisheries in the Bay Delta Estuary and at the Delta State Pumps without public review and comment of a CEQA document.**
- 32. The State Water Board and its staff must honor and comply with Section 1727 (b) (2) of the California Water Code because the proposed water transfer at the State Pumps would continue to cause unreasonable adverse effects and losses to endangered and threatened fish species at the State Pumps. The matter of the unreasonable effects to endangered and threatened fish species and**

non-listed fish species must be addressed in the final Order for this water transfer.

- 33. The State Water Board and its staff must consult with the California Department of Fish and Game and take actions to comply with the State of California Steelhead Restoration and Management Plan. The matter of the management of threatened steelhead at the State Pumps must be addressed in the final Order for this water transfer.**
- 34. The State Water Board and its staff must require the Tulare Lake Basin Storage District and the Empire West Side Irrigation District to comply with Section 10800 et seq of the California Water Code and require an conservation management plan prepared and implemented immediately.**
- 35. Finally, we are requesting the State Water Board and its staff not to give special treatment to the California Department of Water Resources. Clearly the California Department of Water Resources and its staff are not fish friendly and have received special treatment by the Board and its staff.**

A written response to each of the above numbered comments is requested from the State Water Board and its staff, including whether the State Water Board and its staff will approve the subject water transfer.

Respectfully

Signed by Robert J. Baiocchi electronically

**Robert J. Baiocchi, President
California Fisheries and Water Unlimited
P.O. Box 1035
Graeagle, CA 96103**

Dated: March 18, 2010

**cc: Chairman Charles Hoppin, SWRCB
Deputy Director Victoria Whitney, Division of Water Rights
Asst. Deputy Director James Kassel, Division of Water Rights
Greg Wilson, Water Transfer Agent, Division of Water Rights
California Department of Water Resources – Chief Nancy Quan
US NOAA Fisheries – Ms. Maria Rea – Mr. Randy McInnis
Interested Parties (bcc)**

References

Federal Endangered Species Act of 1973

Sections 7 and Section 9 of the federal Endangered Species Act

50 Code of Federal Regulations Section 402.01 (a)

California Endangered Species Act

California Code of Regulations; Title 14; Section 783.1

California Fish and Game Codes Sections 86 and 2080

California Constitution; Article X; Section 2

National Audubon Society v. Superior Court (1983)

PUD No. 1 v. Washington Department of Ecology (1994)

Section 401 of the Federal Clean Water Act

E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal.631. 171 P. 417 (1918)

Crane v. Stevinson, 5 cal. 2d 387, 54 P.2d 1100 (1936)

Rancho Santa Margarita v. Vail 11 Cal. 2d 501, 81 P. 2d 533 (1938)

Permit 16482; California Department of Water Resources; Order Approving Change in Place of Use and Issuing Amended Permit; September 14, 2009**

State Water Pumps; Fish Losses; 1984 to 2002; Memo; January 31, 2007; Department of Water Resources**

Oroville Project FERC Project 2100 License;

California Aqueduct FERC Project 2426 License;

Provisions of the Federal Power Act;

Steelhead Restoration and Management Plan for California; Department of Fish and Game; February 1996

Water Management Plans; Agricultural; Section 10800 et seq of the California Water Code

Water Management Plans; Urban; Section 10620 et seq of the California Water Code

Section 1725 et seq of the California Water Code

**Section 1727 et seq of the California Water Code
Section 1700 et seq of the California Water Code**

Numerous Protests and Objections Filed with the State Water Resources Control Board and the Division of Water Rights by the California Fisheries and Water Unlimited and the California Salmon and Steelhead Association on Water Transfers; 2008 and 2009

Historic and Present Distribution of Chinook Salmon in the Central Valley Drainages of California; Yoshiyama, Gerstung, Fisher, and Moyle

Western Salmon Counts Down 90 Percent in 7 Years; Huffington Post; March 10, 2010

e-WRIMS Public Information

**** = Attachments**

Note the following:

The sprinklers will go on this summer in the Central Valley, but not as much as farmers would like. Interior Secretary Ken Salazar announced Tuesday that growers south of the Sacramento-San Joaquin River Delta will receive 25 percent of the water they were hoping to get. That may not sound good on the surface, but it is better than the 5 percent the U.S. Bureau of Reclamation was planning to give them before a series of winter storms drenched the state and left a blanket of snow in the Sierra. "This is good news for the large majority of water users served by the Central Valley Project, but we realize that south-of-Delta agricultural water service contractors face serious water supply challenges," Salazar said during a joint news conference with Deputy Interior Secretary David Hayes and Bureau of Reclamation Commissioner Mike Connor. Three years of drought and federally mandated limits on pumping to protect endangered fish caused some farmers to abandon fields and others to trim jobs. Tensions between farmers and conservationists reached a high point when Sen. Dianne Feinstein threatened to bypass environmental laws to get farmers more water. The news of a 25 percent allocation was rushed out a week early at the urging of Feinstein, Sen. Barbara Boxer and Reps. Jim Costa, D-Hanford (Kings County), and Dennis Cardoza, D-Atwater (Merced County).

"This updated allocation provides more certainty and should help farmers secure the loans they need," Feinstein said in a statement. "I'm pleased that the Interior Department has recognized the urgency of the water crisis." The allocation could be increased if snow runoff exceeds expectations or more storms arrive between now and May. "We continue to work hard and make progress toward providing an additional 8 to 10 percent for agriculture south of the delta," Salazar said. The water content of the California snowpack is currently above average for this time of year, especially in the northern Sierra, which feeds the state's largest reservoir, Shasta Lake. The Central Valley Project reservoir is currently 81 percent full and 104 percent of average for this date. Water from Shasta irrigates about 3 million acres of farmland from Redding to Bakersfield. It provides drinking water for close to 2 million people. The announcement also increased the amount of water going to farmers, residents and industry north and south of the delta. Regulators warned nevertheless that it is no time to bask in the shower or leave the water running in the yard. As of now, Lake Oroville, the State Water Project's primary source of water for 25 million Californians and 700,000 acres of farmland, is 43 percent full. That's 57 percent of the average storage for this date.# - San Francisco Chronicle, Peter Fimrite.