

## PROTEST- PETITION

This form may also be used for objections

### PETITION FOR TIME EXTENSION, CHANGE, TEMPORARY URGENT CHANGE OR TRANSFER ON

**APPLICATION** \_\_\_\_\_ **PERMIT** 16478, etc. **LICENSE** \_\_\_\_\_  
**OF** Department of Water Resources and U.S. Bureau of Reclamation

I (We) have carefully read the notice (state name):

\_\_\_\_\_  
Address, email address and phone number of protestant or authorized agent: Jennifer Buckman,  
General Counsel, Friant Water Authority, 1107 Ninth St., #640, Sacramento, CA 95814,  
jbuckman@friantwater.org

Attach supplemental sheets as needed. To simplify this form, all references herein are to protests and protestants although the form may be used to file comments on temporary urgent changes and transfers.

**Protest based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS (Prior right protests should be completed in the section below):**

- the proposed action will not be within the State Water Resources Control Board's jurisdiction
- not best serve the public interest
- be contrary to law
- have an adverse environmental impact

State facts which support the foregoing allegations Please see attachment.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)

Please see attachment.

\_\_\_\_\_  
\_\_\_\_\_

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**Protest based on INJURY TO PRIOR RIGHTS:**

To the best of my (our) information and belief the proposed change or transfer will result in injury as follows: Please see attachment.

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Protestant claims a right to the use of water from the source from which petitioner is diverting, or proposes to divert, which right is based on (identify type of right protestant claims, such as permit, license, pre-1914 appropriative or riparian right): Contracts with United States Bureau of Reclamation, which holds rights to appropriate water for use in the Central Valley Project.

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List permit or license or statement of diversion and use numbers, which cover your use of water (if adjudicated right, list decree).

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Where is your diversion point located? \_\_\_ 1/4 of \_\_\_ 1/4 of Section \_\_\_, T \_\_\_, R \_\_\_, \_\_\_ B&M

If new point of diversion is being requested, is your point of diversion downstream from petitioner's proposed point of diversion? \_\_\_

The extent of present and past use of water by protestant or his predecessors in interest is as follows:

- a. Source San Joaquin River
- b. Approximate date first use made 1944
- c. Amount used (list units) \_\_\_
- d. Diversion season \_\_\_
- e. Purpose(s) of use \_\_\_

Under what conditions may this protest be disregarded and dismissed? Please see attachment.

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**All protests must be signed by the protestant or authorized representative:**

Signed: Jennifer T. Buckman, General Counsel Date: 2/13/15

**All protests must be served on the petitioner.** Provide the date served and method of service used:

Please see attachment.

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**PROTEST AND OBJECTION  
OF FRIANT WATER AUTHORITY  
TO THE DROUGHT CONTINGENCY PLAN,  
AND PETITION FOR RECONSIDERATION  
OF THE EXECUTIVE DIRECTOR'S ORDER  
REGARDING THE TEMPORARY URGENCY CHANGE PETITION**

On February 18, 2015, the State Water Resources Control Board will conduct a workshop to receive public input on: (1) the Temporary Urgency Change Petition jointly filed by the California Department of Water Resources ("DWR") and the United States Bureau of Reclamation last month, (2) the Executive Director's order approving the TUCP in part and denying it in part, and (3) the Drought Contingency Plan that DWR and Reclamation have prepared as required under State Water Board Order WR 2014-0029.

Friant Water Authority hereby joins in and incorporates by reference the petitions of other Central Valley Project and State Water Project water users requesting reconsideration of the Executive Director's Order. (See, e.g., request for reconsideration filed by San Luis & Delta-Mendota Water Authority and State Water Contractors.)

Friant files this separate protest and objection to the Drought Contingency Plan. The 2015 Drought Contingency Plan suffers from the same fatal flaws as the 2014 drought operations plan did. The State Water Board, as the agency charged with enforcing California's water rights, should not approve this plan until its numerous infirmities have been corrected.

**I. BACKGROUND FACTS**

**A. What Went Wrong in 2014**

The 2014 drought operations plan included several policy decisions that combined to create the water supply disaster that has unfolded within the Friant Division.

First, Reclamation applied its M&I shortage policy to determine the amount of water to be provided to its contractors, and in doing so, Reclamation completely overlooked the human needs within the Friant Division. The Friant Division was constructed, as contemplated in the California Water Plan, for conjunctive use of groundwater with augmentation by surface water supplies. San Joaquin River water supplies were developed for the Friant Division because it was recognized that local surface water supplies were inadequate to support the farms and communities on the east side of the Valley, and it was not feasible to get water from other sources to this location.

Recognizing the intertwined nature of the agricultural operations and their rural communities and the conjunctive use of water in this area, the water rights permits issued for the Friant Division did not specifically call out M&I uses for priority. Rather, the water supply needs of the rural communities and cities within the Friant Division were given preference in the form of a Class 1 contract. The Friant Division is unique among federal Reclamation projects in that its water supply is divided into two classes to reflect the variable hydrology of the San Joaquin River, and the Friant Division contracts reflect the local conditions and access to other water supplies such as groundwater. Some contractors have only Class 1 water, some only have Class 2 water, and some have both Class 1 and Class 2. All of the Class 1 contract amounts are fulfilled before any water is made available under Class 2 contracts. The amount of water subject to Class 1 contracts was calculated as the amount that could be obtained from the San Joaquin River during the 1927-33 drought. Obviously, the amount of water allocated under Class 1 contracts is less than is available under Class 2 contracts, but the Class 1 supplies are supposed to be highly reliable.

Within the Friant Division, most M&I communities, including disadvantaged communities, do not have direct deliveries and rely on the larger district in which they are located to protect their source, which is primarily groundwater. Whether the district actually spreads the water or by in-lieu deliveries and reduced pumping, the disadvantaged communities' needs are met by getting water to the Friant Districts. In 2014, in calculating the amount of water needed to serve essential health and safety needs of people, Reclamation overlooked all the Friant Class 1 contractors who serve these communities on the east side of the San Joaquin Valley and neglected to consider how the failure to deliver any surface water would impact this conjunctive use system.

Second, in violation of the terms of both Reclamation's contracts and D-935, the 2014 drought operations plan gave the Exchange Contractors *not only* the amount of San Joaquin River water rights that they had reserved under the Exchange Contract, *but also* the water rights that Reclamation had purchased or acquired on the San Joaquin River for the benefit of the Friant Division contractors.

Third, under the 2014 drought operations plan, Reclamation decided to share the supplies that developed in San Luis Reservoir, even though the Coordinated Operating Agreement contains no term authorizing Reclamation to split water with the State *before* it has satisfied the substitute water supply to the Exchange Contractors. This decision violates the holding of *Westlands Water District v. United States of America*, 337 F.3d 1092, 1103-04 (9th Cir. 2003) ("*Westlands VII*") that "substitute water delivered to the Exchange Contractors . . . is a vested priority obligation the Bureau must satisfy without including it in CVP available supply." *Id.*, approving *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1165 (E. D. Cal. 2001) ("*Westlands VI*").

Fourth, in the 2014 drought operations plan, Reclamation allocated water to the refuges as if they had the same priority as the Exchange Contractors' substitute supply. The refuges hold contracts entitling them to water supply from the Central Valley

Project. However, as the Ninth Circuit ruled in *Westlands VII*, "substitute water delivered to the Exchange Contractors . . . is not 'available water'" for any other CVP contractors. *Id.*, at 1103-04, approving *Westlands VI*, 153 F. Supp. 2d at 1165 (E. D. Cal. 2001). Reclamation subsequently permitted the south-of-Delta refuges to exchange their Level 2 water supplies with irrigation districts, effectively allowing those irrigation districts to line-jump Friant's water rights priority, even though the CVPIA does not permit refuges to make such exchanges of Level 2 water.

Thus, the 2014 drought operations plan prepared and implemented by Reclamation and DWR included these and numerous other fatal defects which combined to deprive the Friant contractors of the entirety of their water supply. Without conducting a hearing or otherwise inquiring into the legality, factual underpinnings, or implications of any of these decisions, the SWRCB approved the 2014 drought operations plan and the related Temporary Urgency Change Petitions.

As a result, Friant contractors received no Class 1 allocation in 2014.

Water users within the Friant Division were forced to rely on groundwater alone for their entire 2014 supply. The results were predictably disastrous. Hundreds of domestic wells went dry. 15 communities in California ran out of drinking water supplies in 2014: **14 of those communities -- Alpaugh, Earlimart, Farmersville, Frazier Park, Huron, Lindsay, London, rural Madera County, Orange Cove, Pixley, Poplar, Porterville, Strathmore, Tipton, and Terra Bella -- are within the Friant Service Area.** Some of these communities depend exclusively on Friant Division supplies to sustain them, while others rely on groundwater sources that are normally boosted by the surface water deliveries; last year, those sources were overtaxed and failed. Homes within these areas remain without adequate water for drinking, basic sanitation, and fire suppression. To this day, numerous families who have lost their domestic wells at their homes have to drive to a public park to shower. Some of these families have been without water in their homes for 7 – 9 months – even though it is the established policy of this State "that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." Cal. Water Code § 106.3(a). The impact has been disproportionately large on low-income families who cannot afford to move or dig deeper wells.

Under the extraordinary strain that was placed upon it last year, the conjunctive use system that forms the backbone of the Friant service area broke. Groundwater resources have been depleted. Many communities that were able to squeak by on groundwater last year will not be able to do so this year, as last year's operations completely exhausted any groundwater "savings" they had available. For this reason, the amount of surface water that will be needed to sustain the communities within the Friant Division is much higher this year than it was last year. The City of Fresno has estimated that the amount of surface water it alone will need to meet its residents' health and safety supplies in 2015 is 75,000 acre-feet. And the City of Fresno is just one of the six cities that hold Friant Class 1 contracts.

## **B. Procedural History**

In January 2014, the Governor recognized the critical state of California's water supplies and declared a drought emergency. A Drought Operations Management Team consisting of representatives from the Department of Water Resources, the Bureau of Reclamation, the United States Fish and Wildlife Service, the National Marine Fisheries Service, the California Department of Fish and Wildlife, and staff from this agency, the State Water Resources Control Board, was convened and developed a drought operations plan. In furtherance of the 2014 drought operations plan, throughout 2014, Reclamation and DWR filed a series of Temporary Urgency Change Petitions to adjust water quality requirements to address California's drought emergency.

Through WR 2014-0029, the SWRCB required Reclamation and DWR to file a drought operations plan by January 15, 2015 to address what would occur should conditions remain dry. The 2015 Drought Contingency Plan repeats many of the errors made in the 2014 plan. Through this protest and objection, Friant challenges those flaws and *urges the State Water Board to perform its duty of adjudicating whether the plan is legally adequate*. The involvement of State Water Board staff in preparing the plan does not excuse the Board from conducting this analysis.<sup>1</sup> The State Water Board is the only agency that has authority to enforce California's water rights laws, and the water users are depending on this agency to undertake a thorough review of the proposed actions.

### **II. Protest**

Friant Water Authority protests and objects to the Drought Contingency Plan because: (1) the Drought Contingency Plan is contrary to law, (2) the Drought Contingency Plan does not best serve the public interest, and (3) the Drought Contingency Plan injures the prior rights of the Friant Division contractors. Each ground will be discussed in detail below.

#### **A. The Drought Contingency Plan Is Contrary to Law**

The Drought Contingency Plan claims that it aims "to maximize regulatory flexibility of Project operations while still remaining within existing law and regulations."

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<sup>1</sup> Indeed, as a matter of due process, when the State Water Board conducts its adjudicatory review of the plan, State Water Board staff who participated in the development of the plan should be precluded from urging the Board to deem it sufficient. Due process requires notice and a hearing before property rights can be compromised. In any adjudicative proceeding before an administrative agency such as the State Water Board, "The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency . . . ." Cal. Gov. Code § 11425.10(a)(4). Procedural fairness requires "some internal separation between advocates and decisionmakers to preserve neutrality." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal.4th 1, 10 (2006). Due process can be satisfied when "rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed . . .," but the presumption that administrative agency decision makers are impartial can be overcome when specific evidence demonstrates actual bias or a particular combination of circumstances creating an unacceptable risk of bias. *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal.4th 731, 741 (2009).

Friant has no objection to the laudable goal of maximizing regulatory flexibility, particularly in the difficult circumstances of this drought. Unfortunately, however, the Drought Contingency Plan falls far short of the mark in terms of complying with existing law and regulations.

First, the Drought Contingency Plan does not specify that the Friant Division operations will comply with the terms of D-935, the permits issued thereunder, and the Purchase, Second Amended Exchange, and Friant Division repayment contracts.

Second, the Drought Contingency Plan seems to suggest that again in 2015, Reclamation will not adhere to water rights priority. The water quality standards at issue in this proceeding derive from D-1641, which was extensively litigated and ultimately resulted in an appellate decision. In *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 729 & n. 21 (2006), the Court of Appeals confirmed that the Board must conduct a regulatory proceeding to amend a water quality control plan as well as an adjudicative proceeding to assign responsibility to the water users for meeting the water quality objectives in the plan. *Id.*, citing *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 119 (1986). In seeking to ensure compliance with water quality objectives, California's law of prior appropriation generally requires the SWRCB to adhere to water rights priorities; priorities cannot be disregarded or subverted without an evidentiary finding of substantial justification. *El Dorado Irrigation Dist. v. State Water Resources Control Bd.*, 142 Cal. App. 4th 937, 967 (2006).

"Substitute water delivered to the Exchange Contractors . . . is a vested priority obligation the Bureau must satisfy without including it in CVP available supply." *Westlands VII*, 337 F.3d at 1103-04. Until that vested priority obligation is fulfilled, Reclamation has no water available south-of-Delta to share with the State or to deliver under the contracts for the refuges. To the extent the Drought Contingency Plan suggests otherwise, it is contrary to law.<sup>2</sup>

Third, the State Water Board's proceedings in 2015 suffer from the same procedural defects as the 2014 proceedings did. To date, the State Water Board has not indicated any intent to conduct an adjudicatory proceeding, even though at no time has any stakeholder been afforded the opportunity for an adjudicative hearing, even though the actions of the State Water Board and its staff in approving the Drought Contingency Plan threaten to deprive the Friant Division contractors of their property rights. Friant is not aware of any legal basis for the process being used for these proceedings.

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<sup>2</sup> Last year, after Reclamation illegally elevated the priority of the refuges' Level 2 water supplies to be equivalent to its "vested priority obligation" to the Exchange Contractors' substitute supply, it then permitted the refuges to exchange their Level 2 supplies with irrigation districts. This had the effect of allowing those junior water users to "line-jump" the Friant water users in priority. However, as the Drought Contingency Plan notes, refuge water supply contracts allow for reallocation of Level 2 supplies "between and among refuges." Reallocation of Level 2 refuge water supplies to other water users is not permitted. To the extent the Drought Contingency Plan facilitates and fails to forbid similar exchanges in 2015, it violates both the CVPIA and California's prior appropriation doctrine.

## B. The Drought Contingency Plan Does Not Best Serve the Public Interest

As indicated above, in 2014, Reclamation's application of its M&I Shortage Policy to calculate essential health and safety needs utterly failed to capture those needs within the Friant Division due to its unique nature. Now, with depleted groundwater resources, the surface water needs within the Friant service area are even greater this year. However, the Drought Contingency Plan claims, "The vast majority of CVP contractors throughout the entire service area that receive M&I water from the CVP have other available supplies to help meet their demand." Within the Friant Division in 2015, this is **patently inaccurate**. Nonetheless, the Drought Contingency Plan indicates that essential health and safety needs in 2015 will again be calculated using the M&I Shortage Policy – even though the 2014 experience demonstrated that this method severely shortchanges communities within Friant. Blithely disregarding what is going on in the real world, the Drought Contingency Plan claims that "For planning purposes the 180 TAF is a reasonable estimate of minimum CVP M&I needs for WY2015...." Clearly, 180,000 af is not "a reasonable estimate," unless Reclamation considers it reasonable to run 14 communities within the service area of its conjunctive use project *completely dry*.<sup>3</sup> Moreover, the needs of those communities have only *increased* in 2015 based on Reclamation's actions in 2014 and the resulting depletion of groundwater. As noted above, the City of Fresno *alone* estimates its health and safety needs at 75,000 acre-feet.

It is never in the public interest to leave entire communities – hundreds of families – without water in their homes and schools. Having sufficient water of adequate quality for drinking, sanitation, and fire suppression must be a top priority for any civilization: as the Interagency 2015 Drought Strategy notes, "As a first priority, the Projects must assure that adequate water supplies are available for drinking water, sanitation, and fire suppression for communities within their service areas."

Allocating no Class 1 water to the Friant contractors for the second year in a row would also result in catastrophic economic loss. The economy and fabric of the Friant Division has developed in reliance on water supplies that are highly reliable (when their priority is recognized and followed). More than half of Friant's service area is in permanent plantings, and the percentage is even higher in the districts with Class 1 water in their contracts. With the groundwater resources having been severely depleted by the effects of the 2014 drought operations plan within Friant, there is scant water left to irrigate these permanent plantings. Without water, trees and vines will die. Thousands of acres were taken out of production in the Friant service area last year due to lack of water. That number will increase exponentially if similar allocation decisions are made this year. The public interest weighs in favor of limiting these critical economic losses.

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<sup>3</sup> Reclamation asked the Friant Division contractors to estimate their essential health and safety needs by February 10, 2015. It is not clear to us why Reclamation did not seek information from the Friant Division contractors until the end of January, or why it did not ask for this information before it attempted to estimate the "reasonable" amount of health and safety water that would be required for CVP contractors in 2015.

The public interest also requires consideration of the non-economic impacts resulting from failing to deliver water to the Friant Division. In the San Joaquin Valley, where most of the historic wetlands have been lost over time, habitat functions for birds and terrestrial species are often served by groundwater recharge basins. Without the water, those habitat functions are lost. For example, six of the Friant Division contractors have a joint use project, developed with the National Fish and Wildlife Foundation in partnership with local Audubon Society, to provide both recharge of groundwater and habitat for migratory birds. The recharge basin is dry, and the habitat has been lost, because there was no surface water available to sustain it. Loss of farmland also results in associated loss of habitat for terrestrial species that rely upon that farmland (see, e.g., San Joaquin County Multi-Species Habitat Conservation Plan, § 2.2.1.2 - containing FWS' finding that agricultural lands, including orchards, vineyards, and croplands, constitute a habitat type that benefits certain terrestrial species). Failure to supply water to agriculture has also resulted in dust storms due to extensive fallowing, causing poor air quality and related health effects on the citizens of the Valley, in addition to the grave socioeconomic impacts that have been noted by the other protestants.

The Drought Contingency Plan pays lip service to essential human health and safety water needs and critical economic loss, but it fails to truly balance the competing public interest factors. The Board must perform this balance to ensure that water is being properly allocated. This is particularly important given the Projects' failure in 2014 to ensure adequate drinking and domestic water supplies within the Friant service area. In 2014, Reclamation shared water with the State Water Project, even though the Coordinated Operating Agreement does not authorize Reclamation to share the Exchange Contractors' substitute water supply. But as the Drought Contingency Plan notes, "Most SWP contractors have alternative sources of water, including groundwater and local reservoirs." The Drought Contingency Plan cannot possibly be consistent with the public interest if it requires Reclamation to share water with the State Water Project even when the State Water Contractors have adequate back up supplies and 14 entire communities within the CVP are left without sufficient water to serve the most basic human needs. The State Water Board should examine the balance struck in the Drought Contingency Plan and ensure that it meets essential human health and safety needs within the Friant Division and avoids critical economic losses to the extent possible.

### **C. Friant Division Contractors Are Legal Users of Water, and the Drought Contingency Plan Injures Their Interests**

The Drought Contingency Plan indicates an intent to "facilitate[e] voluntary water transfers and exchanges to the extent possible, while balancing the needs of upstream storage, fishery and wildlife resource protection, and operational flexibility." While Friant does not object to voluntary water transfers or operational flexibility in concept, movement of this water cannot be allowed to disrupt project supplies or their priority.

Thus, the blanket statement in the Interagency 2015 Drought Strategy that the projects will “Allow transfers outside the July through September window provided for in the Biological Opinions if conditions permit” is concerning to Friant because it contains no text indicating that movement of transfer water cannot displace movement of project supplies. In 2014, as the Interagency 2015 Drought Strategy notes, Reclamation allowed some 75-90,000 af of transfer water to be conveyed to San Luis & Delta-Mendota Water Authority across the Delta through November 15, 2014. A condition that was placed on the movement of this water in the environmental documents was that it not displace the movement or priority of project supplies.

Beginning in September, Friant has requested accounting from Reclamation and San Luis & Delta-Mendota Water Authority to show that the movement of this transfer water did not interfere with development of the substitute supply for the Exchange Contractors. To date, neither entity has provided any accounting to demonstrate the lack of impact, even though this was a condition of the environmental documents. It is not yet clear whether Reclamation will be able to establish that this transfer did not harm Friant or other CVP contractors.

To the extent the Drought Contingency Plan authorizes or streamlines water transfers, those authorizations must be made contingent on the projects demonstrating that the transfers do not harm other legal users of water.

### **III. CONCLUSION**

Last year, in the throes of an unprecedented drought, the State Water Board chose not to inquire as to how Reclamation and DWR ran the projects. But last year, as a result of the drought operations plan prepared and implemented by Reclamation and DWR, 14 communities within the Friant Service Area were deprived of adequate water to meet the most basic human needs, and thousands of acres of permanent plantings were lost.

This agency is charged with policing water rights. The communities and 15,000 farmers within the Friant Division are counting on this agency to do its job, so that the disaster of 2014 will not be repeated this year.

#### **IV. STATEMENT OF SERVICE**

Notice of this PROTEST AND OBJECTION OF FRIANT WATER AUTHORITY TO THE DROUGHT CONTINGENCY PLAN, AND PETITION FOR RECONSIDERATION OF THE EXECUTIVE DIRECTOR'S ORDER REGARDING THE TEMPORARY URGENCY CHANGE PETITION has been served by email as follows:

State Water Resources Control Board  
c/o Rich Satkowski  
P.O. Box 2000, Sacramento, CA 95812-2000  
Rich.Satkowski@waterboards.ca.gov

Department of Water Resources  
c/o James Mizell,  
P.O. Box 942836, Sacramento, CA 94236-0001  
James.Mizell@water.ca.gov

Regional Solicitor's Office  
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