

## STAFF REPORT

MEETING DATE: February 15, 2022

TO: Siskiyou County Board of Supervisors

FROM: Elizabeth Nielsen, Deputy County Administrator

SUBJECT: Federal Energy Regulatory Commission (FERC) Proceedings for the Lower Klamath Project: Impacts of the Water Right Held Under Application A016958 and the Siskiyou County Flood Control and Water Conservation District Act on FERC Proceedings.

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### I. INTRODUCTION

Members of the public have expressed repeated interest in the County seeking to obtain a 60,000 acre feet water right held by the State Water Resources Control Board under Application A016958, and have also expressed a belief that a special district in the County, the Siskiyou County Flood Control and Water Conservation District, presents leverage in the proceedings before the Federal Energy Regulatory Commission for the decommissioning of the Lower Klamath project. Staff is providing this staff report regarding the assessments undertaken on these two topics for the benefit of Board members and the interested members of the public.

### II. DISCUSSION

#### a. WATER RIGHT HELD UNDER APPLICATION A016958

In 2009, the County hired outside counsel to review and confirm the validity of the water right held under Application A016958 and to look into the possibility of filing a petition for assignment, if it were still viable. The County determined that the application fee and the associated costs presented a substantial hurdle to assignment of Application A016958's water rights.

Application A016958, a "State Filing Application" ("SFA"), was filed by the Department of Finance in 1956, and subsequently transferred to the State Water Resources Control Board ("SWRCB"). The SWRCB may assign any portion of the SFA when "the release or assignment is for the purpose of development not in conflict with such general or coordinated plan or with water quality objectives established pursuant to law." (Wat. Code, § 10504.) The State Water Board may not release from priority or assign an SFA if the county in which the water originates would be deprived of water necessary for its development. (Wat. Code, §§ 10505, 10505.5.) It is the County's understanding that Application A016958 reserved 60,000 acre feet annually from the Klamath River for "various uses including irrigation, industrial, domestic, municipal recreation, fish and wildlife. The place of use is 'within Shasta Valley'." The county may submit to the SWRCB a "petition for assignment" of Application A016958 seeking assignment of all 60,000 acre-feet annually or only a portion thereof.

In the fall of 2009, outreach was made to SWRCB and SWRCB advised that petition for assignment fee would be \$5,000 plus an additional \$850 to the California Department of Fish and Game. In addition to the petition fee, there would be an application fee in the amount of \$1,000 plus \$15 per each acre-foot greater than 10 acre-feet sought under the application, or \$454,960, whichever is less. It was calculated that \$15 per acre-foot for 59,990 acre-feet (60,000 minus 10) amounted to \$899,850. The maximum fee in 2009 would therefore have been reached at approximately 30,340 acre-feet. The filing fee would not guarantee that the right would be assigned to the County nor would it be returned in the event that the right was not assigned. The County was advised that it would be designated the lead agency for purposes of the California Environmental Quality Act (CEQA) and it was highly likely that a full environmental impact report (EIR) would be required. In addition, any petition for assignment of a state filing application automatically requires a mandatory hearing where evidence must be presented. Thus, even omitting the application fee, the EIR and the hearing expenses would have presented a considerable financial and regulatory obstacle.<sup>1</sup>

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<sup>1</sup> The County was advised that the priority date for a petition for assignment is the date that the application is filed *and fees are paid*. While the County could file a petition for assignment without concurrently paying the fee, this leaves open the possible that another party within the County could filing their own application with the fee, thereby taking precedence over the County's application.

Staff Report

In 2018, staff worked with the County's outside consultants, SWCA, and its new outside counsel to confirm the challenges related to seeking the water right under Application A016958 that were identified by its outside counsel in 2009. Other obstacles that have been identified for this water right include the need for construction of a conveyance system to bring Klamath River water into the Shasta Valley. An entity would need to be responsible for the design, construction, operation and maintenance of the conveyance system, which staff believes would represent a very significant cost.

Staff is aware that some of members of the public desire for the County to pursue the water right under Application A016958. The County has invested significant resources into review of Application A016958, and at this time, based on the review of two outside law firms and the County's environmental consultants, staff cannot recommend that the Board take such action or invest additional County resources into this matter. If members of the public have their own professional analyses they desire to submit to staff, staff will make review of those analyses and continue to assess its recommendation.

#### **b. The Siskiyou County Water Conservation and Flood Control District Act.**

The Siskiyou County Flood Control and Water Conservation District Act, Cal. Uncod. Water Deer Act, § 1240 (the "Act"), is often cited by members of the public as a potential source of local power over water rights within the boundaries of the District. In 2008, the County retained outside counsel to consider the impacts of the Act on dam decommissioning and whether the Flood District had powers that could be leveraged in the dam decommissioning process. It was determined that the same preemption principles that preclude the County from exercising regulatory power over the dam decommissioning process, preclude the district's exercise of regulatory power over the dam decommissioning process.

The Siskiyou County Flood Control and Water Conservation District Act was adopted by the State Legislature in 1959 and established a special district of the same name, and of limited powers that could provide flood protection, water conservation, recreation and aesthetic enhancement within its boundaries. The District is governed by a Board of Directors that is composed of the Board of Supervisors; however, the District is a separate legal entity from the County, with independent rights and limited powers set forth in its originating act. The District's assets, debts, liabilities and obligations are its own, not the County's. The Act is a state law with provisions nearly verbatim to that of numerous other flood control districts throughout the state of California.

The County has been advised that the relevant regulatory authority the Act creates is preempted by both state and federal law.

### **III. CONCLUSION**

Members of the public have presented staff and the Board with interesting and thought provoking ideas related to decommissioning of the Lower Klamath Project that they would like members of County government to research and explore on their behalf; however, in regard to the topics above, significant resources have already been expended and investment in further investigation does not appear warranted. Staff, however, remains happy to review professional assessments submitted by members of the public on these topics.

The County has limited staff resources and a set of core responsibilities that staff must continue to meet in service to the public. Current assessments suggest that staff's time would best be spent focusing on the County's participation in FERC's environmental review process. Environmental review processes are a traditional avenue for local governments' involvement in dam decommissioning processes. While California Senate Bill 155 conclusively presumes that the environmental documents prepared by the SWRCB in its 401 certification process satisfy the California Environmental Quality Act (CEQA), FERC's NEPA (National Environmental Policy Act) process still provides the County with the opportunity to weigh in on project alternatives and mitigation measures to address issues such as flood management, fisheries, groundwater, cumulative impacts, environmental justice, and climate change.