

René Voss – Attorney at Law

15 Alderney Road
San Anselmo, CA 94960
Tel: 415-446-9027
renepvoss@gmail.com

June 30, 2015

Sent to:
comments-pacificsouthwest-sequoia@fs.fed.us

Eric La Price – District Ranger
O’Dell Tucker – Planner
Western Divide Ranger District
32588 Highway 190
Springville, CA 93265

**cc: Ara Marderosian
Lisa Belenky
Carla Cloer
Illeene Anderson**

Subject: McKee Water SUP Scoping Comments for Sequoia ForestKeeper, Center for Biological Diversity, & the Kern-Kaweah Chapter Sierra Club

Sequoia ForestKeeper (SFK), the Center for Biological Diversity (CBD), and the Kern-Kaweah Chapter Sierra Club (the Club) thank you for the opportunity to comment.

Because of the short time-frame and significant amount of information in the county and state files, SFK, CBD, and the Club may submit additional comments at a later time.

Introduction and Background

Douglas McKee, the owner of the Bace Ranch, has asked the Forest Service to issue him a new special use permit (SUP) for construction of a water line and the use of tanks and pumps, to enable export of water from the Giant Sequoia National Monument for commercial purposes. McKee has submitted a separate application with the California State Water Resources Control Board requesting a change in use from irrigation to commercial, so he can sell most of the water from one spring for use as bottled water. He currently does not have the approval for that use, he does not have a permit for use of the old pipeline, which is in substantial disrepair, and does not have a permit for two 10,000 gallon tanks located near the lower end of Bace Ranch Rd, which are located on national forest land.

According to the SUP for his existing water system, McKee currently holds water rights for 5 springs to supply his property for irrigation/agricultural and domestic uses. Water from 4 of the 5 springs is being co-mingled and used on the McKee property to irrigate an orchard and provide water for domestic use. McKee, however, has only requested a change of use for one spring (Spring #4), which is also the subject of this new SUP application. The proposal is for water from Spring #4, located on the Monument, to be first pumped to his property and then via the new pipeline down the road to the two existing but unpermitted 10,000 gallon tanks where it would be trucked away to produce bottled water.

McKee currently holds a Forest Service Permit for use of Bace Ranch Rd (FS No. 20S92) and also holds a Forest Service SUP for use of the springs, waterlines, two water tanks near Spring

#4, and the use of an access road to Spring #4.¹ Water from Springs #4 and #5 currently feed into the two 10,000 gallon tanks located near Spring #4. From those tanks, the water is then pumped into a storage pond on Bace Ranch, which also holds water from Springs #1 and #3.

Tulare County Records indicate that before applying to Forest Service for a SUP, McKee requested a permit for a water transfer station for pumping and hauling of spring water from his water system. McKee's application to the county includes a signed affidavit and asserts that "all infrastructure is already in place." The county describes the project as follows:

The preliminary review is for a Special Use Permit to allow a water transfer station on private land within the unincorporated area of Tulare County. Spring water will be pumped to the site from a spring located in the Sequoia National Forest and then loaded into tanker trucks for transporting the spring water to an off-site bottling facility. The natural spring water will then be sold to various customers and end-users.

In response to the McKee application to the county, then District Ranger Rick Stevens wrote the county, expressing the following:

After review of your project cover letter, I would like to note that the project description differs from my understanding of Mr. McKee's proposal. The transfer station (location where the water will be filled into tanker trucks) will occur on Forest Service lands. The water from a source located on Forest Service lands will be collected in a holding tank on private land, then transferred down-hill via pipe and filled into tanks of a tanker truck parked at a landing (most of the pipeline and the landing is located on Forest Service lands).

I would also like to submit comments regarding Mr. McKee's Application (General Information/Cover Sheet). He states that there is unlimited parking on property in his response to Question 7; regarding Forest Service lands, parking would only occur at the transfer station landing site. Mr. McKee also states in response to Question 18 that all infrastructure is in place for this project; however, in his application for a Forest Service Special Use Permit regarding this project, Mr. McKee proposes to remove the existing water pipeline that currently exist above ground that follows the edge of the existing access road and replace it with a waterline below ground.

January 30, 2013 Letter to Nick Hahn of the Tulare County Resource Management Agency.

Tulare County Records from 2001 indicate that county staff and the Tulare County Planning Commission previously considered the use of a commercial water transfer facility from the property (described as APN 220-410-003; aka. the Bace Ranch parcel) which is located in an area zoned A-1. A-1 zoning was established "to prevent the introduction of incompatible

¹ Scoping for the 10-year water systems SUP was done internally and with the proponent of the SUP, but did not include the public, which the Forest Service justified because the proposed activities in the new SUP were the same as those under the previous SUP.

commercial, manufacturing, subdivision, and other urban uses into predominately agricultural areas of the County.” The Tulare County Planning Commission, by unanimous resolution on June 27, 2001, recommended that the proposed project, to divert water from an artesian spring through a pipeline to a storage tank below the spring and exported by truck over county roads, be declared incompatible and prohibited in the A-1 zone. It is unclear, however, whether the Tulare Board of Supervisors adopted the recommendation of the resolution in order for the Planning Commission’s interpretation to become effective.

In his application to the State Water Resources Control Board McKee has asserted that “The Tulare County Resource Management Agency has determined that a County Permit is not required, as the pipeline and transfer station will be on federal, not private, land.” Our review of the County Records, however, cannot confirm that this is the case. According to the Tulare County Resource Management Agency, Nick Hahn no longer works in that office, and we are trying to verify whether or not the county will require permits or whether zoning allows the proposed use. As of 6/29/2015 we have not been able to verify these facts.

The Proposal

The permit applicant, McKee, requests a SUP to reconstruct a 3 inch water pipeline, to be buried 2 feet below the surface of the Bace Ranch Rd for a distance of approximately 2 miles from his property to the two unpermitted 10,000 gallon tanks at the lower end of the road.

The scoping notice, however, erroneously states that the pipeline would run from the spring to the storage tanks, a distance of about two miles, and that no pumps or power generation would be required, and that gravity would drive the water from the spring to the tank, located 1600 feet below.

This description is contradicted by the map provided and the information in the county records and earlier SUP documents, which suggest that water from the spring must first be pumped 800 feet up to the holding pond, comingled with water from 3 other springs, and then drained to where the McKee property meets the Forest Service road before it can then flow with gravity down the pipeline to the unpermitted holding tanks.

In addition, the applicant would use an existing wooden shed at the loading area to store the hoses that would be used to move water from the tanks to the transport trucks. This shed is also located on the national forest/Monument and also appears to be unpermitted. Trucks would be staged near the existing shed and would drain approximately 12,000 gallons of water per day from the tanks. It is expected that there will be 3 truck trips per day (4,000 gallons each time) to and from the tanks. These trucks would use the Bear Creek Rd, other county roads, and probably State Highway 190 to transport the water to a water bottling plant somewhere in the area.

The applicant proposes to also make improvements to the road and install several culverts of varying sizes and rolling dips, as specified by the Forest Service Engineer. He would also be responsible for maintaining the road.

Comments and Questions

Before proceeding with its planning and environmental reviews, we request that the Forest Service verify whether or not Tulare County has jurisdiction over any aspect of the project's activities, such as whether the transport of water by trucks over county roads requires a permit, whether county zoning in zone A-1 is incompatible with the proposed commercial use, or whether the county has any other reason to require its own SUP for the proposed activity.

We have previously sent a copy of the Tulare County files for this project to the Forest Service and request that they be included in the project record. We also request that the Forest Service include the application and other documents associated with the change in use request to the State Water Resources Control board in the project file, including the initial California Department of Fish and Wildlife report.

1. Forest Service should prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under NEPA.

The Forest Service should prepare a full EA or EIS. Extraordinary circumstances preclude the use of a categorical exclusion (CE). California is in the middle of a historic drought, which is causing extreme stress to the trees and resources on the Sequoia National Forest and Monument. This project proposes to export water from the forest for a new purpose rather than allow the remnant water not used for the adjacent agricultural activities to seep from the orchard back into the ground to recharge the water table. This change in use will have a significant impact on the resources near Bear Creek since the exported water would no longer recharge the local water table or provide other benefits for wildlife, and therefore this loss of water should require a full environmental review.

The streams in the area are within the historic range of yellow-legged frogs, and the Forest Service should consider the impact from the project on this threatened species, its habitat, and its recovery in consultation with the U.S. Fish and Wildlife Service. The potential impact on the frogs, their habitat and recovery are an extraordinary circumstance, which also precludes the use of a CE.

Also, the area includes habitat for the Pacific fisher (*Pekania pennanti*), a Forest Service sensitive species and proposed threatened species under the ESA,² which resides in areas adjacent to the project area. These are all extraordinary circumstances that require robust environmental review. "A proposed action may be categorically excluded from further analysis and documentation in an EIS or EA *only if* there are no extraordinary circumstances related to the proposed action" 36 C.F.R. § 220.6(a) (emphasis added). Among the factors to be considered in determining whether there are extraordinary circumstances are the presence of and potential effects on protected species.

Resource conditions. (1) Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action

² The proposed rule for listing the Pacific fisher as threatened was published on October 7, 2014. See 79 Fed. Reg. 60419 (Oct. 7, 2014).

warrant further analysis and documentation in an EA or an EIS are: (i) *Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species*”

Id. at § 220.6(b) (emphasis added).

2. The EA or EIS must evaluate the environmental effects from the loss of water from the Sequoia National Forest and Giant Sequoia National Monument.

In addition to the direct impacts from burying the pipeline in the road and use of trucks on the Forest Service and other roads, the proposed SUP will enable the applicant to remove water from the national forest and monument that would otherwise have been retained on site to recharge the water table after use for irrigating the orchard. The Forest Service cannot simply pass the “analysis” buck to the State Water Resources Control Board just because they are the agency who will be determining whether the change of use can be permitted. As the lead agency, the Forest Service must conduct a full NEPA analysis of the direct, indirect, and cumulative impacts from loss of water from the national forest and monument, in addition to any state analysis under CEQA.

NEPA has two primary purposes: to ensure that the federal agency makes a fully informed decision in light of the potential environmental consequences of its actions, and to keep the public informed about those consequences and allow them an opportunity to comment on the proposed action.

Here, because the road is a Forest Service road and the tanks and transfer area are on federal lands, the proposed project cannot go forward to export water from the area without the Forest Service’s authorization of the pipeline and use of the tanks on the national forest (as acknowledged by the SWRCB). And so the scope of the environmental analysis must be comprehensive and include disclosure of effects from the enabling change the permitted activities would have on water resources on the forest and Monument.

This means the Forest Service must consider the full effects of the private development likely to occur as a result of the issuance of the proposed permit. Such an analysis is part of an accepted NEPA requirement to consider the environmental effects of Federal action.

NEPA requires an assessment of the effects—direct, indirect and cumulative—of an agency’s proposed action on the human environment. That assessment includes effects on a wide range of resources, including air, water, cultural resources, animal and plant species, human communities, etc. The sweep of NEPA is very broad.

“Effects” include direct effects, which are caused by the action and occur at the same time and place, and indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include related effects on air and water and other natural systems, including ecosystems. *See* 40 C.F.R. § 1508.8

(“Effects includes ecological . . . aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”).

Since the scope of review in the NEPA analysis must be broad, the Forest Service cannot limit it to only those effects from construction of the pipeline, and must analyze fully the direct and indirect effects of the export of water from the national forest and Monument. These effects are even more significant now that the State of California is in the midst of one of a historic drought. This analysis would be incomplete if left out now and instead left for the State to consider at a later time.

3. Has the flow rate from the spring diminished since the start of the drought?

Another aspect of the drought is whether the spring can continue to sustain the output that McKee envisions removing from the forest and monument. While the flow from this spring normally varies seasonally from 5 to 40 gallons per minute, that historic flow may no longer be accurate. And if there is a reduction in the normal range of flow, there would be a need to retain more of the water on the forest lands for the downstream riparian area. To make this determination, the Forest Service must gather this critical data via a flow meter at the earliest possible time so the flow data can aid in the Forest Service in its NEPA analysis.

4. Water meters are needed for each spring.

Because the waters under this project are comingled with waters from three other springs, and the drought may reduce flow from Spring #4 below normal ranges, there is a possibility that the flow down the pipe could exceed that of Spring #4 by contributions from the other three springs. To ensure that the proposed water use cannot exceed the amount from Spring #4, as part of the evaluation of the proposed project, if it is allowed to proceed, the Forest Service should require installation of meters and reporting of the flow data as a condition of the permit.

Please keep us informed of all further actions, notices, and opportunities to comment on this matter.

For Sequoia ForestKeeper, the Center for Biological Diversity, and the Kern-Kaweah Chapter of the Sierra Club,



René Voss – Attorney at Law
15 Alderney Road
San Anselmo, CA 94960
Tel: (415) 446-9027
renepvoss@gmail.com



Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Tel: (415) 632-5307
Fax: (510) 844-7150
lbelenky@biologicaldiversity.org