Legislation to Address California Environmental Laws Relating to Protection of Fish and Wildlife to Facilitate Foothill Feeder Maintenance and Repairs

Communications and Legislation Committee

Item 8-7

February 8, 2016

Proposed Action

- Seek legislation to authorize incidental take of a California fully protected species associated with Foothill Feeder maintenance and repair

Overview

- Foothill Feeder
- Unarmored Threespine Stickleback
- Legal Setting
- Recent California Supreme Court Case
- Legislative Proposal

Foothill Feeder

- A primary conduit of State Water Project water into the service area

Foothill Feeder

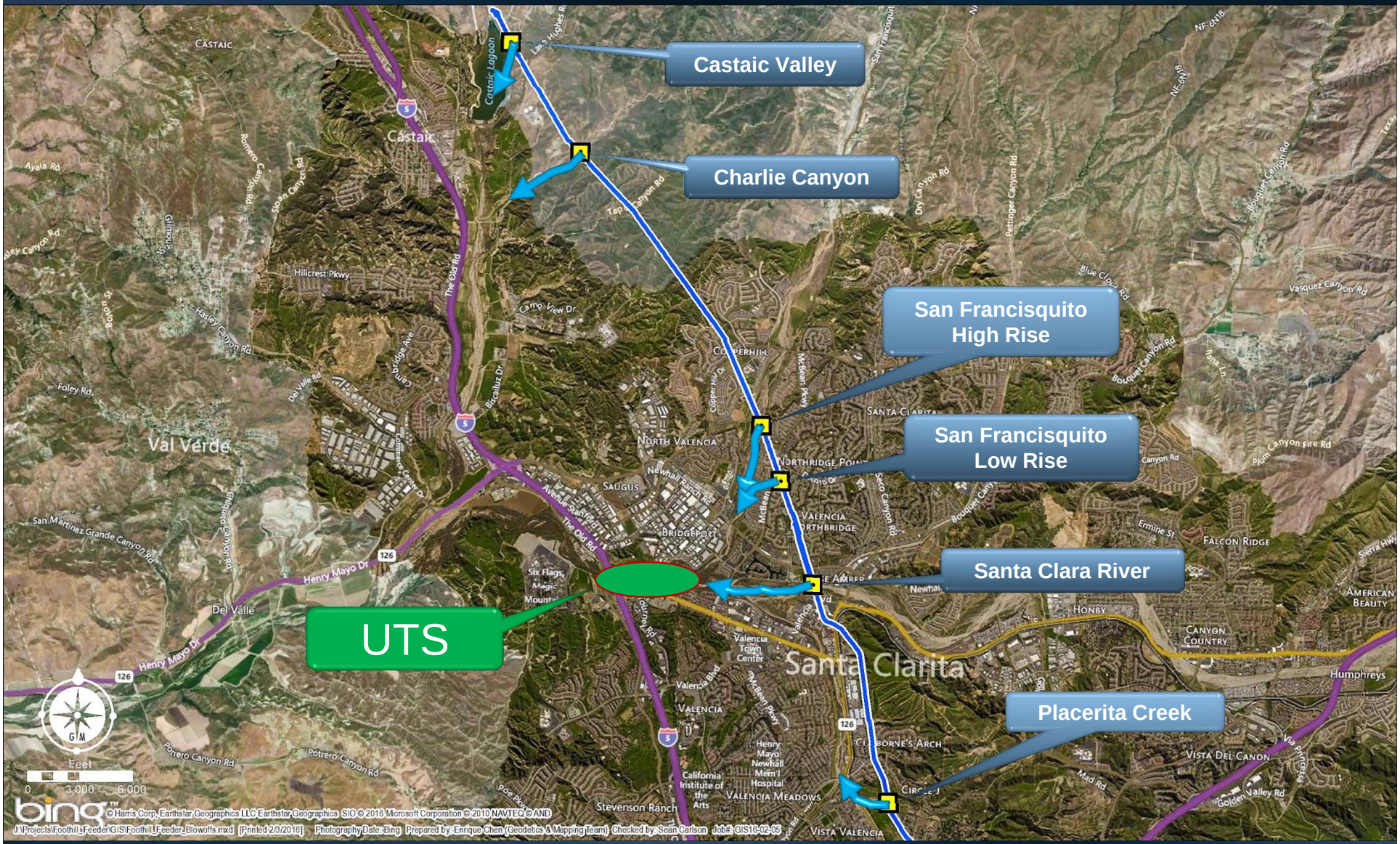
- Representative section

Foothill Feeder

- Inspection and repair approximately every five years
  - ~15-mile tunnel & pipeline
    - 6.3 miles of pre-stressed concrete cylinder pipe (PCCP)

- Emergency repairs may be needed at any time
- Dewatering
  - 535 AF total - 227 AF into Santa Clara River and San Francisquito Creek

Foothill Feeder Blow-off Locations



Unarmored Threespine Stickleback

- 2-3 inches in length
- Weak swimmer
- Occupies backwaters

- Species in decline
- Habitat loss/Drought
- Endangered and fully protected

Potential Effects of Dewatering

- Sudden increase and decrease of flows
  - Potential to push fish downstream
  - Fish retreat to low flow margins
  - Potential to strand fish when water recedes
- 2012 Maintenance
  - Metropolitan dewatered as slowly as feasible
  - Federally permitted monitors were prepared to move stranded fish back into stream

Recent California Supreme Court Opinion Held Relocation Is Take

- *Center for Biological Diversity v. California Department of Fish and Wildlife**
  - Lower court held that live relocation is not "take"
  - Supreme Court reversed
  - CDFW may not authorize relocation as avoidance
- Increases risk of unauthorized take from dewatering

**Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204

Recent Amendments Allow DFW to Permit Incidental Take of Fully Protected Species

- 2011 - SB 618 (Wolk, D-Davis)
  - Allows incidental take of fully protected species under a Natural Community Conservation Plan (NCCP)
- 2012 - AB 1973 (Olsen, R-Modesto)
  - Allows CDFW to issue CESA permit for Caltrans landslide repairs
- 2015 - AB 353 (Lackey, R-Palmdale)
  - Allows CDFW to issue a CESA permit for LA DWP and LA County Dept. of Public Works (Bouquet Canyon Creek channel capacity)

Proposed Legislation for Foothill Feeder

- Focus on Foothill Feeder periodic maintenance and repair relative to UTS only
- Still need to comply with other state and federal laws, e.g.,
  - CEQA
  - Endangered Species Act
- Staff will continue to evaluate avoidance alternatives

Summary

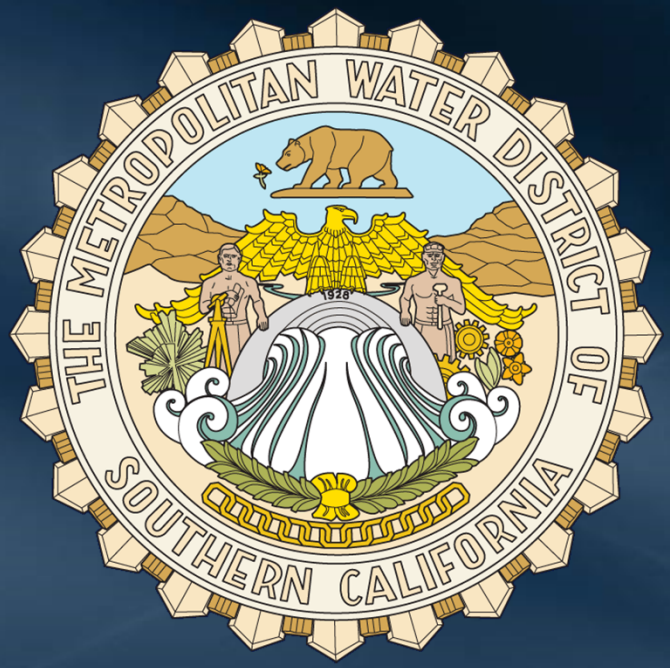
- Foothill Feeder essential to regional supplies, health & human safety
- Maintenance anticipated in 2016-2017 timeframe
- Potential to strand UTS
- Recent court case rules out moving stranded fish into stream to avoid impacts
- February 19 deadline to introduce bill

Board Options

- Option #1
  - Adopt the CEQA determination that the proposed action is not subject to CEQA, and authorize staff to seek legislation to allow for incidental take, if any, of the Unarmored Threespine Stickleback (UTS) associated with dewatering Metropolitan's Foothill Feeder for critical maintenance and repair.
- Option #2
  - Do not authorize staff to seek legislation.

Recommendation

- Option #1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