

1 RYAN S. BEZERRA, State Bar No. 178048
2 ALAN B. LILLY, State Bar No. 107409
3 JENNIFER T. BUCKMAN, State Bar No. 179143
4 ANDREW J. RAMOS, State Bar No. 267313
5 BARTKIEWICZ, KRONICK & SHANAHAN
6 A PROFESSIONAL CORPORATION
7 1011 Twenty-Second Street
8 Sacramento, California 95816-4907
9 Telephone: (916) 446-4254
10 Facsimile: (916) 446-4018
11 E-Mail: rsb@bkslawfirm.com

12 Attorneys for Protestants
13 City of Folsom, Sacramento Suburban
14 Water District and San Juan Water District

15 BEFORE

16 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

17 CALIFORNIA WATER FIX HEARING

18 Hearing in the Matter of California
19 Department of Water Resources' and
20 United States Bureau of Reclamation's
21 Petition for Change in Points of Diversion
22 for the Central Valley Project and the
23 State Water Project

24 PART 1 CLOSING BRIEF OF CITY OF
25 FOLSOM, SACRAMENTO SUBURBAN
26 WATER DISTRICT AND SAN JUAN
27 WATER DISTRICT

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1 **INTRODUCTION**

2 Protestants City of Folsom, San Juan Water District (“SJWD”) and Sacramento
3 Suburban Water District (“SSWD”) submit this closing brief for Part 1 of the California
4 WaterFix (“Cal WaterFix”) Water Right Change Petition hearing.

5 The hearing officers’ September 29, 2017 ruling asked protestants to address
6 the following questions:

- 7 • What burden of proof do protestants carry to demonstrate possession of legal
8 entitlements under water rights or contracts, and to demonstrate potential injury
9 that may occur due to the proposed changes?
- 10 • To what extent are third-party water right holders protected from any changes to
11 stream flows or reservoir storage levels that may occur as a result of the
12 proposed changes?
- 13 • To what extent are parties who have entered into contracts with petitioners
14 protected under the terms of their contracts from any changes to stream flows
15 or reservoir storage levels that may occur as a result of the proposed changes?
- 16 • What conditions, if any, should be included in any approval of the change
17 petition to protect legal users from injury due to changes in stream flows or
18 reservoir storage levels?

19 (Sept. 29, 2017 Ruling Regarding Request To Change The Part 2 Hearing Schedule,
20 Motions To Strike Petitioners' Letter Regarding Operations, Optional Part 1 Closing
21 Brief Topics, And Other Procedural Matters, p. 5 ("Sept. 29, 2017 Ruling").)

22 Water Code section 1702 protects the interests of Folsom, SJWD and SSWD,
23 as legal users of water supplies in the American River region, from injury by the Cal
24 WaterFix water right change petition filed by petitioners California Department of
25 Water Resources (“DWR”) and the United States Bureau of Reclamation
26 (“Reclamation”). Part 1 evidence demonstrates that Cal WaterFix would injure legal
27 users of water who divert from, or are reliant on, Folsom Reservoir because the project
28 would enable Petitioners to draw down the reservoir further preceding dry years, which

1 would exacerbate an existing risk of the municipal and industrial ("M&I) intake in the
2 reservoir being compromised during dry years. Petitioners' own modeling shows that,
3 if the State Water Resources Control Board ("SWRCB") were to approve the proposed
4 changes, Petitioners could operate the Central Valley Project ("CVP") and State Water
5 Project ("SWP") to endanger the water supplies for over one million people in Placer
6 and Sacramento Counties. Water Code section 1702 prohibits the SWRCB from
7 approving these changes without providing adequate protection for other legal users of
8 American River supplies.

9 If the SWRCB ultimately decides to approve the proposed changes, to protect
10 American River water users from injury due to Cal WaterFix operations, the SWRCB
11 should require the project to comply with the Modified Flow Management Standard
12 ("MFMS") proposed by the ARWA group.

13 **STATEMENT OF RELEVANT FACTS**

14 Folsom, SJWD and other ARWA members hold some of the oldest water rights
15 in California, some of which date from the 1850s. Folsom and SJWD both hold
16 settlement contracts with Reclamation that allowed Folsom Dam and Reservoir to be
17 built. SSWD holds rights to, and relies on, groundwater supplies in the American River
18 region and contractual rights to surface water supplies diverted from the American
19 River by other water users. Folsom and SJWD also hold CVP water-service contracts
20 that physically depend on diversions from Folsom Reservoir.

21 **A. Folsom**

22 Folsom owns portions of the oldest water right in the South Fork of the
23 American River, specifically a right based on an 1851 notice by the Natomas Water
24 Company. (Folsom-1, ¶¶ 9-15; see Folsom-7 to Folsom-13.) That right is the basis for
25 Folsom's settlement contracts with Reclamation, specifically Contract No. 14-06-200-
26 5515A and Contract No. 14-06-200-4816A. (Folsom-1, ¶ 14; Folsom-9 to Folsom-13.)
27 Under those contracts, Folsom has the right to 27,000 acre-feet a year ("af/yr") of
28 deliveries taken through the Folsom Reservoir M&I intake. These contracts expressly

1 preserve and recognize Folsom’s right to full deliveries and do not authorize dry-year
2 reductions by Reclamation. (Folsom-1, ¶ 10; Folsom-8 at pp. 6-7; Folsom-10 at p. 4
3 (recognizing city’s water right and insuring to the extent physically possible the
4 availability of the full contract supply to the city).)

5 As authorized by Public Law No. 101-514, Folsom also receives water under a
6 CVP water-service contract. (Folsom-1, ¶¶ 15-19.) Folsom can only access water
7 under its settlement contracts and its CVP water-service contract through Folsom
8 Reservoir’s M&I intake. (Folsom-1, ¶¶ 20-21.)

9 **B. SJWD**

10 SJWD owns the oldest water right in the North Fork of the American River as
11 successor to a right initiated by the North Fork Ditch Company in 1853. (SJWD-1, ¶ 7.)
12 That right is the basis of SJWD’s settlement contract with Reclamation, Contract No.
13 DA-04-167-eng-610. (SJWD-1, ¶¶ 7-25.) Under that contract, the District holds a right
14 to 33,000 af/yr of deliveries from Folsom Reservoir. That contract does not authorize
15 dry-year reductions by Reclamation. (SJWD-1, ¶ 20; SJWD-10.) It further provides
16 that SJWD has no interest in storage space in Folsom Reservoir “except to the
17 minimum extent in each instance necessary to enable [Reclamation] to comply with
18 the terms hereof and to provide at the times and in the quantities specified herein the
19 water to be received by [SJWD] and to which it is recognized [SJWD] is entitled.”
20 (SJWD-10 at p. 15.) In other words, SJWD has an interest in Folsom Reservoir
21 storage under that contract to the extent necessary for Reclamation to satisfy that
22 contract.

23 SJWD also holds a 24,200 af/yr CVP water-service contract with Reclamation.
24 (SJWD-1, ¶¶ 26-32; SJWD-12.) In addition to SJWD’s contract with Reclamation, it
25 holds water-supply contracts with Placer County Water Agency (“PCWA”) for water
26 that PCWA appropriates in its Middle Fork Project. SJWD’s contract is for 25,000
27 af/yr. (SJWD-1, ¶¶ 33-34; SJWD-13.) Water under the PCWA contract is conveyed
28 through Folsom Reservoir’s M&I intake under a Warren Act contract with Reclamation.

1 (SJWD-14.) All of these supplies are delivered through Folsom Reservoir’s M&I
2 intake. (SJWD-1, ¶ 35.)

3 Terms in Reclamation’s water-right permits for Folsom Reservoir protect the
4 rights of American River region water agencies, like SJWD, who hold certain water-
5 serve contracts from Reclamation. (See SWRCB-10 (Permit No. 11315 at p. 34, Term
6 11); SWRCB-11 (Permit No. 11316 at p. 42, Term 11).) Before Reclamation received
7 water-right permits for Folsom Dam and Reservoir, SJWD’s predecessors Fair Oaks
8 Irrigation District and Citrus Heights Irrigation District and other agencies in the region
9 filed water-right applications to appropriate water from the American River. (SJWD-1,
10 ¶ 26; D-893, p. 53.) The SWRCB’s predecessor agency, the State Water Rights
11 Board, considered those applications while considering Reclamation’s applications for
12 Folsom Dam and Reservoir. In Decision 893 (“D-893”), the Board decided not to
13 approve the local agencies’ applications because local water needs would be
14 adequately protected by permit terms:

15 Permits are being issued to the United States to appropriate enough
16 American River water to adequately supply the applicants naturally
17 dependent on that sources and availability of water to such applicants is
18 reasonably assured by the terms to be contained in the permits to be
19 issued to the United States restricting exportation of water under those
20 permits insofar as exportation interferes [sic] with fulfillment of needs
21 within Placer, Sacramento and San Joaquin Counties.

22 (Roseville-5 (SWRB Decision No. 893, p. 54).)

23 Based on this logic, the Board inserted a term in Reclamation’s Permits Nos.
24 11315 and 11316 to protect the water supplies of the agencies “naturally dependent”
25 on the American River. (D-893, p. 72.). In its landmark 2006 decision concerning D-
26 1641, the Court of Appeal interpreted that term in response to arguments by Santa
27 Clara Valley Water District. (See *State Water Resources Control Board Cases* (2006)
28 136 Cal.App.4th 674, 814.) The Court of Appeal interpreted the above discussion in
D-893 and stated:

1 Understandably, Santa Clara does not claim that Santa Clara County is
2 an area *naturally* dependent on water from the American River.
3 Moreover, the language following “United States” refers to a permit
4 condition that, as the decision states, was imposed to protect the
5 “fulfillment of needs within Placer, Sacramento and San Joaquin
6 Counties.” Thus, the Water Rights Board was explaining that the
availability of water to applicants within Placer, Sacramento, and San
7 Joaquin Counties that were naturally dependent on the American River
was “reasonably assured” by the permit condition that restricted the
export of water appropriated under the American River permits until the
needs of those counties were fully met.

7 (*Id.* (italics in original).)

8 Decades later, in a decision concerning north-of-Delta CVP water-service
9 contractors' claims to priority allocations under California's area-of-origin laws, the
10 federal Ninth Circuit Court of Appeals held that area-of-origin agencies could assert
11 their rights by filing water-right applications that would have priority over the CVP's
12 rights. (*Tehama-Colusa Canal Authority v. U.S. Department of Interior* (9th Cir. 2013)
13 721 F.3d 1086, 1090-1092, 1094.) In essence, the American River agencies
14 anticipated this guidance by filing their own water-right applications and, in exchange,
15 received water-right terms applied to Reclamation's Folsom Reservoir permits to
16 protect their interests.

17 **C. SSWD**

18 SSWD's primary water supply is groundwater pumped from the American River
19 region. (SSWD-1, ¶¶ 6-11.) Groundwater supplies in SSWD's current service area
20 were subject to historical overdraft conditions. (SSWD-1, ¶¶ 6-7.) In addition,
21 groundwater in the District's service area has been affected by contamination plumes
22 originating from the EPA Superfund sites at the former McClellan Air Force Base and
23 the Aerojet-Rocketdyne site in Rancho Cordova. (SSWD-1, ¶ 8.)

24 SSWD's reliance on groundwater has been significantly reduced since 1995
25 because the district has expanded its use of surface water supplied by other local
26 agencies. (SSWD-1, ¶ 9.) SSWD has contracts with PCWA and the City of
27 Sacramento for delivery of surface water supplies. (SSWD-1, ¶¶ 13-21.) SSWD's
28 water supplies from PCWA can only be delivered through the M&I intake at Folsom

1 Reservoir. (SSWD-1, ¶ 15.) SSWD's contract with the City of Sacramento restricts
2 deliveries to SSWD when that city's American River diversions are constrained by
3 water-right terms limiting those diversions when the river's flows are below certain
4 levels. (SSWD-1, ¶ 19; SSWD-11, pp. 6-7 and Exh. E.)

5 ARGUMENT

6 **A. Water Code section 1702 protects Folsom, SJWD and SSWD as** 7 **legal users of American River water supplies.**

8 Before the SWRCB may approve a petition for change, the petitioner shall
9 establish that the change will not operate to the injury of any legal user of water
10 involved. (Water Code, § 1702.) The “no injury” rule codified in Water Code section
11 1702 is a common law rule designed to protect the rights of third-party water right
12 holders when a water right is changed. (SWRCB Order WR 1999-0002, p. 20; see,
13 e.g. *Scott v. Fruit Growers Supply Co.* (1927) 202 Cal. 47, 55.) In the context of
14 Section 1702, “injury” means the invasion of a legally-protected interest. (*State Water*
15 *Resources Ctrl. Bd. Cases, supra*, 136 Cal.App.4th at pp. 738-743.)

16 Folsom and SJWD hold legal interests in surface water that are protected from
17 injury by the Cal WaterFix changes requested by petitioners. Folsom and SJWD hold
18 senior appropriative American River water rights, which are reflected in settlement
19 contracts with Reclamation for diversions from Folsom Reservoir. (Folsom-1, ¶¶ 9-15;
20 SJWD-1, ¶¶ 7-25.) Those settlement contracts do not authorize Reclamation to
21 reduce Folsom's and SJWD's supplies in dry years. (Folsom-1, ¶ 10; Folsom-8, pp. 6-
22 7; Folsom-10, p. 4; SJWD-1, ¶ 20; SJWD-10.) SJWD also holds a CVP water-service
23 contract entitled to protection under the terms imposed on Reclamation's water rights
24 permits via D-893. (SJWD-12.) That contract incorporates the terms that the
25 SWRCB, and its predecessor agencies, have imposed on Reclamation's water-right
26 permits because the key contractual definition of "Project Water" indicates that it is the
27 water that Reclamation appropriates pursuant to those terms. (See SJWD-12, p. 9.)
28

1 These rights are protected from injury by Reclamation’s proposed changes to Folsom
2 Reservoir operations.

3 Water Code section 1702 protects vested rights in groundwater supplies,
4 including groundwater recharge, from injury. (See SWRCB Decision No. 1290, p. 28
5 (imposing permit terms to protect downstream vested interests in groundwater
6 supplies); SWRCB Order WR 2006-0001, pp. 10, 15-16 (change to pre-1914
7 appropriative right prohibited from injuring vested rights of downstream groundwater
8 users); cf. *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 335 (vested
9 rights in groundwater are protected under “no injury” rule).) SSWD’s appropriative
10 rights in groundwater are protected from injury by the proposed changes.

11 **B. Petitioners have not met their burden of showing the proposed**
12 **changes would not injure protestants’ legal use of water.**

13 Petitioners bear the burden to produce substantial evidence in light of the whole
14 record that no injury will result from the proposed changes. (Water Code, § 1702;
15 Sept. 29, 2017 Ruling, p. 2.) For the reasons discussed in the following sections,
16 Petitioners have not met this burden.

17 1. **If Cal WaterFix were to result in Folsom Reservoir**
18 **being drawn down further preceding dry years,**
19 **Folsom, SJWD and SSWD would be injured as legal**
20 **users of water.**

21 The 2014 and 2015 drought demonstrated that there is already a risk of
22 American River water agencies losing access to supplies from Folsom Reservoir if the
23 reservoir is drawn down before and during very dry years. (Folsom-1, ¶¶ 20-33;
24 Folsom-18 to Folsom-24; SJWD-1, ¶¶ 35-47, 57; Roseville-16.) This risk exists
25 because Folsom Reservoir’s M&I intake will go dry when the reservoir is at very low
26 levels and becomes unsafe to use even before it goes dry. (Folsom-1, ¶¶ 20-3;
27 Folsom-18 to Folsom-19.) The SWRCB previously has taken steps to protect
28 American River water agencies against this risk by imposing, as a drought-emergency
measure, an end-of-October 2016 minimum Folsom storage requirement on the CVP's

1 water-right permits. (SWRCB Order WR 2015-0043, pp. 63-64.) The SWRCB
2 adopted that order over Reclamation's objections. (Exh. BKS-50 to BKS-51; 4/27/17
3 RT, pp. 71:7-74:5.¹)

4 Although Folsom and SJWD's water-right settlement contracts do not allow dry-
5 year reductions (Folsom-1, ¶ 10; SJWD-1, ¶ 20), they would be unable to exercise
6 their senior water rights in such low-reservoir conditions. The emergency measures
7 that Reclamation planned during 2015 demonstrate that Reclamation would unable to
8 meet water-right settlement supplies to Folsom and SJWD in such conditions.
9 Reclamation's emergency measures would have been able to meet only about 50% of
10 Folsom's settlement-contract supply. (Folsom-1, ¶¶ 9-15, 26-32; Folsom-7 to Folsom-
11 13.) Reclamation's emergency measures would not have been able to meet SJWD's
12 settlement-contract supply. (SJWD-1, ¶¶ 7-25, 42-47, 57; SJWD-6 to SJWD-11;
13 Folsom-19; Roseville-16.) Moreover, Reclamation was operating Folsom Reservoir
14 during 2015 in such a manner that, had the SWRCB not imposed the minimum Folsom
15 storage requirement, Reclamation likely would have breached the provision of SJWD's
16 settlement contract that requires Reclamation to maintain storage in Folsom "to the
17 minimum extent ... necessary to enable [Reclamation] to comply with the terms [of the
18 SJWD settlement contract] and to provide at all times and in the quantities specified
19 herein the water to be received by [SJWD\ and to which it is recognized [SJWD] is
20 entitled." (SJWD-10 at p. 15.) The Cal WaterFix project, as proposed by petitioners,
21 would exacerbate this existing dry-year problem by making Folsom Reservoir supplies
22 less reliable for American River Division contractors.

23 Less reliable Folsom Reservoir supplies would injure SSWD both directly by
24 affecting surface-water supplies and indirectly affecting groundwater supplies. SSWD
25 relies in part on lower American River water diverted by the City of Sacramento to
26 reduce SSWD's historical level of groundwater pumping and contribute to stabilizing
27

28 ¹ "RT" refers to the Reporter's Transcript of Proceedings for Part 1.

1 the local groundwater basin. (SSWD-1, ¶¶ 17-21; SSWD-8; SSWD-11 to SSWD-13.)
2 The terms of the City of Sacramento's water-right permits, however, constrain the
3 City's diversions when lower American River flows are below certain levels. (SSWD-1,
4 ¶ 20; SSWD-13.) SSWD's contract with the City of Sacramento contains similar
5 constraints on deliveries to SSWD. (SSWD-1, ¶ 19; SSWD-11, pp. 6-7 and Ex. E;
6 CITYSAC-1, ¶ 17.) To the extent that Cal WaterFix would cause those flows to be
7 below the applicable levels more often, SSWD's ability to use lower American River
8 water would be impacted. (SSWD-1, ¶¶ 22-26, 30-31.) To the extent that Folsom
9 Reservoir supplies were to become less reliable, agencies near SSWD probably would
10 need to pump more groundwater. This in turn would impact SSWD's groundwater
11 supplies by drawing down the local groundwater basin and by creating a risk that
12 existing contamination plumes would migrate. (SSWD-1, ¶¶ 6-8, 27-29; SSWD-6 to
13 SSWD-7.)

14 **2. Cal WaterFix is likely to injure legal users because Cal**
15 **WaterFix will enable Folsom Reservoir to be drawn**
16 **down further preceding dry years.**

17 Petitioners' case-in-chief modeling demonstrates that Cal WaterFix is likely to
18 enable significant drawdowns of Folsom Reservoir storage before during dry cycles,
19 and, in so doing, injuring the exercise of rights of Folsom, SJWD and SSWD.

20 **a. Petitioners' own modeling results show that Cal**
21 **WaterFix is likely to injure water users**
22 **dependent on Folsom Reservoir.**

23 Results extracted from Petitioners' modeling show that the modeling contains
24 multiple instances in which Folsom Reservoir would be drawn down significantly at the
25 end of a dry year. (BKS-200, BKS-201, ARWA-100, ¶¶ 4-5, 13-34; ARWA-105 to
26 ARWA-106; BKS-12 to BKS-13.)² Petitioners' biological assessment modeling ("BA
27 modeling") testimony demonstrates that Cal WaterFix is likely to enable significant
28 drawdowns of Folsom Reservoir storage before and during at least some future dry

² Exhibit SVWU-201 is a compilation of extensive modeling results from
Petitioners' case-in-chief modeling. (SVWU-200, ¶ 4.) The tables for Folsom
Reservoir storage in exhibit SVWU-201 are tables 4-1 to 4-11.

1 years. Testimony by Petitioners' witness Nancy Parker demonstrates that Cal
2 WaterFix, as reflected in the BA modeling, is likely to have that impact on Folsom
3 Reservoir storage. Ms. Parker's testimony confirmed that her model results
4 demonstrated that Cal WaterFix could significantly impact Folsom Reservoir storage in
5 many dry years and in drought cycles. (BKS-100, pp 2; 5, Fig. 1c; 17-20, Table 2 &
6 fig. 8 22, Table 3; 5/5/17 RT, pp. 6:5-23-13, 26:24-27:8.)³ In addition, Ms. Parker
7 authenticated additional BA modeling results that show that Cal WaterFix is likely to
8 draw down Folsom storage in future dry years. (BKS-103 to BKS-104; 5/4/17 RT, pp.
9 217:1-227:13.) As discussed in the testimony by Tom Gohring for the Water Forum,
10 the modeling in petitioners' final EIR demonstrates the same possibility in the late-long
11 term. (ARWA-300, ¶¶14-17; ARWA-305 to ARWA-306.)

12 Petitioners' attempt to dismiss the dry-year risk to Folsom Reservoir storage
13 identified in their own modeling is telling. Petitioners essentially ask the SWRCB to
14 disregard the risk of dry-year reductions in Folsom Reservoir storage depicted in their
15 own modeling by claiming that their modeling does not accurately depict how the CVP
16 and the SWP would operate in "stressed water supply conditions" when reservoirs are
17 near dead pool. (See DWR-71, p. 12, lines 15-18; 8/10/16 RT, pp. 253-256; 8/11/16
18 RT 10:42-44; 8/23/16 RT, 207:211-217; 9/22/16 RT, pp. 183-188, 193-210, 213-221,
19 224-226, 230-233.) Thus, through this testimony, Petitioners have conceded that they
20 have not met their burden of proof under Water Code section 1702 because they have
21 failed to present the SWRCB with evidence proving that granting their petition, without
22 conditions, would not injure legal users of water. Instead, the only testimony that
23 Petitioners have presented on this point is that they would not operate in very dry
24 conditions as depicted in their modeling. They have not provided any evidence about
25 how they actually would operate in "stressed water supply conditions" with Cal
26 WaterFix in place, and they have resisted any attempts to incorporate conditions to

27 _____
28 ³ Exhibit BKS-100 is a copy of DOI-36 Errata with highlighting. (5/5/17 RT, p.
5:5-7.)

1 protect against these injuries.⁴ The absence of evidence on this key point means that
2 Petitioners cannot satisfy their burden of proof under Water Code section 1702.

3 **Petitioners’ modeling understates Cal WaterFix’s**
4 **impacts on Folsom Reservoir storage because**
5 **its allocation logic ignores the increased Delta-**
6 **diversion capacity that Cal WaterFix would**
7 **provide.**

8 Petitioners’ testimony demonstrates that their modeling probably *understates*
9 Cal WaterFix’s effect on Folsom Reservoir storage and therefore American River
10 water supplies because their modeling assumptions: (1) ignore the fact that Cal
11 WaterFix would enable the CVP and SWP to allocate more water south of Delta, and
12 (2) were set to favor upstream storage.

13 Petitioners illogically did not modify CalSim logic driving south-of-Delta water-
14 supply allocations to reflect the additional diversion capacity that is the reason for Cal
15 WaterFix. As Petitioners’ witnesses Nancy Parker and Erik Reyes testified, following
16 issuance of the 2008 and 2009 Biological Opinions, an “export estimate” was added to
17 CalSim’s water-supply allocation logic to reflect the constraints on Delta exports
18 imposed by those opinions. (6/15/17 RT, pp. 124:5-125:3, 137:13-140:14.) A key goal
19 in pursuing Cal WaterFix is to loosen those constraints. The loosening of those
20 constraints presumably would cause the CVP and SWP to allocate more water to
21 south-of-Delta contractors so that they would see some return on their investment.

22 Petitioners, however, either did not change CalSim’s export estimate between
23 the modeling’s no action alternative and the with-project alternatives or actually made
24 the export estimate more restrictive with Cal WaterFix. (SVWU-107, pp. 2, 27; SVWU-
25 110, pp. 8-9; 10/20/16 RT, pp. 35:14-19, 38:12-40:12, 63:19-25; BKS-101, pp. 5.A-24,
26 5.A-30; 6/15/17 RT, pp. 124:5-125:3, 137:13-140:14). Petitioners’ models did not
27 actually attempt to export more water using the additional diversion capacity that Cal
28

⁴ Petitioners have not proposed, and, as recently as in their September 8, 2017 filing, reiterated that they are opposed to any conditions that would protect other water users from these injuries.

1 WaterFix would provide. As discussed by the SVWU group’s witnesses from MBK,
2 this flaw in Petitioners' modeling exists in all of their modeled scenarios, including in
3 the Boundary 1 and Boundary 2 scenarios that Petitioners claim represent the outer
4 bounds of all possible Cal WaterFix operations. (SVWU-100, p. 2.) This means that,
5 for even the Boundary 1 and 2 scenarios, Petitioners assumed away any relaxation on
6 the existing constraints on their Delta diversions. (*Ibid.*)

7 The illogical result of these illogical assumptions is that Petitioners’ modeling
8 shows that CVP south-of-Delta agricultural contractors would receive *less* water with
9 Cal WaterFix than without it. (SVWU-107, p. 28, Table 3; 4/27/17 RT, pp. 48:5-50:8
10 (R. Milligan testimony).) It is difficult to believe that beneficiaries would agree to fund
11 Cal WaterFix if that would be the result. Ron Milligan and Nancy Parker of
12 Reclamation acknowledged this result, stated that it was not final and acknowledged
13 that the use of Cal WaterFix is still being negotiated by DWR and Reclamation.
14 (4/27/17 RT, pp. 48:5-50:8; 5/5/17 RT, p. 58:19-23.)

15 c. **Petitioners’ modeling understates Cal WaterFix’s**
16 **impacts on Folsom Reservoir storage because**
17 **its assumptions were set to protect upstream**
18 **storage.**

19 In the with-project alternatives, Petitioners changed the model logic that moves
20 water from upstream storage to San Luis Reservoir – the San Luis rule curve – to be
21 more protective of upstream storage than the rule curve in the no action alternative.
22 (DWR-86, pp. 14:1-15:20; BKS-101, p. 5.A-30; 5/5/17 RT, pp. 27:9-34:11.) This
23 results in an invalid comparison. Accordingly, the model results on which petitioners
24 rely in claiming that Cal WaterFix will not affect upstream storage are, at least in part,
25 a function of discretionary modeling decisions that they knew would favor that result.
26 (*Ibid.*) Petitioners conducted “sensitivity analyses” in which they kept the San Luis rule
27 curve static between the no action alternative and the with-project alternative and the
28 evidence indicates that the results were less protective of upstream storage. (BKS-

1 101, p. 5.A-30.) Petitioners, however, did not disclose those “sensitivity analyses” in
2 the hearing.

3 The analysis of Petitioners' BA modeling by MBK Engineers demonstrates that
4 Petitioners made significant changes to the San Luis rule curve between the no action
5 alternative and the with-project modeling, with the with-project curve being specifically
6 tailored to recover from drawdowns earlier in a water year before the end of
7 September. (See DWR-71, pp. 18-19 (with-project modeling resulted in similar or
8 higher end-of-September storage in project reservoirs); SVWU-107, pp. 17-18; SVWU-
9 110, p. 40; 10/20/16 RT, pp. 70:13-73:19.) MBK identified that, relative to the San Luis
10 rule curve Petitioners used in their no action alternative modeling, their BA modeling
11 used a rule curve that draws down upstream storage from June through August and
12 then reduces upstream releases to cause upstream storage to recover before the end
13 of September.

14 On this point, MBK’s Walter Bourez testified:

15 You'll notice that the rule curve in the with-project case is lower in July,
16 August, and September. This is the reason that Shasta and Folsom tend
17 to be higher at the end of September is [sic] because the model is
changing the balance in with-project relative to the no-action for end-of-
September storage.

18 (10/20/16 RT, p. 72:6-11.) The fact that Petitioners' modeling shows similar
19 end-of-September storage with and without Cal WaterFix therefore only shows that
20 Petitioners successfully achieved their modeling goals, not that Cal WaterFix would
21 not operate to injure upstream water users. In fact, DWR’s own testimony shows that
22 the Petitioners could operate without seeking to protect upstream storage as they
23 sought to do in their modeling by changing the San Luis rule curve. Under cross-
24 examination, DWR’s operator John Leahigh stated that it was not necessary to adjust
25 the San Luis rule curve to appropriately reflect operations with Cal WaterFix. (8/11/16
26 RT, pp. 163:3-165:20.) It is distinctly possible that, with Cal WaterFix, the CVP and
27 SWP would export water more aggressively than depicted in their modeling.
28

1 d. **MBK's testimony shows that Petitioners could**
2 **operate the CVP and the SWP with Cal WaterFix**
3 **to have more impacts on upstream storage.**

4 MBK's testimony confirms that Cal WaterFix's impacts on upstream storage and
5 water users could be worse than Petitioners' modeling depicts. MBK sought to
6 address Petitioners' failure to account for the additional export-diversion capacity that
7 Cal WaterFix would provide in their modeling logic by using model assumptions that
8 incorporated that capacity in the model's south-of-Delta allocations. (SVWU-107, pp.
9 38-40, 42.) MBK did this by establishing reasonable allocations to export water when
10 it was available in north-of-Delta storage and through-Delta conveyance capacity was
11 available. (*Ibid.*) MBK's analysis shows that, when Cal WaterFix's enhanced diversion
12 capacity is actually incorporated into the model's allocation logic, Cal WaterFix would
13 result in south-of-Delta exports generally being higher and north-of-Delta storage
14 generally being lower than in Petitioners' modeling. (SVWU-107, pp. 50-52, 54-56.)
15 While Petitioners critiqued MBK's method of determining south-of-Delta allocations,
16 MBK's sur-rebuttal testimony demonstrated that, if the model were adjusted to account
17 for Cal WaterFix diversion capacity as petitioners suggested, even more south-of-
18 Delta exports and even lower north-of-Delta storage would result. (SVWU-300, ¶4;
19 SVWU-302, pp. 25-28.)

20 3. **Petitioners' other testimony is inadequate to show that**
21 **implementing Cal WaterFix would not injure legal users**
22 **of water.**

23 Petitioners essentially rely on two types of testimony in claiming that the
24 evidence shows that approving Cal WaterFix would not injure other legal users of
25 water. Neither type of testimony is sufficient to satisfy petitioners' burden of proof
26 under Water Code section 1702.

27 Petitioners rely on a small subset of their CalSim results to claim that there is no
28 possibility that Cal WaterFix would injure other legal users of water. Those results are
 small slices of results depicting water deliveries to other water users and end-of-
 September reservoir storage results. However, these water-delivery results are

1 inadequate in relation to American River water agencies because, among other things,
2 they include no analysis at all of deliveries under Reclamation's American River
3 settlement contracts with Folsom and SJWD, among others. (DWR-71, pp. 16-21;
4 DWR-514, pp. 5-18, Fig. 2-15; DOI-7, p. 4; DWR-86, pp. 1-6.) Petitioners' testimony
5 concerning Cal WaterFix's effect on north-of-Delta CVP contractors relies on
6 annualized deliveries and does not account for the potential catastrophic physical
7 unavailability of water from Folsom Reservoir that is a key concern of American River
8 water users. (DWR-71, p. 17; DWR-514, p. 11.) Petitioners have presented no
9 analysis whatsoever of Cal WaterFix's effect on the availability of water under the City
10 of Sacramento's American River water-right permits, which contain certain diversion
11 limits that are based on flow levels. (SSWD-13 (City of Sac permits; see DWR-71, pp.
12 16-21; DWR-514, pp. 5-18, Fig. 2-15; DOI-7, p. 4; DWR-86, pp. 1-6 (limited sets of
13 water-supply modeling results that do not include City of Sac diversions).) SSWD
14 relies on the City's diversions (SSWD-1, ¶¶ 17-21), so Petitioners have presented no
15 evidence at all concerning the effect of Cal WaterFix on SSWD's surface-water
16 supplies.

17 Petitioners have presented no testimony whatsoever about Cal WaterFix's
18 potential indirect effects on groundwater in the American River region that could result
19 if Cal WaterFix causes Folsom Reservoir supplies to become less reliable. SSWD's
20 general manager presented undisputed testimony that reducing the reliability of
21 Folsom Reservoir supplies could result in more groundwater pumping in the region.
22 (SSWD-1, ¶¶ 6-9, 27.) The results would be lower groundwater levels and potential
23 migration of well-known contaminant plumes, both of which could impact SSWD's
24 groundwater supplies. (*Ibid.*) In addition to potentially injuring SSWD as a legal user
25 of water, such a result could be an "undesirable result" under the Sustainable
26 Groundwater Management Act. (Water Code § 10721, subd. (x)(4).)

27 Petitioners' reliance on modeled end-of-September reservoir storage levels is
28 inadequate to meet Petitioners' burden of showing no injury to other legal users of

1 water. M&I water users such as the American River agencies must deliver water year-
2 round, so impacts on their supplies in any month could cause an injury. The end of
3 November is often the lowest point in Folsom Reservoir storage (ARWA-300e, ¶ 15),
4 so end-of-September storage is not particularly informative for American River water
5 users. MBK's analysis of Petitioners' BA modeling demonstrates that Petitioners
6 chose modeling assumptions for the San Luis rule curve that would recover previous
7 drawdowns so that end-of-September storage would be similar with and without Cal
8 WaterFix. (SVWU-107, pp. 17-18; SVWU-110, p. 40; 10/20/16 RT, pp. 70:13-73:19.)
9 The fact that Petitioners specifically chose model assumptions that would achieve that
10 result therefore indicates that their end-of-September storage results provide no
11 evidence at all to support a conclusion that Cal WaterFix will not injure legal users of
12 water.

13 Petitioners' end-of-September modeling does not account for the risk to Folsom
14 Reservoir highlighted during the 2014-2015 drought, namely that drawdowns
15 immediately before a very dry winter will impact water supplies from the reservoir. As
16 discussed above, petitioners' own modeling shows that Cal WaterFix would create a
17 significant risk of significantly lower Folsom Reservoir storage occurring immediately
18 before a very dry winter. (SVWU-200, SVWU-201, BKS-200, BKS-201, ARWA-100,
19 ¶¶ 4-5, 13-34; ARWA-105 to ARWA-106; BKS-12 to BKS-13.)

20 The second type of testimony relied on by Petitioners is their statements at
21 numerous points during their Part 1 testimony that they would avoid injury to other
22 legal users of water by applying their operators' discretion through real-time
23 operations. By definition, this testimony is inadequate to meet Petitioners' burden of
24 proof under Water Code section 1702 because it would leave other water users
25 subject entirely to Petitioners' discretion under unknown future circumstances.

26 Real-life experience during the 2014-2015 drought contradicts Petitioners'
27 position. SJWD's rebuttal testimony shows that, even in 2014-2015, the CVP and
28 SWP were under pressure from potential Cal WaterFix beneficiaries to not protect

1 American River water users. (SJWD-17, ¶¶ 16-20; SJWD-22 to SJWD-25.) In fact,
2 when, in 2015, the SWRCB proposed minimum Folsom Reservoir carryover storage
3 requirements to protect American River water users, Reclamation itself opposed those
4 requirements, as did its south-of-Delta contractors who are supporting Cal. WaterFix.
5 (See BKS-50 to BKS-51; 4/27/17, RT 71:7-74:5.)

6 Reclamation's proposed 2015 drought-emergency measures at Folsom
7 Reservoir would not have even satisfied American River water-right settlement
8 contracts, much less satisfied conditions that D-893 inserted into Reclamation' Folsom
9 permits to protect American River water users more generally. The emergency pumps
10 that Reclamation installed in 2015 to serve Folsom under its settlement contracts
11 would have met about 50% of Reclamation's obligation to deliver water to the city.
12 (Folsom-1, ¶¶ 24-33.) Reclamation's plan to serve both SJWD and the City of
13 Roseville could have supplied only SJWD's settlement contract with unexplained
14 effects on Roseville. (SJWD-1, ¶¶ 39-47.) The evidence from the recent drought
15 contradicts the Petitioners' statements in this hearing that, in future droughts with Cal
16 WaterFix in place, Reclamation's and DWR's operators would exercise their discretion
17 to assure that other water users would not be injured.

18 **C. The ARWA group has proposed terms and conditions to protect**
19 **Folsom Reservoir storage and will further support them in Part 2.**

20 During the Part 1 hearing, ARWA witnesses presented the proposed Modified
21 Flow Management Standard ("MFMS") developed by the Sacramento Water Forum.
22 One of the MFMS's three key goals is to maintain Folsom Reservoir storage sufficient
23 to keep the lake level above 90,000 AF during two consecutive critical years. (ARWA-
24 300e, ¶ 27.) 90,000 AF is the lowest level that CalSim can model for Folsom
25 Reservoir and is below the lake levels at which the M&I intake would begin to have
26 significant operational problems. (Folsom-1, ¶ 23; Folsom-19; ARWA-300e, ¶ 14;
27 5/5/17 RT, p. 222:6-9.) The Water Forum's modeling shows that implementing the
28 MFMS would achieve this goal. (ARWA-303, ¶¶ 29, 33; ARWA-400, ¶ 7; ARWA-402,

1 pp. 3-5.) Consistent with the hearing officers' direction, the ARWA group intends to
2 present further testimony concerning the MFMS in Part 2 of this hearing..

3 **CONCLUSION**

4 Prior water-right decisions concerning Folsom Dam and Reservoir have
5 recognized the need to protect American River water users' supplies from the
6 possibility that exports could injure those supplies. D-893 explicitly conditioned
7 Reclamation's permits to ensure that the operation of Folsom Reservoir to export
8 water out of the basin would not injure local water agencies In 2015, the SWRCB
9 recognized that minimum carryover storage was necessary in that particular drought to
10 protect M&I uses of water that rely on Folsom Reservoir storage. Any approval of the
11 pending change petition similarly must protect Folsom, SJWD and SSWD because the
12 Part 1 evidence demonstrates that their supplies otherwise will not be protected with
13 Cal WaterFix in place.

14 Petitioners have not met their burden of showing that, if approved, Cal WaterFix
15 would not injure other legal users of American River water supplies. For this reason,
16 the petition must be denied or appropriately conditioned according to the terms of the
17 MFMS presented in Parts 1 and 2 of this hearing.

18
19 Dated: November 8, 2017

Respectfully submitted,

20 BARTKIEWICZ, KRONICK & SHANAHAN

21
22 /s/ Ryan S. Bezerra
23 Attorneys for Protestants City of Folsom,
24 Sacramento Suburban Water District and
25 San Juan Water District
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