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**BEFORE THE**  
**CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

HEARING IN THE MATTER OF  
CALIFORNIA DEPARTMENT OF WATER  
RESOURCES AND UNITED STATES  
BUREAU OF RECLAMATION  
REQUEST FOR A CHANGE IN POINT OF  
DIVERSION FOR CALIFORNIA WATER  
FIX

**MOTION FOR RECONSIDERATION OF  
THE MAY 21, 2018 RULING GRANTING  
MOTION TO STRIKE PORTIONS OF THE  
PART 2 TESTIMONY OF MARC DEL  
PIERO, CSPA-208-CORRECTED, AND  
RELATED ORAL TESTIMONY**

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1 **I. INTRODUCTION.**

2 Protestants County of San Joaquin, San Joaquin County Flood Control and Water  
3 Conservation District, and Mokelumne River Water and Power Authority (“San Joaquin County  
4 Protestants”), Local Agencies of the North Delta (“LAND”), California Sportfishing Protection  
5 Alliance, California Water Impact Network, and AquAlliance (collectively herein, “San Joaquin  
6 County et al.”) hereby request reconsideration of the Hearing Officers’ May 21, 2018 Ruling  
7 granting DWR’s motion to strike portions of Marc Del Piero’s Part 2 Testimony, CSPA-208-  
8 Corrected, and Related Oral Testimony (“May 21 Ruling”). As explained below, portions of the  
9 written and oral testimony stricken in the May 21 Ruling were squarely within the key Part II  
10 hearing issues identified at the outset of these proceedings. (See October 30, 2015 Ruling, p.  
11 11 [listing Part II Key Hearing Issues].)

12  
13 **II. ARGUMENT**

14  
15 **A. The May 21 Ruling Addresses Two Arguments San Joaquin County et al.**  
16 **did Not Make, While Neglecting to Address the Argument San Joaquin**  
17 **County et al. Did Make.**

18 The May 21 Ruling addresses two arguments San Joaquin County et al. did not make.  
19 However, the May 21 Ruling does *not* address the one argument San Joaquin County et al. did  
20 make.

21  
22 First, as explained in the April 30, 2018 Opposition to DWR’s Motion (“Opposition”), San  
23 Joaquin County et al. do not contend that compliance with CEQA is an issue before this Board.  
24 For that reason, the Opposition expressly acknowledged that specific portions of the Del Piero  
25 Testimony, considered in that light, could properly be stricken. (Opposition at pp. 8:18-20;  
26 10:13-21; 12:6-11; 19:8-13.) **Consistent with that acknowledgement, this motion does not**  
27  
28

1 **challenge the part of the May 21 Ruling striking those specific portions of Mr. Del**  
2 **Piero's testimony.**

3       Second, San Joaquin County et al. have not contended that whether the Petition for  
4 Change requests a new water right is a Part 2 issue. (Opposition, p. 7:9-19; 19:14-19.) **For**  
5 **that reason, this motion does not challenge the May 21 Ruling insofar as the ruling**  
6 **reiterates that whether or not the Joint Petition requests a new water right is not a Part 2**  
7 **issue.**

8  
9       Mr. Del Piero's testimony focused on questions that **are** squarely within the scope and  
10 focus of Part 2: whether the SWRCB must balance the Public Trust in its consideration of the  
11 Joint Petition and whether, in doing so, the SWRCB must determine whether there is a  
12 sufficient amount of water in the system to adequately protect fisheries and other Public Trust  
13 resources. Most of the portions of Mr. Del Piero's Testimony stricken by the May 21 Ruling  
14 address *these* Public Trust issues, *not* CEQA or water rights questions.

15  
16       Oddly, however, nowhere in the May 21 Ruling granting DWR's motion is there any  
17 discussion of Mr. Del Piero's opinion that the SWRCB must balance the Public Trust or of Mr.  
18 Del Piero's opinion that in balancing the Public Trust the Board must consider whether there  
19 would be sufficient water in the system for fisheries and other Public Trust resources if the  
20 Petition is granted. Yet, the Ruling strikes Mr. Del Piero's testimony on exactly those points.

21  
22       In its present form, the May 21 Ruling holds that under the Public Trust doctrine, the  
23 Board's consideration of the Petition for Change does not require it to make a determination as  
24 to whether enough water exists in the Delta system to adequately protect fisheries and other  
25 Public Trust resources if the Petition is granted, i.e., that it may lawfully proceed without  
26 making such a determination.  
27  
28

1 On this pivotal issue, the May 21 Ruling conflicts directly with duties imposed upon the  
2 Board and other State agencies by the *National Audubon* Decision,<sup>1</sup> the *Racanelli* Decision,<sup>2</sup>  
3 and the 2009 Delta Reform Act.<sup>3</sup> Accordingly, San Joaquin County et al. respectfully request  
4 reconsideration of the May 21 Ruling, as explained below.

5 **B. Mr. Del Piero’s Part 2 Testimony on the Public Trust and the Need to**  
6 **Determine if Sufficient Water Exists in the Delta System to Support Project**  
7 **Approval While Also Adequately Protecting Fisheries and Other Public**  
8 **Trust Resources is Squarely Within the Scope of Part 2 and Consistent with**  
9 **State Law and Policy.**

10 Mr. Del Piero summed up his opinion succinctly: “I’ve indicated in my testimony that in  
11 water rights – that a water availability analysis is necessary for you to satisfy your public trust  
12 duties.” (April 25, 2018 Transcript, 28:24-29:2.)<sup>4</sup>

13 As San Joaquin Co. et al. observed in their Opposition, Mr. Del Piero was not the only  
14 expert witness to address the necessity of a water availability determination as part of  
15 balancing the Public Trust. (Opposition, pp. 5:20-6:3.) However, Mr. Del Piero was the only  
16 expert witness who brought to this subject a background that includes extensive experience as  
17 a Hearing Officer for the Water Board, many years of experience with water decisions while  
18 serving on a County Board of Supervisors and on a Planning Commission, as well as decades  
19 of experience as a water law attorney and professor. (See Exh. CSPA-209, Mr. Del Piero’s  
20 Statement of Qualifications.) No other expert witness addressing Public Trust issues in this  
21 proceeding has done so with such authority or real-world bona fides.  
22

23 <sup>1</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 444 [“The board of limited  
24 powers of 1913 had neither the power nor duty to consider interests protected by the public  
25 trust; the present board, in undertaking planning and allocation of water resources, is required  
26 by statute to take those interests into account.”], 446-447 [explaining the State’s continuing  
27 duty to consider and protect Public Trust resources].

28 <sup>2</sup> *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 106 [“the  
state, as trustee, has a duty to preserve this trust property from harmful diversions by water  
rights holders”], 150-151 [explaining the Board’s continuing duty under *National Audubon*].

<sup>3</sup> Water Code section 85000, et seq.

<sup>4</sup> All references to the “Transcript” are to the “Rough Draft” WaterFix Hearing Transcript of April  
25, 2018, which is the transcript used in the May 21 Ruling.

1 Based on his deep understanding of the decision-making obligations of this Board, Mr.  
2 Del Piero explained the importance of balancing the Public Trust and determining whether  
3 sufficient water exists in the system to approve the proposed project without unreasonable  
4 impacts to Public Trust resources. Asked to explain why a water availability analysis is  
5 essential, he explained that it is required by law and by the Board's Public Trust obligations.  
6 (April 25, 2018 Transcript, pp. 34:16-35:2; 41:12-16.)

7 Mr. Del Piero's written testimony at pp. 21:15 -24:11 – *all of which was stricken by the*  
8 *May 21 Ruling* – addresses the necessity of determining whether sufficient water exists in the  
9 system to allow approval of the Petition for Change without “unreasonably affect[ing] fish and  
10 wildlife or recreational uses of water, or other public trust resources.” (See October 30, 2015  
11 Ruling, p. 11 [listing Part II Key Hearing Issues].) In that context, Mr. Del Piero invokes  
12 *National Audubon* and critiques Petitioners' reliance on “paper water” to meet Public Trust and  
13 public interest obligations. He reiterated this in his oral testimony:

14  
15 [E]veryone needs to just face up to the reality that – that – that the public trust  
16 resources and the ecological health of the Delta is in effective free-fall. . . . In  
17 the Delta, without recognizing that there's a problem. And the problem is real  
18 simple. . . . You can throw as much money at the Delta as you want. Until there  
19 is water available for the protection of public trust resources, until more water is  
20 committed by the State Board and the State to the protection and preservation of  
21 public trust resources, then continuing to rely on old paper and new pipes isn't  
22 going to fix the problem.

23 (April 25, 2018 Transcript, p. 36:10-13 and p. 36:21-37:3.)

24 **This testimony has nothing to do with CEQA compliance.**

25 **This testimony also has nothing to do with whether the Joint Petition requests a**  
26 **new water right.**

27 Mr. Del Piero's testimony comports with the Public Trust's imposition of an affirmative  
28 duty on State agencies. (*Racanelli, supra*, 182 Cal.App.3d at pp. 106, 118 [directing the State  
Board, in performing its regulatory and adjudicatory functions, to consider, among other things,

1 the availability of unappropriated water]; p. 151 [explaining that the State, acting through the  
2 Board, “has an affirmative duty to take the public trust into account in the planning and  
3 allocation of water resources, and to protect public trust uses whenever feasible”; accord,  
4 October 30, 2015 Ruling, p. 11 [listing Part II Key Hearing Issues].)

5 **III. CONCLUSION.**

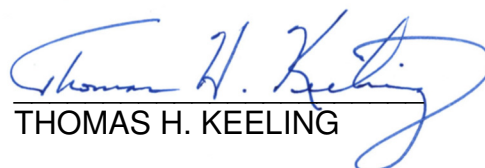
6  
7 In sum, San Joaquin Co. et al. request reconsideration of the May 11 Ruling because it  
8 strikes portions of Mr. Del Piero’s testimony on the basis of contentions San Joaquin Co. et al.  
9 has not made, while neglecting to address the core contention that San Joaquin Co. et al. did  
10 advance, i.e., that this Board has an obligation to balance the Public Trust in its consideration  
11 of the Petition for Change and that, as part of that balancing, this Board must determine  
12 whether there is sufficient water in the Delta system to both approve the project and assure  
13 there are not unreasonable impacts on fisheries, recreation and other Public Trust resources.

14 As explained in detail in the Opposition, San Joaquin County et al. recognize and agree  
15 that the following language in Mr. Del Piero’s written testimony (CSPA-208-Corrected) is  
16 beyond the scope of Part 2 and may be stricken: page 9, line 3 -- “*the CEQA-required*  
17 *environmental information to establish*”; page 18, line 13 -- “*as required by CEQA*”; and page  
18 28, lines 21-25 -- “*without acknowledging any need for mitigations pursuant to CEQA.*” Also,  
19 page 27, lines 14-18 [beginning with “*As the Petition requests*” and ending with “*(Wat. Code, §*  
20 *1375, subd. (d).)*”] appears to address Part 1 issues, and it too may be properly stricken.

21 However, the remainder Mr. Del Piero’s written testimony (CSPA 208-Corrected), as  
22 well as his oral testimony, properly addresses Part 2 Public Trust issues and should not be  
23 stricken for the reasons set forth above and in the Opposition.

24  
25 Dated: May 31, 2018

**FREEMAN FIRM,**

26   
27 THOMAS H. KEELING  
28



1 Dated: May 31, 2018

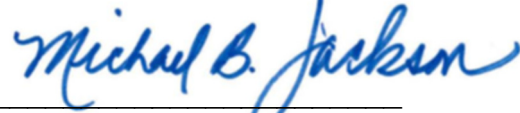
**SOLURI MESERVE,**

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3 OSHA R. MESERVE

4 Dated: May 31, 2018

**MICHAEL B. JACKSON,**

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6 MICHAEL B. JACKSON

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