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

8
9 **HEARING IN THE MATTER OF**
10 **CALIFORNIA DEPARTMENT OF**
11 **WATER RESOURCES AND UNITED**
12 **STATES BUREAU OF RECLAMATION'S**
13 **REQUEST FOR A CHANGE IN POINT**
14 **OF DIVERSION FOR CALIFORNIA**
15 **WATER FIX**

16 **SAN JOAQUIN RIVER EXCHANGE**
17 **CONTRACTORS WATER**
18 **AUTHORITY STATEMENT OF**
19 **ISSUES THAT SHOULD BE**
20 **ADDRESSED IN BRIEF REGARDING**
21 **PART 1 HEARINGS**

22
23 In response to the request from the State Board for Protestants to indicate the
24 subjects that could be beneficially addressed in briefing, the San Joaquin River Exchange
25 Contractors Water Authority ("SJREC") submits the following discussion:
26

27 **I. Introduction.**

28 The DWR and Bureau of Reclamation have a legal and procedural duty and burden
of presenting evidence that shows with definiteness how the change proposed and the new
and existing works proposed will operate to avoid or reduce harm to legal users of water.
Briefing would allow a full examination of the lack of evidence showing how the 3,000
cfs "dual path" will be reliably available. The failure to specifically place on the record
and explain how the protection of Delta levee integrity will be organized, funded and
conducted to maintain the ability to deliver 3,000 cfs across the Delta to the State and
Federal pumps is a fundamental legal deficiency in the record of these proceedings to this
date. Alternatively, the DWR and Bureau can explain the "single path operations" that

1 will be conducted if Delta levee maintenance, improvements and repairs are not
2 effectively financed, organized and maintained with DWR and Bureau contributions and
3 efforts. Briefing at this time will explain how this defect in the record can be remedied by
4 the testimony proposed by SJREC and the conditions crafted upon the WaterFix proposal.

5 The SWRCB first determined that examination of DWR employees with expertise
6 engaged in preparation and implementation of Delta Risk Management Studies One and
7 Two (“DRMS 1 and 2”) by SJREC was relevant and appropriate to fully consider the
8 effects of the proposed WaterFix project that a “dual path” be maintained. At least 3,000
9 cfs is to be conveyed through the Delta through channels created by levees and islands
10 through “second path” through the Delta to the State and Federal pumps each year during
11 the months of July through September (approximately 540,000 acre/feet/year). Ruling of
12 October 7, 2016 attached as Exhibit “A”.

13 DWR then filed a Motion for Protective Order to prevent DWR’s witness
14 testimony, and the SWRCB then reversed its ruling on or about December 8, 2016. A
15 copy of that reversal is attached as Exhibit “B”.

16 The SJREC filed a motion for reconsideration, joined in by other hearing
17 participants, which has not been ruled upon. See Exhibit “C”.

18 Filing of the briefs proposed by the San Joaquin River Exchange Contractors
19 would aid the SWRCB, which is obviously having difficulty understanding how the
20 continued operations and maintenance of Delta levee integrity could become the partial
21 obligation of the DWR and Bureau of Reclamation when the conditions of those levees is
22 exactly the principal problem that the proposed WaterFix Tunnels are designed to address.

23 If the DWR and Bureau do not plan to establish and maintain the organizational
24 efforts and to partially fund the maintenance of levee integrity sufficient to allow
25 continued diversion through the pumps of 3,000 cfs during the summer and fall (the “dual
26 path”), then the plan for the Tunnels should state that and accurately describe the water
27 operations in that circumstance and the harm to legal users of water which is likely to
28 occur under those circumstances. The Project Proponents can contend that the lack of

1 reliability of the “dual path” is not the fault of the Tunnel project but would not be
2 accused of misleading the decisionmakers by modeling and testimony asserting that the
3 water quality conditions of the cross-Delta “dual path” operations will exist. DWR and
4 the Bureau would produce evidence as to whether the devotion of massive amounts of
5 capital to Tunnels and their operation and maintenance should be increased to scale up the
6 facilities’ capacity to accommodate the unavailability of the “second path” because of
7 failure of the levee and island system. DWR and the Bureau can contend that the harm to
8 legal users of water receiving the “dual path” waters arises from causes other than
9 permission for the Tunnel project to be built and operated, but the harm conditions must
10 be accurately described so that conditions can be applied to DWR and the Bureau which
11 would reduce that harm to legal water users.

12 The briefing would provide a glimpse into why as a matter of law and fact this
13 evidence is necessary . . . both to meet DWR and the Bureau’s burden of producing
14 evidence, and to weigh the feasibility of the DWR and Bureau’s plan. The SWRCB may
15 not process a petition for change of the point or means of diversion by arguing that there
16 will be no harm to other legal users based on an assumption that a “dual path conveyance”
17 through intact levees and channels will exist across the Delta without evidence of the
18 feasibility of this essential element of the plan (particularly, repair once breaches have
19 occurred). Repair of the levees is essential to that “dual path” and must exist (money,
20 organization, and rapid means of repair).

21 It is only necessary to consider the following hypotheticals to understand how a
22 reviewing Court will judge the current state of the record:

23 1. Would the Board consider a new substitute point of diversion for the City
24 and County of San Francisco from the Southern Delta near the existing pumps without
25 evidence of how the diversion water quality would be affected by levee failures and
26 failure to finance levee protection works and repair when levee failures occur, as the
27 DRMS Reports conclude is inevitable? Obviously, diversions for an urban population
28 require quality assurance and reliability of physical facilities.

1 2. If a governmental Agency is required to adjudge a proposal to create a
2 totally separate power supply and grid to serve the Los Angeles urban area from that
3 serving the rest of California on the basis of harm to other legal users of power, would the
4 Board accept the bald assertion of the Los Angeles advocates for a separate system that
5 there will be adequate funding and organization to maintain the power grid for the
6 remainder of California with no testimony. Prohibiting the submission of testimony by
7 other participants because proponents of the grid separation modeled all future operations
8 as if the grid for the remainder of California was economically sustainable without
9 examination of that assertion denies fundamental due process. Would the grid separation
10 proponents be permitted to ignore the aged infrastructure, the increasing costs of
11 maintenance of the power grid for the remainder of California, the limited financial
12 resources to pay repair costs without Los Angeles' power users, and to boldly assert that
13 was outside of the proper realm of review by the Board?

14 3. This is tantamount to a project proponent proposing a new roadway for 1/2
15 of the volume of existing vehicle travel because a bridge on the existing roadway
16 alignment is about to fail. The new roadway proponents present witnesses in favor of the
17 effects of the new alignment, assuring all that the 1/2 of the vehicles proposed to continue
18 to drive on the historic roadway alignment will be accommodated when and if the bridges
19 fail, but with no examination of how the remedial work upon the weakened bridges will
20 be funded or organized.

21 3.1 Apparently, in the application of this example to the Water Fix
22 proposal, the "rich" and "haves" of the water world (Tunnel users) can make vague
23 assurances about how the "have nots" will be served by trucks and vehicles using the
24 existing roadway alignment and develop models of vehicle usage which assumes the
25 bridges on the old roadway alignment will not fail, but when the bridges do fail (as all
26 DRMS studies of the bridges [levees] in our example predict will occur), and there is
27 insufficient funding and organization of public agencies to reconstruct the defective
28 bridges, the permitting authority (the equivalent of the SWRCB) is to express surprise that

1 the “dual path” did not work as planned, but has no duty to inquire if the original plan to
2 split the traffic is defective or incomplete.

3 4. The proposed briefing by SJREC would allow those questions to be
4 answered: The project considered by the Board in Phase 1 may be modified to state that
5 when and if the levees collapse and the water quality impacts of organic carbon and
6 salinity arising from the failures prevent the pumping of Delta water, those “harms” are
7 not part of the proposed new diversion plan of DWR and the Bureau? The brief would
8 address whether the Petition and proposed plan of DWR and the Bureau should more
9 accurately state that when the “dual path” levee system collapses, only the Tunnel path
10 will be utilized. This more accurate plan description will explain how the Tunnel will be
11 utilized when/if the second path levees have collapsed with no funding for their repair,
12 and will explain which water uses will end.

13 The briefing will allow DWR and Bureau to explain their proposition that the
14 Board has no jurisdiction and authority to condition the “proposal” of a “dual path”
15 conveyance upon financial and organizational feasibility of that “dual path” existing and
16 being reasonably maintained. If the DWR and Bureau wish to revise their plan to state
17 that it is impractical or impossible to finance, organize and provide for repair of the levee
18 system to reliably maintain the “dual path”, then they should simply change the project
19 proposal and modeling assumptions, explain that the detrimental effects are “harm” not
20 caused by the abandonment of cross-Delta deliveries but instead inevitable of occurrence,
21 and explain where that water formerly transported in the “dual path” will go in the
22 arguably undersized Tunnels if demands south of the Delta are to be met. Alternatively,
23 the water demands which are to end can be described.

24
25 **II. In requesting the subjects sought to be briefed, the SWRCB obviously wishes**
26 **to know how much threat there is that legal requirements have not been**
complied with and to identify the means of correction, if any exists.

27 Here, competent testimony based upon studies funded by the State of California
28 and conducted by DWR itself regarding levees and necessary measures (DRMS 1 and 2),

1 which studies were directed to be performed by the Legislature, are being prevented from
2 inclusion in the record, and testimony about the effects of the data accumulated on the
3 WaterFix’s plan feasibility is thereby prohibited. Apparently this prohibition is argued to
4 be fair on the basis that because the DWR and Bureau did not present any witnesses who
5 testified to the feasibility and likelihood of Delta levee failures to permit judgment as to
6 the likelihood of a reliable “dual path” delivery system, other parties – such as SJREC –
7 may not be allowed to produce such evidence. The basis for this proposed rule of
8 evidence is not divulged. Briefing will allow the SWRCB to finally resolve its rationale if
9 there is continued refusal of submission authority.

10
11 **III. What legal standards would the SWRCB be reminded of in the proposed Brief**
12 **which may be helpful in developing a lawful decision?**

13 The SJREC brief would describe how the legal standard established in Water Code
14 Section 1702 that a petition for change must meet the following standard:

15 “(d) Include sufficient information to demonstrate a
16 reasonable likelihood that the proposed change will not injure
any other legal user of water.”

17 The brief would explain that the DWR and Bureau’s evidence to date asserts that no injury
18 standard is complied with even though the “dual path” element of the change in point of
19 diversion plan is known to depend on funding, organization and measures regarding
20 levees which do not currently exist, and no evidence has been submitted indicating any
21 plan to provide for those measures.

22
23 The record to date includes no information that those “dual path” works will be
24 organized and maintained, nor has DWR explained that the “dual path” mechanism will be
25 abandoned upon multiple failures occurring. The Tunnels will be the sole means of
26 delivering water South of the Delta in some circumstances in July through September if
27 that occurs. The DWR/Metropolitan Water District planners apparently think the support
28

1 for their project will disappear if the costs of levee maintenance are added or if the Project
2 planners declare that the Tunnels will increase diversions for as long as the failures exist.

3 Water Code Section 1705 states:

4 “After the hearing, the Board shall grant or refuse, as the facts
5 may warrant, permission to change the point of diversion...”

6 The brief will explain that findings are required based on evidence that the “dual path”
7 without DWR and the Bureau’s commitment to maintenance of the levee system is
8 feasible and likely. The proposed change as submitted by the DWR and Bureau now
9 proposes to deliver, pump and use 3,000 cfs in the “dual path” at the pumps. This is the
10 proposal of DWR and the Bureau.

11 The briefing can emphasize for the Board’s consideration that it can be contended
12 that the condition of the approved change to permit the Tunnel diversions is the “dual
13 path” and that the DWR and Bureau will have breached the terms of the permitted change
14 authorizing the Tunnels and their operations if the levees and channels are not maintained
15 or promptly repaired when damaged and the “dual path” does not exist. Of course,
16 revoking authority for the WaterFix Tunnel operations after they are built would be an
17 ineffective remedy. Requiring some organization and funding of the “dual path” would
18 alone be an effective measure. The combined refusal to allow testimony offered by the
19 SJREC regarding the likelihood of the “dual path” being unavailable together with the
20 lack of logic and evidentiary explanation of how the SWRCB could assume that the “dual
21 path” will be maintained and repaired by someone else will mystify a Court when there is
22 no evidence to support such a proposition.

23 Protestants are denied a fair hearing if there is a prohibition upon presentation of
24 evidence (*Dare v. Board of Medical Examiners* (1943) 21 Cal.2d 790) or a failure to make
25 findings on the basis of evidence in the record (*Old Mission Portland Cement Co. v.*
26 *Helvering* (1934) 293 U.S. 289, 44 S.Ct. 158, 79 L.Ed. 367). Whether the proceedings are
27 fundamentally fair is a question of law to be resolved by the Courts, and the determination
28 of the administrative Agency as to fairness and whether the evidence is sufficient is not

1 determinative; *Garamendi v. Golden Eagle Insurance Co.* (2004) 116 Cal.App.4th 694;
2 *Crocker National Bank v. San Francisco* (1989) 49 Cal.3d 881, 888. Although deference
3 to an administrative Agency's interpretation is usually to be granted, no deference to an
4 Agency's interpretation of a statute or its requirements is conclusive, and an Agency
5 cannot disregard the clear requirements and meaning of the statute and must make explicit
6 findings supported by evidence. *Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 776-8.
7 Here, the Tunnels are argued by the Proponents to be necessary because of the risks of
8 failure of the channel and levee system for transportation of water. However, without
9 supporting evidence, the SWRCB is to presume the second path will exist and no injury or
10 harm to legal users of water will occur because the levee system will be sufficiently intact
11 to deliver 540,000 ac/ft/year through the "dual path" during the July through September
12 period.

13 The California Supreme Court and the United States Supreme Court each require
14 that findings based on evidence presented and present in the record be made in quasi-
15 judicial proceedings, such as this SWRCB hearing. If neither findings or findings upon
16 evidence in the record are available for review, "the analytic gap between the raw
17 evidence and ultimate decision or order" does not exist and the order or decision must be
18 set aside. *Overton Park v. Volpe* (1971) 401 U.S. 402, 92 S.Ct 814; 28 L.Ed.2d 136;
19 *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506,
20 515. What evidence will be on the record that the "dual path" will reliably exist when the
21 DWR and Bureau refuse to submit any evidence as to their participation and financial
22 support of maintenance and rebuilding failed levees? What evidentiary basis will the
23 SWRCB cite to when DWR objects to presentation of the DWR's own most
24 knowledgeable witnesses and studies on what efforts would be required to provide a
25 reasonably reliable "dual path" as described in DWR's own DRMS Reports?

26 This Board should obviously direct briefing, but equally important, grant the
27 Petition for Reconsideration of the SJREC to present the testimony.

28 //

1 If the DWR and Bureau's plan is to abandon the "dual path" when it gets too
2 burdensome for the local interests to finance, they need only describe under what
3 circumstances that will be done and what will happen to those legal users of water and to
4 the water formerly used by them through the "second path." Does the water go through
5 the Tunnels during a failure of the "second path?" The State Board gets close to the
6 accusation of "hiding facts" when it refuses evidence and testimony on this subject.

7
8 **IV. Conclusion**

9 The SWRCB in requesting an outline of the issues which would be briefed
10 provides perhaps the last opportunity to correct a fundamental flaw in judging whether
11 and what type of harm to legal users of water could be avoided by proper design and
12 operating conditions for the WaterFix Tunnels. If a "dual path" or "second path" is not to
13 be organized, funded and maintained partially by the DWR, Bureau, and the local
14 interests, that change in the project proposal should be identified and new modeling
15 submitted and an amended project description provided. However, the SWRCB must
16 consider evidence of those facts as a requirement of due process and the project
17 proponents' burden of proof under Water Code Section 1702.

18
19 Dated: January 31, 2017

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20
21 By: 
22 PAUL R. MINASIAN, ESQ.
23 Attorneys for SAN JOAQUIN RIVER
24 EXCHANGE CONTRACTORS WATER
25 AUTHORITY
26
27
28

EXHIBIT "A"

EXHIBIT "A"



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

October 7, 2016

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST AND INTERESTED PERSONS LIST

CALIFORNIA WATERFIX HEARING – RULING ON WRITTEN TESTIMONY OUTSIDE THE SCOPE OF PART 1 AND OTHER PROCEDURAL MATTERS

This ruling addresses objections to written testimony submitted for Part 1B of the hearing on the water right change petition for California WaterFix Project on the grounds that the testimony is not relevant to the key hearing issues noticed for Part 1 of the hearing. The remaining objections to testimony and exhibits submitted for Part 1B of the hearing will be addressed after the respective parties have the opportunity to respond to the objections and present their cases in chief. This ruling also addresses several other outstanding procedural issues concerning the participation of some of the parties in Part 1B.

Written Testimony Outside the Scope of Part 1

The Department of Water Resources (DWR) and various other parties have filed objections to the written testimony of numerous witnesses submitted for Part 1B of the hearing on the grounds that the testimony is not relevant to the key hearing issues for Part 1 of the hearing.¹ We have reviewed the objections, responses to objections, and written testimony in question, and concluded that some of these objections have merit. With the exception of one subject area, the testimony that falls outside the scope of Part 1 of the hearing is relevant to the key hearing issues for Part 2 of the hearing, and affected parties will be permitted to resubmit the testimony during that part of the hearing. To ensure that the hearing is conducted in an organized manner, however, the parties identified below are directed to withdraw their testimony for Part 1B of the hearing or to revise and resubmit their testimony in accordance with the guidance contained in this letter by noon on October 17, 2016.

¹ Evidentiary objections to Part 1B cases in chief were due by noon on September 21, 2016. Due to an oversight, DWR neglected to submit some of its objections by the deadline, and as a result some of DWR's objections were submitted several hours after the deadline. Several parties have argued that we should disregard DWR's objections if they were late. We will consider DWR's objections, however, because DWR made a good faith effort to submit its objections on time, and no party appears to have been prejudiced by DWR's failure to submit all of its objections by noon.

FLORIA MARRAS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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The October 30, 2015, hearing notice set forth the following key issues for Part 1 of the hearing:

1. Will the changes proposed in the Petition in effect initiate a new water right?
2. Will the proposed changes cause injury to any municipal, industrial or agricultural uses of water, including associated legal users of water?
 - a. Will the proposed changes in points of diversion alter water flows in a manner that causes injury to municipal, industrial, or agricultural uses of water?
 - b. Will the proposed changes in points of diversion alter water quality in a manner that causes injury to municipal, industrial, or agricultural uses of water?
 - c. If so, what specific conditions, if any, should the State Water Board include in any approval of the Petition to avoid injury to these uses?

The key issues reserved for Part 2 of the hearing included whether the changes proposed in the petition would unreasonably affect fish, wildlife, or recreational uses of water, or other public trust resources, and whether the proposed changes are in the public interest.

In response to questions raised during the pre-hearing conference concerning issues that do not fit squarely within Part 1 or Part 2, we clarified in a ruling dated February 11, 2016, that "generally Part 1 focusses on human uses of water (water right and water use impacts) and Part 2 focusses on environmental issues. Part 1 can address human uses that extend beyond the strict definition of legal users of water, including flood control issues and environmental justice concerns. If a human use is associated with the health of a fishery or recreation, testimony on this matter should be presented in Part 2."

Despite this guidance, several parties submitted written testimony that addresses the potential impacts of the California WaterFix Project on fish and wildlife or recreation. This testimony, including any related testimony concerning potential impacts to human uses associated with the health of a fishery or recreation, must be withdrawn and resubmitted in Part 2. For example, any testimony concerning potential impacts to hunting or fishing, or economic impacts to recreation-oriented businesses, should be presented during Part 2.

Several parties objected to the written testimony of a number of witnesses that addressed the potential impacts attributable to construction of the WaterFix Project. Some of the testimony in this category concerns potential impacts to groundwater wells or water distribution systems, and is at least arguably relevant to the issue of injury to legal users of water. To the extent that it is not relevant to the issue of legal injury, the testimony concerning construction-related impacts is relevant to the issue of whether the project would be in the public interest. Although this issue is noticed for Part 2 of the hearing, we will permit all testimony concerning construction-related impacts to be presented in Part 1B, provided that it does not concern potential impacts to fish, wildlife, recreation, or other public trust resources. The parties are strongly encouraged, however, to present testimony concerning all construction-related impacts during Part 2. Before Part 2 begins, the Final California Environmental Quality Act (CEQA) documentation for the Project will be available, which may afford more information concerning construction-related impacts and mitigation. Accordingly, waiting until Part 2 to present testimony concerning

construction-related impacts may be more efficient and avoid the need to present testimony on the same topic during both parts of the hearing.

Another issue that should be addressed during Part 2 is the economic feasibility of the WaterFix Project. This issue is not relevant to any of the key issues for Part 1, but it is relevant to the issue of whether the project is in the public interest, which is an issue allowable in Part 2. In Part 1B, we will permit testimony concerning the potential, indirect economic impacts attributable to the proposed changes in point of diversion, such as testimony concerning any costs attributable to any impacts to water quality that may be caused by the proposed changes. Similarly, testimony concerning the potential effects of the project on funding for levee maintenance may be presented in Part 1B. Any testimony concerning the cost of constructing the WaterFix Project, however, or how it will be funded, should be presented in Part 2, subject to additional direction from the Hearing Officers. Finally, the written testimony for several witnesses addresses the consistency of the WaterFix Project with the Delta Reform Act or the California Water Plan. These issues are not relevant to the key issues for Part 1 and therefore should be presented in Part 2.

In addition to clarifying the scope of Parts 1 and 2 of the hearing, we have explained in prior rulings that, as the lead agency under the CEQA, the DWR is responsible for preparing an Environmental Impact Report (EIR) for the WaterFix Project that satisfies CEQA requirements. Consistent with the State Water Resources Control Board's (State Water Board) more limited role as a responsible agency under CEQA, we have ruled that the adequacy of the DWR's EIR for the WaterFix Project for purposes of CEQA compliance is not a key hearing issue, and we directed the parties not to submit evidence or argument on that issue.

Contrary to this direction, several parties submitted written testimony that addresses the adequacy of the Revised Draft EIR/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) for the WaterFix Project. This testimony is not relevant to any key issue, and should be withdrawn. However, specific testimony concerning the adequacy of the information contained in the RDEIR/SDEIS as it relates to a specific hearing issue is permissible, but testimony that opines on whether the RDEIR/SDEIS satisfies the requirements of CEQA or the National Environmental Policy Act (NEPA) is not relevant and will not be admitted into evidence.

The parties and witnesses who submitted testimony that is partially outside the scope of Part 1 are identified in the table below. The parties are directed to revise the testimony to eliminate the subject areas identified in the table. The parties may not add any substantive testimony. **Revised, written testimony should be submitted as soon as possible, but no later than noon on October 17, 2016.** Deletions must be shown in strike-through and any additions must be underlined. As an alternative to revising witness testimony, the parties may elect to withdraw their witness testimony altogether and present the testimony in Part 2 if the testimony is relevant only to the issue of whether the project is in the public interest.

In light of the volume of objections and testimony, this ruling may not address every issue concerning whether testimony submitted for Part 1B exceeds the scope of Part 1, and the table below may not identify every witness who has submitted testimony that is outside the scope of Part 1. All of the parties who may have submitted testimony that may exceed the scope of Part 1 are encouraged to review their own testimony and make any revisions that may be warranted. In addition to the testimony identified in this ruling, we may exclude any other testimony that we subsequently determine to be outside the scope of Part 1. In addition, please note that this ruling applies only to written testimony. Exhibits have not been reviewed for relevancy. **The parties must review all of their exhibits in light of the guidance afforded by this ruling,**

and remove any exhibits that are not relevant to Part 1 issues. In particular, any exhibits associated with testimony that is reserved for Part 2, such as witness qualifications, power point presentations, and documents authenticated by witnesses who will no longer testify in Part 1, should be removed or revised. Parties who withdraw and reserve for Part 2 any testimony or exhibits should submit a revised exhibit index that lists only the testimony and exhibits that will be presented in Part 1. Revised exhibit identification indexes should be submitted together with any revised, written testimony, and are due no later than noon on October 17, 2016.

Written Testimony Outside Scope of Part 1						
Party	Witness	Subject Area of Testimony				
		Environmental Impacts	Impacts to Recreation	Economic Feasibility	CEQA/NEPA Compliance	Misc. Public Interest
South Delta Water Agency						
	Dr. Jeffery Michael		X	X		
	Dante Nomellini	X			X	Consistency with Delta Reform Act
Save the California Delta Alliance						
	Janet McCleery		X			
	Frank Morgan	X	X			
	Michael Brodsky					Consistency with Delta Reform Act
California Sportfishing Protection Alliance						
	Bill Jennings	X				
	Chris Shutes				X	
	G. Fred Lee		X			

Written Testimony Outside Scope of Part 1						
Party	Witness	Subject Area of Testimony				
		Environmental Impacts	Impacts to Recreation	Economic Feasibility	CEQA/NEPA Compliance	Misc. Public Interest
California Water Impact Network						
	Arve Sjovold			X		
AquAlliance						
	Barbara Vlamis				X	
	James R. Brobeck	X				
Restore the Delta						
	Tim Stroshane			X		Consistency with Delta Reform Act
	Esperanza Vielma		X			
	Gary Mulcahy	X				
	Roger Mammon	X				
	Xuily Lo	X				
North Delta Cares						
	Steve Haze	X		X		Consistency with California Water Plan

A number of parties objected to the written testimony submitted by Westlands Water District (Westlands) on the grounds that it is not relevant to Part 1 issues. Westlands submitted testimony that addresses the benefits to Westlands if the WaterFix Project is approved and the adverse impacts to Westlands if the project either is not approved or is approved with more significant operational limitations than exist today. Similarly, Friant Water Authority and its member agencies (Friant) submitted written testimony that that describes the harm to Friant that would occur if Central Valley Project (CVP) exports are reduced and less water is delivered to Friant as a consequence. In Friant's opening statement, Friant argues that the change petition could injure Friant because limitations on the draw-down of CVP reservoirs and new restrictions on Old and Middle River reverse flows could reduce exports.

Although we acknowledge that both Westlands and Friant are legal users of water, the key issue noticed for Part 1 is whether the proposed changes would cause injury to any legal user of water, not whether approval of the petition would benefit any legal user, or whether disapproval of the petition would injure any legal user. Similarly, the focus during Part 1 is on the effects of the proposed changes on legal users of water, not the effects of any operational limitations that may be imposed as conditions of approval. The issues raised by Westlands and Friant are relevant to the issue whether approval of the petition, with or without conditions, is in the public interest. Accordingly, Westlands and Friant will not be permitted to present their testimony in Part 1B of the hearing. They may resubmit their testimony during Part 2.

Order of Group Presentations and Cross Examination

We received thirteen letters regarding proposed grouping assignments with requests for order of presentation for joint testimony and/or cases in chief. Based on the information received, parties will generally remain within their previously assigned groups and groups will present their cases in chief in roughly the same sequence as in Part 1A. For consistency with Part 1A, we will not assign new group numbers for Part 1B. Specific requests to present joint testimony included: Sacramento Valley Water Users group of parties (Group 7), East Bay Municipal Utility District (Group 15) and Sacramento County Water Agency's (Group 7) request to present a joint witness panel as part of their individual cases in chief immediately following the case in chief of the Sacramento Valley Water Users group of parties; Local Agencies of the North Delta et al. (Group 19), Daniel Wilson (Group 20), and County of San Joaquin et al.'s (Group 24) request to coordinate their cases in chief and witness panels; and Pacific Coast Federation of Fishermen's Association (PCFFA) and Institute for Fisheries Resources (IFR) and Deirdre Des Jardins' request to present coordinated cases in chief, with Deirdre Des Jardins presenting after PCFFA and IFR. The presentation of joint panels and joint cases in chief will serve to improve the efficiency of the hearing and these requests are approved.

In addition, parties generally requested to conduct cross examination in the same order as in Part 1A except to allow for coordination between certain parties. We encourage parties to coordinate cross examination as much as possible to avoid duplication and increase efficiency. Parties will therefore conduct cross examination in the same sequence as Part 1A, subject to modification upon request and with the approval of the hearing officers.

Finally, because of limitations on the availability of some of its witnesses in November and early December 2016, Restore the Delta requested to present its case in chief in early to mid-January, 2017. **In order to accommodate this request, Restore the Delta must provide a schedule of its witness availability to the WaterFix hearing team by October 28, 2016. Likewise, any other parties with scheduling conflicts should contact the hearing team by October 28, 2016, if they have not already done so.**

Patrick Porgans' Request to Present a Case in Chief in Part 1B

By email dated August 31, 2016, Patrick Porgans requested permission to amend his Notice of Intent to Appear (NOI) and present a case-in-chief in Part 1 of the hearing. Mr. Porgans' original NOI indicates intent to participate in Part 1 by cross examination and/or rebuttal only. The basis for the request is that Mr. Porgans found the responses of petitioners' witnesses to questions asked during cross examination unsatisfactory. The fact that petitioners' witnesses did not provide the answers that Mr. Porgans was expecting, however, does not justify his failure to indicate on his original NOI his intent to present a case in chief in Part 1 of the hearing. Accordingly, this request is denied.

Request of Friends of the River et al. for Official Notice and Dismissal of the Petition

Friends of the River, Sierra Club, and the Planning and Conservation League, (Friends of the River et al.) submitted a joint opening statement that included requests for official notice and a joint motion to reconsider a previous motion to dismiss the petition. Parties presenting a case-in-chief may make an opening statement that briefly and concisely states the objectives of the case-in-chief, major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. (Hearing Notice, p. 35.) It is not proper for Friends of the River et al. to submit an opening statement for Part 1 because they are not presenting a case in chief in Part 1B. In addition, the majority of this submittal is argument appropriate for a closing brief (when and if requested) or facts that could be presented as part of a case-in-chief in Part 2 of the hearing. Accordingly, the opening statement of Friends of the River et al. will be treated as a procedural motion, which is addressed in more detail below.

Friends of the River et al. request that the State Water Board take "official notice" of "certain facts and actions" including the U.S. Environmental Protection Agency's NEPA comments, various findings in the U.S. Bureau of Reclamation's Biological Assessment (BA), a Guidance document issued by the Council on Environmental Quality, and court opinions.

The regulations governing evidentiary hearings before the State Water Board provide that the Board or hearing officer may take official notice of any facts which can be judicially noticed by the courts. (Cal. Code Regs., tit. 23, § 648.2.) These include decisional, constitutional, and public statutory law, various rules of pleading practice and procedure, and facts and propositions "of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." (Evid. Code, § 450 et seq.) Generally, the State Water Board's practice is to take official notice of statutes, court decisions, and precedential Board orders or decisions that are cited as legal authority in parties' closing briefs without the need for a formal request for official notice. Accordingly, Friends of the River et al.'s request for official notice of legal authority is unnecessary.

To the extent that Friends of the River et al. seek official notice of certain documents that are relevant to factual issues that will be addressed in Part 2 of the hearing, these documents should be submitted as exhibits as part of their case in chief in Part 2. In addition, consistent with an email sent to the service list on September 28, 2016, parties who are not presenting a case-in-chief in Part 1B may offer any exhibits that are identified during cross examination into the record at the end of Part 1B.

Friends of the River et al. also request reconsideration of previous and repetitive motions to dismiss the petition based on the timing of the proceeding and adequacy of relevant documents. These issues have been addressed multiple times and will not be revisited at this time. (See Rulings issued on February 11, 2016, March 4, 2016, April 25, 2016, and July 22, 2016.)

San Joaquin River Exchange Contractors Water Authority's Request to Amend its NOI and Call DWR Witnesses

On August 30, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) sent notice to DWR requesting the appearance of DWR witnesses pursuant to Government Code section 11450.50. SJRECWA's witness amendment sheet indicates its intent to substitute DWR employees and consultants instead of its previously listed witness Christopher H. Neudeck. On September 2, 2016, DWR requested that the State Water Board reject or deny

SJRECWA's request for being procedurally improper and substantively unfair. In its opposition, DWR argues that the witness substitution impermissibly broadens the topic of Mr. Neuduck's testimony and constitutes the submittal of a new NOI.

The rules governing evidentiary hearings before the State Water Board provide for the issuance of subpoenas to compel the testimony by witnesses in a proceeding. (Wat. Code, § 1080 et seq.; Gov. Code, §§ 11450.05-11450.50; Cal. Code Regs., tit. 23, § 649.6.) Under Government Code section 11450.50, the service of a subpoena on the witness is not required to compel the appearance of a party to a proceeding. Instead, written notice requesting the witness to attend, with the time and place of the hearing, must be served on the attorney of the party as provided under section 1987 of the Code of Civil Procedure. (Code of Civ. Pro., § 1987 [service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance].) The notice must be served at least 10 days before the time required for attendance. This notice has the same effect as service of a subpoena on the witness. Parties have the same rights to object to its terms by a motion for a protective order, including a motion to quash. The presiding officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands.

SJRECWA's notice complies with the provisions stated above. DWR is a party to the proceeding so a subpoena is not required. The notice was served on DWR's attorney more than 10 days before Part 1B is scheduled to begin, and provides a reasonable time for preparation and travel. DWR has not made any showing that SJRECWA's request is unreasonable or oppressive. In addition, the scope of testimony falls within the scope of testimony of the original witnesses identified. In the original NOI, the scope of proposed testimony of Christopher H. Neudeck was: "Need for comprehensive agreements between SWP/CVP/local Reclamation Districts, and funding for maintenance, repair and improvement of levees and channels for conveyance and control of water across and through Sacramento/San Joaquin Delta to CVP and SWP pumps to prevent unreasonable salinity impairment of water quality" In its amended NOI, DWR witnesses are listed to testify on "DWR plan and financing plan to maintain Channels and levees to support 3,000 cfs or move cross Delta flow to CVP/SWP pumps as assumed in DWR Exhibit 515, page 2." This revision falls within the scope of the proposed testimony of Christopher H. Neudeck.

DWR argues that the proposed substitution will potentially significantly delay the hearing by adding numerous hours surprise testimony and additional cross examination. We disagree. The Hearing Notice provides an exception to the advanced submittal of written testimony for adverse witnesses testifying in response to a subpoena or alternative arrangement. (Hearing Notice, p. 33, fn. 16.) Further, it does not appear that presentation of SJRECWA's case in chief will take more time as a result of SJRECWA's proposed changes. SJRECWA has not submitted written testimony for three expert witnesses listed on SJRECWA's original NOI, including Mr. Neudeck. In addition, it appears that SJRECWA has decided not to subpoena Daniel B. Steiner, Hydrologist-CVP/SWP as an expert witness to testify on a variety of issues. The estimated length of this witness' direct testimony was two hours.

Absent a showing of why SJRECWA's request is unreasonable or oppressive, the request to substitute witnesses as provided in SJRECWA's amended witness sheet is granted, and DWR is directed to coordinate with SJRECWA to arrange for the appearance of the appropriate witness or witnesses at the appropriate time.

City of Antioch's Request to Amend NOI

By letter dated August 2, 2016, the City of Antioch requested approval to amend its NOI to "designate themselves as protestants" for Part 2. This request appears to stem from concern about subsequent information (such as the biological opinions and final environmental documentation) available in Part 2 as it pertains to Part 1 issues, and not necessarily Part 2 issues. As explained below, approval of the City's request is not necessary.

As explained in a previous ruling, it was not necessary to file a protest in order to participate in the hearing, and a party's participation is governed by the scope of the party's NOI, not the party's protest. The City of Antioch timely submitted an NOI indicating its intent to participate in both Parts 1 and 2 of the hearing. Accordingly, the City may participate in Part 2 of the hearing. Designating the City as a protestant for Part 2 is not necessary. In addition, if the City's interest in Part 2 is only based on new information that may have a bearing on Part 1 issues, we have already stated that it may be necessary to revisit Part 1 hearing issues after the close of Part 2 if substantial changes to the final CEQA document or other information has a material bearing on Part 1 issues. (April 25, 2016 Ruling at p. 3.) Part 1 parties will not need to file a protest in order to participate if Part 1 issues are revisited.

Ex Parte Communications

Please remember that ex parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Parties must provide a copy of any correspondence to the hearing team concerning substantive or controversial procedural issues to all of the parties listed in Table 1 of the service list located here: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml. Any such correspondence must also be accompanied by a Statement of Service form.

If you have any questions regarding this letter, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY:

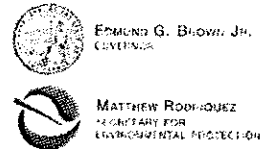
Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY:

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer

EXHIBIT "B"

EXHIBIT "B"



State Water Resources Control Board

December 8, 2016

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST

CALIFORNIA WATERFIX HEARING – RULING VACATING SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY’S NOTICE REQUESTING ATTENDANCE OF WITNESSES

On August 31, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) served written notice on the Department of Water Resources (DWR), requesting the appearance of certain DWR witnesses during Part 1B of this hearing. On October 27, 2016, DWR filed a motion for protective order, seeking to vacate or limit the scope of SJRECWA’s notice. Based on our review of DWR’s motion and SJRECWA’s reply, it does not appear that SJRECWA seeks to compel DWR’s witnesses to testify concerning any issues that are relevant to the key hearing issues for Part 1 of this hearing. Accordingly, SJRECWA’s notice requesting the appearance of DWR’s witnesses is hereby vacated in its entirety.

Procedural Background

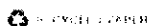
The Notice of Intent to Appear (NOI) that SJRECWA originally filed in this proceeding listed four expert witnesses, including Christopher H. Neudeck. The subject of Mr. Neudeck’s proposed testimony was the need for agreements and funding for the maintenance, repair, and improvement of Delta levees and channels “for conveyance and control of water across and through the Delta to CVP and SWP pumps” On August 31, 2016, SJRECWA notified the State Water Resources Control Board (State Water Board) and the other parties that Mr. Neudeck was no longer available, and SJRECWA proposed to call DWR employees or consultants to testify instead of Mr. Neudeck.

In order to effectuate the substitution of DWR witnesses for Mr. Neudeck, SJRECWA served a notice on DWR pursuant to Government Code section 11450.50, requesting the appearance of: (1) David Mraz, Chief of the Delta Levees and Environmental Engineering Branch within DWR, (2) other DWR employees or consultants most knowledgeable concerning the modeling assumption that preferential pumping of up to 3,000 cubic feet per second (cfs) at the South Delta intakes would occur during July through September “as well as the financial contributions . . . that would provide reasonable assurance that this dual pathway for water to reach CVP and SWP pumps would exist . . . ,” and (3) individuals with knowledge of why the California WaterFix

FLORIA MARSH, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

ATTACHMENT 1



Project does not provide a means for DWR, the U.S. Bureau of Reclamation, and local reclamation districts to implement various levee improvement projects and levee protection programs to ensure that water can continue to be conveyed through the Delta.

Originally, DWR opposed SJRECWA's request on the grounds that SJRECWA was impermissibly seeking to expand the scope of SJRECWA's NOI. In a ruling dated October 7, 2016, this objection was overruled because the scope of the proposed testimony from DWR witnesses was within the scope of Mr. Neudeck's proposed testimony. We also affirmed that SJRECWA had followed the proper procedures to compel a party to appear in an adjudicative proceeding before the State Water Board, and directed DWR to coordinate with SJRECWA to arrange for the appearance of the appropriate witness at the appropriate time.

Following the October 7 ruling, representatives for DWR and SJRECWA met and discussed SJRECWA's request, but were unable to reach agreement. As part of these discussions, SJRECWA provided DWR with a list of possible questions for a prospective DWR witness. DWR submitted a copy of the draft questions as an exhibit to its motion for protective order. The questions concern: (1) the modeling assumption that up to 3,000 cfs would continue to be pumped from the South Delta intakes during July through September, (2) the content of two Delta Risk Management Study (DRMS) reports that addressed the risk of levee failure, and (3) the need to fund levee improvements and repairs in order to maintain the ability to convey up to 3,000 cfs through the Delta.

Discussion

SJRECWA's written notice requesting the appearance of DWR witnesses had the same legal effect as a subpoena. (See Gov. Code, §§ 11450.10, 11450.50 [providing that a subpoena is not required in the case of the production of a party if written notice requesting attendance of the witness is served on the party's attorney in accordance with section 1987 of the Code of Civil Procedure].) A person served with a subpoena, or, as in this case, a written notice requesting attendance of a witness, may object to the terms of the subpoena or notice by a motion for a protective order, including a motion to quash. (Gov. Code, § 11450.30, subd. (a).) The hearing officer has discretion to resolve any objection subject to any appropriate terms and conditions. In addition, the hearing officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands. (*Id.*, § 11450.30, subd. (b).)

In its motion for protective order, DWR argues that SJRECWA's notice requesting the appearance of DWR witnesses is unreasonable and oppressive because: (1) SJRECWA could have asked its prospective questions during cross-examination of DWR's expert witnesses in Part 1A of the hearing, (2) the DRMS reports can be submitted as exhibits, and do not require testimony about their content, and (3) questions concerning long-term efforts to fund levee maintenance and repair are outside the scope of the hearing. In its reply, SJRECWA argues that DWR's motion should be denied because: (1) DWR did not address long-term levee maintenance and repair in its direct testimony, (2) a witness from DWR is needed to explain the level of funding needed to ensure that through-Delta conveyance can be maintained, and (3) the potential for levee failure to disrupt through-Delta conveyance is relevant to the issue of harm to legal users of water.

Having reviewed SJRECWA's prospective questions for DWR's witnesses and reply to DWR's motion for protective order, we have determined that it would be unreasonable to require DWR to provide witnesses to testify as requested by SJRECWA because SJRECWA does not seek to elicit testimony that is relevant to the key hearing issues for Part 1 of the hearing. The key hearing issues for Part 1 are whether the water right changes proposed by DWR and the U.S. Bureau of Reclamation (petitioners) constitute the initiation of a new right or will cause injury to legal users of water or otherwise impact human uses. Based on the limited description of proposed testimony contained in SJRECWA's NOI and written notice to DWR, it was unclear whether SJRECWA sought to present relevant testimony from Mr. Neudeck or DWR witnesses. Based on the more detailed prospective questions provided to DWR, however, it has become clear that the issues that SJRECWA seeks to explore do not concern the potential impacts of the proposed changes. Instead, SJRECWA seeks to present testimony concerning the need for funding for levee maintenance and repair in order to maintain the petitioners' existing ability to convey water through the Delta. This is an issue that will exist regardless of whether the WaterFix change petition is approved. Other than the fact that petitioners propose to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair. Accordingly, requiring DWR to provide a witness to testify on this issue would not be reasonable or an efficient use of time.

For the foregoing reasons, SJRECWA's written notice requesting attendance of DWR witnesses is vacated. Because the notice is vacated in its entirety, a protective order limiting the scope of SJRECWA's proposed questions is not necessary.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY:

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY:

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer

EXHIBIT "C"

EXHIBIT "C"

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6 Attorneys for San Joaquin Exchange Contractors Water Authority

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

8 **STATE OF CALIFORNIA**

9		
10	HEARING IN THE MATTER OF CALIFORNIA DEPARTMENT OF 11 WATER RESOURCES AND UNITED STATES BUREAU OF 12 RECLAMATION'S REQUEST FOR 13 A CHANGE IN POINT OF DIVERSION FOR CALIFORNIA WATER FIX	PETITION FOR RECONSIDERATION OF THE RULING VACATING SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY'S NOTICE 14 REQUESTING ATTENDANCE OF WITNESSES AND OPPORTUNITY TO 15 PRODUCE EVIDENCE
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20 The San Joaquin River Exchange Contractors (SJREC) hereby petition the Board
21 for reconsideration of its December 8, 2016 Ruling that the SJREC may not introduce in
22 Part 1, by Notice to Appear or by Subpoena, the testimony of the head of DWR's Levee
23 and Environmental Engineering Branch or other most knowledgeable persons employed
24 by DWR, regarding evidence of the reasonable measures necessary and economic
25 contributions required to reasonably assure 3,000 cfs cross-Delta flow deliveries in July
26 through September to the Delta pumps. The Ruling of December 8, 2016 is attached as
27 Attachment 1.

28 This Petition is made on the following grounds and bases:

1. The SWRCB's conduct of an adjudicatory proceeding requires that constitutional due process be provided to both applicants and protestants. It is respectfully submitted that the denying SJREC's right to present evidence, whether produced by subpoena or pursuant to cooperative means, violates principles of due process; the

1 granting of reasonable opportunity to present evidence is essential for due process
2 compliance (See Attachment 2 - Legal Authorities). The rescission of authority to present
3 the testimony would violate those fundamental constitutional rights.

4 2. DWR's further objection to the testimony which gave rise to this reversal by
5 the Board and denial of the opportunity to produce evidence was based upon DWR's
6 argument that:

7 "(1) DWR did not address long-term levee maintenance and
8 repair in its direct testimony, (2) a witness from DWR is
9 needed to explain the level of funding needed to ensure that
10 through-Delta conveyance can be maintained, and (3) the
11 potential for levee failure to disrupt through-Delta conveyance
12 is (not) relevant to the issue of harm to legal users of water."
13 (Ruling, Page 2.)

14 The SWRCB states on page 3 of its Ruling:

15 "... we have determined that it would be unreasonable to
16 require DWR to provide witnesses to testify as requested by
17 SJRECWA because SJRECWA does not seek to elicit
18 testimony that is relevant to the key hearing issues for Part 1
19 of the hearing. The key hearing issues for Part 1 are whether
20 the water right changes proposed by DWR and the U.S.
21 Bureau of Reclamation (petitioners) constitute the initiation of
22 a new right or will cause injury to legal users of water or
23 otherwise impact human uses."

24 The Board ruling, based in part on a draft of preliminary questions drafted by SJRECWA
25 for the witnesses, continues by stating:

26 "... it has become clear that the issues that SJRECWA seeks
27 to explore do not concern the potential impacts of the
28 proposed changes. Instead, SJRECWA seeks to present
testimony concerning the need for funding for levee
maintenance and repair in order to maintain the petitioners'
existing ability to convey water through the Delta. This is an
issue that will exist regardless of whether the WaterFix change
petition is approved."

3. The Board's reversal through its Ruling ignores the facts in this instance, the
requirements of due process in an adjudicative hearing, and impermissibly narrows its
proceedings:

A. The authority sought by the DWR and Bureau is to provide for
facilities and uses which would divert around the Delta a majority of the usable water

1 South of the Delta at certain times. The proponents' plan submitted and testified that
2 3,000 cfs would continue to reach the Delta pumps by flowing across the Delta and would
3 be of a quality that the water would be pumped into the State and Federal aqueducts and
4 usable by municipal and agricultural users. That described condition can exist only if
5 Delta levee integrity is maintained, or after levee failure, if critical levees are quickly
6 rebuilt. DRMS I at pages 12-28 estimates a cost of \$100 Million per island for three
7 island failures, also found at page 10 of the Executive Summary. Is the Board really
8 theorizing and presuming that DWR and the Federal government are going to continue to
9 provide funding to aid local interests in protecting levees from failure or rapidly
10 reconstructing those levees if they fail, when \$15 to \$30 Billion is already invested in
11 Tunnels? There is no evidence presented to substantiate such a presumption by DWR and
12 the Bureau who have the burden of reasonably describing how their new and old
13 diversions and plan will be implemented and organized.

14 B. No one twisted DWR's arm to present modeling as part of its
15 description of the WaterFix Tunnel operations, which modeling assumes that critical
16 levees would continue to exist and that cross-Delta flows of 3,000 cfs would be available
17 for pumping in the period of July through September of each year. This is the proposal of
18 DWR and an integral part of its proposal and representation that "no harm will arise."
19 The SWRCB ruling improperly narrows the ability to present evidence showing that such
20 a "proposal" is only feasible if conditions are imposed requiring large amounts of money
21 to be marshaled and devoted to preventative levee work, and, upon failure events, if
22 prompt funding of and organization of efforts to provide repair and replacement is
23 organized and feasible. (DRMS II SJRECWA exhibits filed with the Board.)

24 It is true that the DWR has not presented any evidence of how this part of
25 the Tunnel plan will reliably exist. That is why there is a Phase 1B for protestants or
26 commenters to present the absence of such information and plans and the ease with which
27 those arrangements could be included in the DWR and Bureau plan for the Tunnels as a
28 condition of approval. If the DWR modelers and witnesses had testified that upon a flood,

1 earthquake or simple failure of critical levees, the 3,000 cfs would be routed through the
2 Tunnels, no monies would be contributed to the local Reclamation Districts to repair and
3 reconstruct critical levees, and cross-Delta flows would thereafter be available only during
4 floods, a glaring omission in the description of the Tunnel Project could have been
5 eliminated and the Board ruling might have been correct and the Board's statement in its
6 reversal of the Ruling would be true. However, no such description was included, and all
7 modeling assumes a miraculous preservation without funding for critical levees.

8 C. The Board errs when it curtails testimony of the impacts to legal
9 users of water based on carving out a critical part of DWR's proposed operations. The
10 Board makes the following statement on page 3 of its Ruling and reversal in regard to the
11 subject of what measures will be undertaken to repair upon failure or to prevent critical
12 levee failure:

13 "This is an issue that will exist regardless of whether the
14 WaterFix change petition is approved. Other than the fact that
15 petitioners propose to continue to convey water through the
16 Delta, SJRECWA has not sought to explore any connection
17 between the WaterFix change petition and the need for
18 funding for levee maintenance and repair. Accordingly,
19 requiring DWR to provide a witness to testify on this issue
20 would not be reasonable or an efficient use of time."

21 DWR proposed this operating scheme to satisfy the "ho harm" test. It
22 makes no difference if the levees are fragile and expensive to protect. DWR could have
23 clearly stated that the first time three or more levees failed, efforts to preserve cross-Delta
24 flows would end, and quantify those effects in their modeling. If the Delta pump water
25 users are to be served in a different fashion or to be abandoned, DWR needs to explain
26 that.

27 1. It is the burden of the plan proponent for the new diversion
28 facilities to present evidence that its plan is feasible and will operate as is outlined in its
modeling. The two (2) path proposal (Tunnel and cross-Delta flow) cannot assume that
examination of the potential harm arising from the Tunnel path is the only subject of
inquiry and that someone else will take care of the second path.

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2. If the ruling of the SWRCB by the reference,

“Other than the fact that petitioners proposed to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair...”

is to infer that SJRECWA should have consumed the time of the hearing officers and parties in Part 1A asking questions of DWR witnesses, which witnesses made no offer of proof or testimony on direct as to the likelihood or means to be undertaken physically or financially to cause that the levees would remain intact, and that the 3,000 cfs of pumped water continue to be available or the necessity of proper funding or organization by the DWR and United States, the Board should state that clearly and explicitly in the Ruling. The fact is that DWR presented no such evidence (even though it is DWR’s burden to show the features of its “project” are feasible), and any such questions by SJRECWA would have been objected to by DWR as exceeding the scope of direct and not allowed or answered with “I have no knowledge.”

3. The California Legislature directed the DWR to perform the Delta Risk Management Studies Part I and Part II by State law (Assembly Bill 1200.) The Legislature has directed that tens of millions of Dollars be spent planning how to maintain a dual path method of water delivery and the costs. Is this Board really willing to state to the public and a reviewing Court that DWR and the United States had no duty to explain how, when the first wave of levee failures occurs, the 3,000 cfs would continue to be delivered, or alternatively, discontinued and routed through the Tunnels?

4. In adjudicative proceedings, sometimes the judge has a duty to save a party from its own instincts. Here, DWR needs saving. DWR appears to think it is a good idea to “hide the ball” in regard to whether parties that invest \$15 to \$30 Billion in Tunnels will be willing to continue or increase support of State and Federal financial contributions to maintaining levees or fixing the levees upon failure and preserving the 3,000 cfs dual path flow capability across the Delta. The SWRCB concludes on page 3: “This is an issue that will exist regardless of whether the WaterFix change petition is

1 approved.” Yet, it is with the same logic that water users who may, because Tunnels have
2 been completed and are in operation, if State and Federal contributions to local cost
3 sharing programs for levee repair and reconstruction are not a condition of SWRCB
4 permission to install the Tunnels and operate them, will ask why those levee expenditures
5 should continue or commence. If State and Federal funding contributions are necessary to
6 support local interests in fixing levees necessary to deliver 3,000 cfs to the State and
7 Federal pumps in July through September, and those funding measures are not to be
8 conditions of the Tunnel proposal and levees that fail are to be abandoned, DWR and the
9 Bureau can easily end this inquiry by stating what their plan proposes. Will the 3,000 cfs
10 flow stop? Will the levee damage and failures be repaired utilizing only the local
11 landowners’ funding capabilities which the testimony SJRECWA offers will show are
12 extremely limited? Should the Tunnels be larger, anticipating this change to a one path
13 alternative?

14 D. The attached Notice of Deposition pursuant to Water Code Section
15 1100 is designed to remind the Board of its legal duty to provide a fair proceeding so that
16 a full and correctly conditioned plan is approved or rejected. Review at the Court
17 authorities outlined in Attachment 2. DWR, and apparently some of the State Contractors,
18 are about to create legal defects in a plan and proceeding for which the public is entitled to
19 be given a fair hearing. The Tunnels can obviously provide resiliency to threatened Delta
20 physical conditions, which is a good thing. However, the desire to route water around the
21 Delta to avoid the claimed “thefts” of water, impositions of the Endangered Species Act
22 conditions, and the constant uncertainty is causing a “hide the ball” approach to these
23 issues of the Tunnel plan proponents, which is destructive of the very plan they advocate.
24 By providing a fair and open proceeding as to what the plan really proposes, the Board
25 can assure the proposal gets the attention it is entitled to and complies with the law.

26 **PRAYER**

27 The Board should allow the testimony proposed by the SJREC in Part 1B, or as
28 Rebuttal testimony if that is more efficient for the Board scheduling, whether by direct

1 testimony pursuant to Notice and Subpoena, or by Deposition. If the Deposition proceeds
2 because no reconsideration is granted, be assured a Court will only be left to wonder and
3 examine whether the proceeding which could have been conducted fairly and openly is not
4 constitutionally deficient and subject to being redone in the future.

5 Date: 12/23/16

Respectfully Submitted,

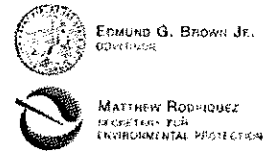
6 MINASIAN, MEITH, SOARES,
7 SEXTON & COOPER, LLP

8 By:



9 PAUL R. MINASIAN, ESQ.

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State Water Resources Control Board

December 8, 2016

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST

CALIFORNIA WATERFIX HEARING – RULING VACATING SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY’S NOTICE REQUESTING ATTENDANCE OF WITNESSES

On August 31, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) served written notice on the Department of Water Resources (DWR), requesting the appearance of certain DWR witnesses during Part 1B of this hearing. On October 27, 2016, DWR filed a motion for protective order, seeking to vacate or limit the scope of SJRECWA’s notice. Based on our review of DWR’s motion and SJRECWA’s reply, it does not appear that SJRECWA seeks to compel DWR’s witnesses to testify concerning any issues that are relevant to the key hearing issues for Part 1 of this hearing. Accordingly, SJRECWA’s notice requesting the appearance of DWR’s witnesses is hereby vacated in its entirety.

Procedural Background

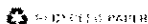
The Notice of Intent to Appear (NOI) that SJRECWA originally filed in this proceeding listed four expert witnesses, including Christopher H. Neudeck. The subject of Mr. Neudeck’s proposed testimony was the need for agreements and funding for the maintenance, repair, and improvement of Delta levees and channels “for conveyance and control of water across and through the Delta to CVP and SWP pumps” On August 31, 2016, SJRECWA notified the State Water Resources Control Board (State Water Board) and the other parties that Mr. Neudeck was no longer available, and SJRECWA proposed to call DWR employees or consultants to testify instead of Mr. Neudeck.

In order to effectuate the substitution of DWR witnesses for Mr. Neudeck, SJRECWA served a notice on DWR pursuant to Government Code section 11450.50, requesting the appearance of: (1) David Mraz, Chief of the Delta Levees and Environmental Engineering Branch within DWR, (2) other DWR employees or consultants most knowledgeable concerning the modeling assumption that preferential pumping of up to 3,000 cubic feet per second (cfs) at the South Delta intakes would occur during July through September “as well as the financial contributions . . . that would provide reasonable assurance that this dual pathway for water to reach CVP and SWP pumps would exist . . . ,” and (3) individuals with knowledge of why the California WaterFix

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ATTACHMENT 1



Project does not provide a means for DWR, the U.S. Bureau of Reclamation, and local reclamation districts to implement various levee improvement projects and levee protection programs to ensure that water can continue to be conveyed through the Delta.

Originally, DWR opposed SJRECWA's request on the grounds that SJRECWA was impermissibly seeking to expand the scope of SJRECWA's NOI. In a ruling dated October 7, 2016, this objection was overruled because the scope of the proposed testimony from DWR witnesses was within the scope of Mr. Neudeck's proposed testimony. We also affirmed that SJRECWA had followed the proper procedures to compel a party to appear in an adjudicative proceeding before the State Water Board, and directed DWR to coordinate with SJRECWA to arrange for the appearance of the appropriate witness at the appropriate time.

Following the October 7 ruling, representatives for DWR and SJRECWA met and discussed SJRECWA's request, but were unable to reach agreement. As part of these discussions, SJRECWA provided DWR with a list of possible questions for a prospective DWR witness. DWR submitted a copy of the draft questions as an exhibit to its motion for protective order. The questions concern: (1) the modeling assumption that up to 3,000 cfs would continue to be pumped from the South Delta intakes during July through September, (2) the content of two Delta Risk Management Study (DRMS) reports that addressed the risk of levee failure, and (3) the need to fund levee improvements and repairs in order to maintain the ability to convey up to 3,000 cfs through the Delta.

Discussion

SJRECWA's written notice requesting the appearance of DWR witnesses had the same legal effect as a subpoena. (See Gov. Code, §§ 11450.10, 11450.50 [providing that a subpoena is not required in the case of the production of a party if written notice requesting attendance of the witness is served on the party's attorney in accordance with section 1987 of the Code of Civil Procedure].) A person served with a subpoena, or, as in this case, a written notice requesting attendance of a witness, may object to the terms of the subpoena or notice by a motion for a protective order, including a motion to quash. (Gov. Code, § 11450.30, subd. (a).) The hearing officer has discretion to resolve any objection subject to any appropriate terms and conditions. In addition, the hearing officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands. (*Id.*, § 11450.30, subd. (b).)

In its motion for protective order, DWR argues that SJRECWA's notice requesting the appearance of DWR witnesses is unreasonable and oppressive because: (1) SJRECWA could have asked its prospective questions during cross-examination of DWR's expert witnesses in Part 1A of the hearing, (2) the DRMS reports can be submitted as exhibits, and do not require testimony about their content, and (3) questions concerning long-term efforts to fund levee maintenance and repair are outside the scope of the hearing. In its reply, SJRECWA argues that DWR's motion should be denied because: (1) DWR did not address long-term levee maintenance and repair in its direct testimony, (2) a witness from DWR is needed to explain the level of funding needed to ensure that through-Delta conveyance can be maintained, and (3) the potential for levee failure to disrupt through-Delta conveyance is relevant to the issue of harm to legal users of water.

Having reviewed SJRECWA's prospective questions for DWR's witnesses and reply to DWR's motion for protective order, we have determined that it would be unreasonable to require DWR to provide witnesses to testify as requested by SJRECWA because SJRECWA does not seek to elicit testimony that is relevant to the key hearing issues for Part 1 of the hearing. The key hearing issues for Part 1 are whether the water right changes proposed by DWR and the U.S. Bureau of Reclamation (petitioners) constitute the initiation of a new right or will cause injury to legal users of water or otherwise impact human uses. Based on the limited description of proposed testimony contained in SJRECWA's NOI and written notice to DWR, it was unclear whether SJRECWA sought to present relevant testimony from Mr. Neudeck or DWR witnesses. Based on the more detailed prospective questions provided to DWR, however, it has become clear that the issues that SJRECWA seeks to explore do not concern the potential impacts of the proposed changes. Instead, SJRECWA seeks to present testimony concerning the need for funding for levee maintenance and repair in order to maintain the petitioners' existing ability to convey water through the Delta. This is an issue that will exist regardless of whether the WaterFix change petition is approved. Other than the fact that petitioners propose to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair. Accordingly, requiring DWR to provide a witness to testify on this issue would not be reasonable or an efficient use of time.

For the foregoing reasons, SJRECWA's written notice requesting attendance of DWR witnesses is vacated. Because the notice is vacated in its entirety, a protective order limiting the scope of SJRECWA's proposed questions is not necessary.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY:

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY:

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer

1 **PETITION FOR RECONSIDERATION ON THE RULING VACATING**
2 **SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY'S**
3 **NOTICE REQUESTING ATTENDANCE OF WITNESSES AND OPPORTUNITY**
 TO PRODUCE EVIDENCE

4 **ATTACHMENT 2 – LEGAL AUTHORITIES**

5 Due process principals applicable to Water Fix Hearing of SWRCB.

6 1. Government Code Section 11513 and 23 CCR Section 648.5.1 require that
7 proceedings be conducted in such a fashion that a party may:

8 “. . . call and examine witnesses, to introduce exhibits; to
9 cross examine opposing witnesses on any matter relevant to
 the issues even though that matter was not covered in the
 direct examination. . .”

11 2. The burden of proof is properly placed on the applicant for a license or
12 permit. *Martin v. Alcoholic Bev. etc. Appeals Bd* (1959) 52 Cal.2d 259; a party appearing
13 before an administrative agency may not make only a skeletal presentation with the
14 expectation the party may make a full and more complete showing before courts at a later
15 time. *Greenblatt v. Munro* (1958) 161 Cal.App. 2d 596; *Dare v. Board of Medical*
16 *Examiners of the State of California* (1943) 21 Cal.2d 709, 799; *West Coast Etc. Co. v.*
17 *Contractor's State License Board* (1945) 72 Cal.App.2d 287, 297.

18 3. A hearing in which due process (the right to hear the evidence and cross
19 examine) is necessary and constitutionally guaranteed before approval of a development
20 project is granted which can affect real property or rights of persons. *Horn v. County of*
21 *Ventura* (1979) 24 Cal.3rd 605, 615 (neighbors had due process right to a hearing prior to
22 approval of an adjacent subdivision); *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541,
23 545, 548-49 (development approval without an evidentiary hearing violated due process
24 rights).

25 4. The United State Supreme Court applies due process guarantees under the
26 Constitution as including a “. . . fundamental requirement of due process is the
27 opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v.*
28 *Eldridge* (1976) 424 U.S. 319, 334. An evidentiary hearing is required if interests in real

1 property, including water, can be affected by the action. *United States v. James Daniel*
2 *Good Real Property* (1993) 510 U.S. 43-45, 53, 61; *Connecticut v. Doehr* (1991) 501 U.S.
3 1, 107-08.

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STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day, January 31, 2017, submitted to the State Water Resource Control Board and caused a true and correct copy of the following document(s):

SJREC's STATEMENT OF ISSUES THAT SHOULD BE ADDRESSED IN BRIEF REGARDING PART 1 HEARINGS

to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition Hearing, dated January 31, 2017, posted by the State Water Resources Control Board at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Service also perfected by placing for collection and deposit in the United States mail a copy/copies of the documents(s) at: MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP, in Oroville, Butte County, California in a sealed envelope, with postage fully prepaid, addressed to:

JAMES MIZELL
DEPARTMENT OF WATER RESOURCES
Office of the Chief Counsel
1416 Ninth Street, Room 1104
Sacramento, CA 95814

I am familiar with the practice of MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on January 31, 2017, the same day on which it/they were placed at MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP for deposit.

I certify that the foregoing is true and correct and that this document was executed on January 31, 2017.



Leah Janowski, Secretary to Paul R. Minasian
On behalf of SAN JOAQUIN RIVER EXCHANGE
CONTRACTORS WATER AUTHORITY
Minasian, Meith, Soares, Sexton & Cooper, LLP
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Oroville, California 95965