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

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

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' RESPONSE TO
PATRICK PORGAN'S MOTION TO
DISMISS**

14
15 **INTRODUCTION**

16 California Department of Water Resources ("DWR") provides this response to the motion
17 to dismiss filed on December 13, 2016 by Patrick Porgans. Mr. Porgans' motion is based on
18 procedural rules that do not apply to this proceeding and is therefore without merit. For the
19 reasons more fully stated below, DWR respectfully requests that the motion be denied.

20 **RESPONSE**

21 **I. Mr. Porgans' Motion Is Based On Procedural Rules That Do Not Apply To This
22 Proceeding.**

23 This is an administrative hearing governed by Title 23 of the California Code of
24 Regulations, sections 648-648.8, 649.6 and 760; Chapter 4.5 of the Administrative Procedure Act
25 (commencing with section 11400 of the Government Code); sections 801 to 805 of the Evidence
26 Code; and section 11513 of the Government Code. (23 Cal. Code Regs. § 648 (b).) Some, but
27 not all of the sections of the Code of Civil Procedure were incorporated in the Board's hearing
28 procedures. (See Water Code § 1100.) Thus, parties are not necessarily permitted to submit

1 motions in Board proceedings. (See Board Order WR 2016-0015, p. 11.) In a recent
2 enforcement action, the Board discouraged parties from filing unauthorized motions. (*Ibid.*)

3 The Board has some discretion when establishing hearing procedures. (23 Cal. Code Regs
4 § 648.5.) Accordingly, in their February 11, 2016 and April 26, 2016 rulings, the Hearing
5 Officers indicated that parties could submit objections, but never indicated that the parties could
6 submit motions. (See February 11, 2016 Ruling, pp. 2-3; April 25, 2016 Ruling, pp. 4-5.)

7 **II. Mr. Porgans' Motion Lacks Merit**

8 Mr. Porgans argues that the petition should be dismissed on the grounds that the Bureau of
9 Reclamation ("Bureau") failed to provide sufficient information with the Change Petition "to
10 show that the Bureau's diversions would stay within the permitted total of 18,000 cfs." (Motion,
11 p. 3.) Mr. Porgans asserts that "[s]ince the Bureau has not provided information to indicate that
12 the total rates of direct diversion will be within the permitted limits, the permit is a new water
13 right and requires a new application." (Motion, p. 4.) Finally, Mr. Porgans also appears to be
14 arguing that the joint Petition failed to address the Bureau's future compliance with permit terms
15 originating from Decision 990. Mr. Porgans assertions are incorrect, contrary to evidence
16 presented by Petitioners and his arguments lack merit.

17 The joint Petition for a change in points of diversion filed by the Bureau and DWR on
18 August 26, 2015, with an addendum and errata filed on September 15, 2015, fully complied with
19 the requirements of Title 23, Section 794 of the California Code of Regulations regarding the
20 information required to be included in a petition for change. Contrary to Mr. Porgans' assertions,
21 the joint Petition provided information regarding the existing and proposed rates of diversion.
22 (See August 26, 2015 Petition, Supplement, p. 13.) Specifically, the Petition states:

23 The source of water would remain unchanged from the existing permits – direct
24 diversion of unappropriated Delta water and rediversion of storage releases. The
25 maximum annual diversion limits of the existing permits are unchanged. ... The
existing purpose of use, places of use, and all other aspects of the existing permits
remain unchanged.

26 (*Ibid.*) In her direct testimony, DWR witness Maureen Sergent confirmed that the joint Petition
27 was limited to a change in point diversion and rediversion only. (DWR-53, p. 8:7-8.) She goes
28 on to state that, as noted in the Petition:

1 all other existing permit provisions, including sources of water, amounts of direct
2 diversion and diversion to storage, maximum allowable combined diversion from the
3 Delta, place of use, purposes of use and season of diversion, will remain unchanged
4 The diversion rates in the existing permits remain unchanged, however maximum
5 annual diversions may increase *consistent with what is authorized under the existing*
6 *permits.*

7 (DWR-53, p. 8:8-13 [emphasis added].) The DWR and Bureau thus have confirmed, and
8 provided information to the Board, that the total rate of diversion would remain unchanged from
9 existing permit conditions.

10 Moreover, as testified to by Mr. John Leahigh and Mr. Ron Milligan, DWR and the Bureau
11 operate, and will continue to operate, the projects to meet all regulatory obligations including the
12 limitations on maximum quantity, maximum rate, timing of diversion, place of use and purpose of
13 use under their respective water rights. (See DWR-61, pp. 4:8-11 and 16:5-17:11; DOI-7, p.4.)
14 On cross examination by Mr. Porgans, Bureau witness Mr. Ray Sahlberg confirmed that the
15 Bureau has made the commitment to comply with the requirements of the terms and conditions of
16 their permits issued by the Board. (Vol. 19, p. 90:9-91:3.)

17 As such, Mr. Porgans' arguments that the Bureau has not provided information to indicate
18 the total rates of direct diversion will be within the permitted limits lacks merit. Furthermore,
19 Petitioners have provided evidence that the projects will be operated in the future with the
20 additional points of diversion, as now, to meet all regulatory requirements including all terms and
21 conditions set by the Board in their respective water rights. For these reasons, DWR respectfully
22 requests that Mr. Porgans' motion to dismiss be denied.

23 Finally, as a final note, Mr. Porgans alleges that both Ms. Sergent and Mr. Sahlberg were
24 unfamiliar with, or failed to recognize, the Bureau's water right permits marked as staff exhibits
25 SWRCB-13 and SWRCB-14, preventing him from asking detailed questions on the Bureau's
26 compliance with the permit terms in Decision 990. (See Motion, pp. 2-3.) This is manifestly
27 untrue. A review of Mr. Porgans' cross examination on September 27, 2016 demonstrates that
28 the witnesses were merely confused by the appearance of the exhibits SWRCB-13 and SWRCB-
14 when displayed because the exhibits contained not only the original permits but also copies of
later amendments including temporary change petitions which were the first pages of the exhibits.
(Vol. 19, p. 98:17-103:1.) When attempting to use the exhibits, Mr. Porgans, who clearly had not

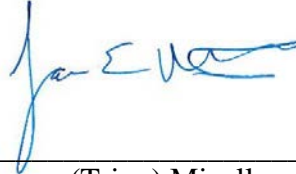
1 opened the exhibits in advance, was unable to navigate the exhibits to the pages desired. (Id.)
2 However, when questioned about a specific Bureau permit by number, Mr. Sahlberg had no
3 problems answering questions regarding the permits terms and conditions. (Id.) If Mr. Porgans
4 was unable to ask detailed questions regarding the terms and conditions of the Bureau's permits,
5 the fault was his own and not the Board's in creating the staff exhibits, nor was it the fault of
6 witnesses Sahlberg and Sergent.

7 CONCLUSION

8 For the foregoing reasons, DWR respectfully requests that Mr. Porgans' motion to dismiss
9 the petition be denied.

10 Dated: January 6, 2017

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

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