

1 PHILIP A. WILLIAMS, State Bar No. 296683
Deputy General Counsel
2 WESTLANDS WATER DISTRICT
400 Capitol Mall, 28th Floor
3 Sacramento, California 95814
Telephone: (916) 321-4500
4 Facsimile: (916) 321-4555
5 Attorney for WESTLANDS WATER DISTRICT

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7 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**
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9 IN RE CALIFORNIA WATERFIX
CALIFORNIA DEPARTMENT OF WATER
10 RESOURCES AND U.S. BUREAU OF
RECLAMATION PETITION FOR
11 CHANGES IN WATER RIGHTS, POINT OF
DIVERSION/RE-DIVERSION
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**WESTLANDS WATER DISTRICT'S
RESPONSE TO VARIOUS PARTIES'
OBJECTIONS TO TESTIMONY AND
EXHIBITS SUBMITTED BY
WESTLANDS WATER DISTRICT**

13 On September 21, 2016, various parties to this proceeding submitted objections to the
14 testimony and exhibits that Westlands Water District (Westlands) submitted as part of its case in chief
15 for Part 1 of this proceeding. Under the rules governing relevancy and the issues as presented and
16 organized by the State Water Resources Control Board, Mr. Gutierrez's testimony (WWD-1) and the
17 submitted supporting exhibits are entirely relevant to the issues presented for Part 1.

18 **I. The Standard for Relevance and The California WaterFix Change Petition's Procedural
19 Background for Part 1**

20 Government Code section 11513(c) states that "Any relevant evidence shall be admitted if it is
21 the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious
22 affairs, regardless of the existence of any common law or statutory rule which might make improper
23 the admission of the evidence over objection in civil actions." Under this standard, "the evidence
24 must be relevant and reliable." (*Aengst v. Board of Medical Quality Assurance* (1980) 110
25 Cal.App.3d 275, 283.)

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1 As many of the parties objecting to Westlands’ case-in-chief themselves pointed out,¹ in the October
2 Notice, the State Water Resources Control Board (“State Water Board”) stated the scope of issues to
3 be weighed in Part 1 included *uses* of water, and not just *legal injury to water users*. Those issues are:

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

15 (October 30, 2015 Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference to
16 Consider the Petition [hereafter, “Notice of Petition”], p.11.) The State Water Board later clarified
17 the scope of issues for Part 1, stating that “generally Part 1 focuses on human uses of water (water
18 right and water use impacts).” (February 11, 2016 Hearing Officers’ Ruling no Pre-Hearing
19 Conference Procedural Issues, p. 10.) The State Water Board also stated that “Part 1 can address
20 human uses that extend beyond the strict definition of legal users of water[.]” (*Id.*)

21 **II. The Testimony and Exhibits Submitted by Westlands Water District are Entirely**
22 **Relevant to Part 1B of this Proceeding**

23 A plain reading of the October 30, 2015, Notice of Petition and Notice of Public Hearing and
24 Pre-Hearing Conference clearly demonstrates that Mr. Gutierrez’s testimony and the supporting
25 exhibits (“WWD’s case-in-chief”) are relevant and well within the scope of Part 1. Several parties
26 argued in their objections that “WWD’s case-in-chief was irrelevant to Part 1. Though often circular

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28 ¹ See, e.g., San Joaquin County, et al., Joint Objections to, and Motion to Exclude the Case-in-Chief
Testimony Submitted by Westlands Water District, p. 4-5; Sacramento Valley Water Users’ Objection
to Written Testimony and Exhibits Submitted by Westlands Water District, p. 2; Tehama-Colusa
Canal Authority and North Delta Water Agency’s Joinder and Objection to Written Testimony and
Exhibits Submitted by Westlands Water District, p. 2 (joining in SVWU’s Objection); and Pacific
Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources to the Case-in-
Chief Testimony and Exhibits Submitted by Westlands Water District and Motion to Exclude Such
Evidence, pp. 1-2.

1 and conclusory, these arguments appear to fall into one or both of two categories: 1) the testimony and
2 exhibits do not articulate a specific legal injury which Westlands is likely to suffer; and 2) the
3 testimony and exhibits present information that is beyond the scope of Part 1. Both arguments fail.

4 **A. As a CVP Contractor That Puts Reclamation’s Water to Beneficial Use,
5 Westlands Does Not Need to Oppose the Petition By Arguing for a Specific Legal
6 Injury In Order to Participate Fully in Part 1**

7 A subtle premise of the parties’ objections is that any party only be allowed to participate to
8 demonstrate how approval of the project would cause them legal injury or demonstrate how it may in
9 effect initiate a new water right.² This is incorrect for two important reasons. First, it is a misreading
10 of the questions the State Water Board published in its Notice of Petition. There, Question 2
11 specifically asks “Will the proposed changes cause injury to any municipal, industrial or agricultural
12 *uses of water, including associated legal users of water?*” (Notice of Petition, p. 11. [emphasis
13 added].) Clearly the State Water Board intends, as part of its analysis, to understand the uses of water
14 involved, and how approval of the proposed project may affect those uses. Therefore, an argument
15 that parties only be allowed to participate in Part 1 under the guise of legal injury is patently incorrect,
16 given the State Water Board’s organization of the proceeding.

17 The testimony provided by Mr. Gutierrez directly ensures the State Water Board fully
18 understands the need for a reliable surface water source in Westlands, and how we put that water to
19 beneficial use by growing food and managing drainage.³ By explaining our sources of water and our
20 operations, Mr. Gutierrez’s testimony is not all that different from that presented by other parties in
21 their cases-in-chief for Part 1.⁴ Providing the State Water Board with this context can only help to

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23 ² See, e.g., San Joaquin County, et al., Joint Objections to, and Motion to Exclude the Case-in-Chief
24 Testimony Submitted by Westlands Water District, Sub-heading II.A (“By Order of this Board, Part
25 1B of this Proceeding Addresses Injury to Legal Users of Water that Might Result from the Changes
Proposed in the Petition, as Well as the Question of Whether the Petition Seeks to Initiate a New
Water Right.”)

26 ³ See Testimony of Jose Gutierrez (WWD-1), Section IV.

27 ⁴ See, e.g., Written Testimony of Thaddeus Bettner (GCID-2), Sections III and IV; Testimony of Einar
28 Maisch (PCWA-020), Sections II, III, IV, V, and VI; and Testimony of Jeffrey P. Sutton on Behalf of
Tehama-Colusa Canal Authority and Water Service Contractors Within Its Service Area (TCCA-1),

1 inform its decision as part of the calculus it must go through to fully understand how beneficial *uses* of
2 water may be affected by the Petition. Mr. Gutierrez’s testimony regarding the potential positive
3 effect the California WaterFix can have on our ability to continue to put water to beneficial use is
4 relevant to how the proposed changes could cause injury to that use.⁵

5 Second, the nature of the petition currently before the State Water Board requires a more
6 sophisticated approach than a strict delineation of parties into categories of “support” and
7 “opposition;” the way that it has organized the issues indicates that it appreciates that complexity. The
8 analyses presented to the State Water Board indicates a wide range of possible operational scenarios,
9 and therefore a wide range of possible impacts, both to *uses* of water and to *legal users* of water.
10 Requiring that the categories of parties be strictly divided into the Department of Water Resources and
11 the Bureau of Reclamation (“Reclamation”) as the only proponents of the Petition, and requiring that
12 all other parties fall into a category of absolute opposition based solely on legal injury will not
13 ultimately help the State Water Board address the serious affair before it. The Notice of Petition
14 indicates that this is not the choice the State Water Board has taken.

15 Case law demonstrates that for purposes of compliance with fundamental principles of
16 California water law, there is an important interaction and distinction between Reclamation and its
17 contractors for Central Valley Project water such as Westlands. California’s Third District Court of
18 Appeal articulated this point: “California law has long recognized that the fundamental basis of a right
19 to appropriate water is that the water must be put to beneficial use.” (*SWRCB Cases* (2006) 136
20 Cal.App.4th 674, 804.) While Reclamation holds the right to appropriate the water at issue, it is
21 contractors such as Westlands which perfect that right by putting that water to beneficial use. Without
22 such beneficial use, the right would extinguish. It is therefore appropriate to allow Westlands to
23 participate in this proceeding. Not only may our interests be distinct from Reclamation’s, but
24 preventing us from fully participating by speaking to how we put Reclamation’s water to beneficial
25 use deprives the State Water Board of the complete picture that California water law requires:

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28 Sections II and III.

28 ⁵ See Testimony of Jose Gutierrez (WWD-1), Section V.

1 *appropriation and beneficial use.*

2 Because Westlands is part of that perfection of Reclamation’s water rights, it is appropriate to
3 present evidence that demonstrates how our role in that perfection has been reduced due to allocation
4 reductions.⁶ Hence Mr. Gutierrez’s testimony as to those reductions and their effects on what would
5 otherwise have been an agricultural use of Reclamation’s water. Part of those effects has been an
6 increased reliance on water transfers and groundwater, to which his testimony directly speaks.⁷

7 However, our partnership with Reclamation does not necessarily amount to a position of
8 unqualified support for the proposed project. Therefore, while a premise of the parties’ objections
9 appears to be an insistence that Westlands cannot participate as anything other than a protestant, it is
10 important to understand that the range of operations modelled and the effects of those operations may
11 work to the detriment of Westlands; in which case we would voice its opposition. Westlands is an ally
12 in this project, not a cheerleader.

13 **B. Westlands’ Case-in-Chief is Well Within the Scope of Part 1**

14 **1. Westlands’ Ability to Put CVP Water to Beneficial Use May be Injured**
15 **Depending on Operational Constraints Imposed In Accordance with the**
16 **Range of Effects Presented in Boundaries 1 and 2**

17 WWD’s case-in-chief demonstrates how approval of the Petition could potentially benefit its
18 beneficial use of water as a CVP contractor. As the objections point out, Mr. Gutierrez’s testimony
19 speaks to the use of water within Westlands, and how California WaterFix may rectify declining
20 allocations. However, these objections fail to recognize that, given certain operating criteria,
21 California WaterFix *may* benefit Westlands – but it also may not.

22 The range of project operations are presented inside two boundaries: Boundary 1 and
23 Boundary 2. This approach assesses the widest-range effects. Boundary 1 assumes a less regulatory-
24 constrained environment; Boundary 2 reflects significantly increased Delta outflow targets and
25 restrictions on exports. Depending on the boundary scenario, water available to south of Delta CVP

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27 ⁶ See Testimony of Mr. Jose Gutierrez (WWD-1), Section V.A.

28 ⁷ See Testimony of Mr. Jose Gutierrez (WWD-1), Sections II.B. and II.C.

1 contractors such as Westlands ranges from a 34% increase to a 33% decrease. The Draft EIR/EIS
2 indicates that deliveries to South of Delta CVP agricultural users, such as Westlands, will be higher
3 than existing conditions in 30% of years but lower in 70% of years. (See Draft EIR/S p. 5-103; Figure
4 5-31, RDEIR/SDEIS Figure 4.3.1-23, 26.) It is therefore entirely possible, depending on the
5 operational criteria imposed by the State Water Board as part an approval of the Petition, that the
6 ability to put water to agricultural use in Westlands may be injured.

7 **2. Westlands May be Injured as a Legal User of Water Depending on**
8 **Operational Constraints Imposed in Accordance with the Range of Effects**
9 **Presented in Boundaries 1 and 2, as Well As Any Conditions Imposed if**
10 **the Petition is Approved**

11 Though Westlands did not allege a specific injury in its case-in-chief, it is still relevant to the
12 State Water Board’s analysis as to legal injury. Westlands is a legal user of water whose rights before
13 the United States are governed by the provisions in its contract with Reclamation.⁸ Mr. Gutierrez
14 specifically referenced both those contracts and how terms in those contracts have resulted in reduced
15 allocations for Westlands in recent years.⁹ Those portions are relevant to the State Water Board’s
16 understanding of Westlands’ status as a legal user of water, whose rights to CVP water may be injured
17 depending on whether and under what conditions the Petition is granted.

18 Mr. Gutierrez’s testimony provides his opinion on the injurious effect not granting the Petition
19 may have for Westlands. His testimony states that our “anticipated allocation going forward,
20 following implementation of the 2008 Delta Smelt and 2009 Salmon Biological Opinions, is about
21 40%.” (Gutierrez Testimony (WWD-1), p. 14.) Implicit in asking whether granting the Petition will
22 operate to the injury of any legal user of water, is the question of whether *not* granting the Petition will
23 operate to injure Westlands as a legal user of water. Presenting testimony and other evidence that
24 answer the latter question is exactly the sort of evidence upon which the State Water Board should

25 ⁸ See *SWRCB Cases*, 136 Cal.App.4th at p. 804 (“If the permit holder seeks the Board’s permission to
26 change the purpose of use that provided the basis for the acquisition of its permit in the first place,
27 there is no reason the persons who, through contracts with the permit holder, actually put the water to
the beneficial use sought to be changed should be precluded from asserting to the Board that the
change will operate to the injury of their rights, simply because those rights derive from a contract.”).

28 ⁹ See Testimony of Mr. Jose Gutierrez (WWD-1), Sections II.A. and V.A.

1 rely in determining whether to approve the Petition.

2 However the operational constraints that may be imposed should the State Water Board grant
3 the Petition will directly implicate the California WaterFix’s ability to redress the reduced allocations
4 Westlands has been suffering from. The analysis demonstrates that, depending on the boundary
5 scenario, Westlands will experience significant variability in deliveries year to year, with ranges
6 anywhere from a 34% increase to a 33% decrease. (See Draft EIR/S p. 5-103; Figure 5-31,
7 RDEIR/SDEIS Figure 4.3.1-23, 26.) If the State Water Board imposes operational constraints
8 commensurate with Alternative 4A H4 modelling, Westlands will very likely suffer legal injury as a
9 result due to reduced allocations.

10 Additionally, the State Water Board has asked whether, should the Petition be granted, any
11 specific conditions should be included to avoid injury. (Notice of Petition, p. 11.) As several
12 protestants have come before the State Water Board alleging that the Petition will result in legal
13 injury, it is entirely proper that Westlands, as a party to the same proceeding, be allowed to present
14 sufficient information so that the State Water Board can understand whether, and if so, how, any
15 conditions of approval should be required that will not operate to Westlands’ own legal injury. Just as
16 much as any other legal user of water in this proceeding, Westlands has a right to ensure that any
17 conditions imposed will not operate to its legal injury. Mr. Gutierrez’s testimony speaks directly to
18 the State Water Board’s ability to make this determination.

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20 Dated: September 30, 2016

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22 By:



23 Philip A. Williams
24 Attorney for WESTLANDS WATER DISTRICT

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