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3 RESOURCES**

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

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

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' OPPOSITION
TO MOTIONS TO DISMISS AND
JOINDERS**

16 At the present time, there are pending motions to dismiss the petition for change in
17 point of diversion for the California WaterFix (Petition), some of which were filed directly
18 preceding or following the most recent ruling issued on October 7, 2016. California
19 Department of Water Resources (DWR) opposes all pending motions and joinders,
20 because the arguments are unfounded, untimely, based on procedural rules that do not
21 apply to this proceeding, and are unclear, duplicative, and based on matters upon which
22 the Board has already ruled. A list of the motions and joinders requesting dismissal of
23 the petition is attached to this Opposition. (See Attachment A.) Because the various
24 motions are titled differently or combined with other filings, as described below, the
25 record is not clear. DWR requests that if the Hearing Officers decide to consider any
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1 motions to dismiss, that they schedule a noticed so that the issues can be clearly stated
2 and fully briefed.

3 **A. The motions are based on procedural rules that do not apply to this**
4 **proceeding.**

5 This is an administrative hearing governed by Title 23 of the California Code of
6 Regulations, section 648-648.8, 649.6, and 760; Chapter 4.5 of the Administrative
7 Procedure Act (commencing with 11400 of the Government Code); sections 801 to 805
8 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs.,
9 tit. 23, § 648, subd. (b).) Some, but not all, of the sections of the Code of Civil Procedure
10 are incorporated in the Board's hearing procedures. (See Water Code, § 1100.) Thus,
11 parties are not necessarily permitted to submit motions in Board proceedings. (See
12 Board Order WR 2016-0015, June 7, 2016, at page 11.¹) In a recent enforcement
13 action, the Board discouraged parties from filing unauthorized motions. (*Ibid.*)

14 The Board has some discretion when it comes to hearing procedures. (Cal. Code
15 Regs., tit. 23, § 648.5.) Accordingly, in their February 11, 2016 and April 25, 2016
16 rulings, the Hearing Officers indicated that the parties could submit objections, but never
17 indicated that the parties could submit motions. (February 11, 2016 Ruling, at pages 2-3
18 and April 25, 2016 Ruling, at pages 4-5.)

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20 **B. The motions are unclear, duplicative, and based on matters upon which**
21 **the Board has already ruled.**

22 Protestants' motions are unclear and duplicate arguments based on the timing of
23 the proceeding and adequacy of relevant documents. These issues have been
24 addressed multiple times and should not be revisited. The February 11, 2016 Ruling
25 indicated, "[w]e are not persuaded by the parties' arguments that . . . additional CEQA

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27 ¹ Available at:
28 [http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2016/wro2016_0015.p
df.](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2016/wro2016_0015.pdf)

1 documentation must be prepared before conducting Part 1 of the hearing,” and strongly
2 discouraged “flurries of unsolicited correspondence, follow-up comments on rulings, and
3 duplicative motions on items already addressed.” (February 11, 2016 Ruling, at pages
4 9-10.)

5 In their March 4, 2016 Ruling, the Hearing Officers noted that Friends of the River
6 (FOR) and others’ February 17, 2016 Letter repeated the arguments made in their
7 January 21, 2016 Letter. (March 4, 2016 Ruling, at page 6.) The Ruling further states
8 that the arguments raised in these letters were already addressed in the February 11,
9 2016 ruling and reiterated that follow-up comments on rulings and duplicative motions
10 are strongly discouraged and the hearing team may not respond to further repetitive
11 arguments. (*Id.* at pages 6-7.)

13 Despite this clear direction, Protestants Friends of the River and others submitted
14 a third motion to dismiss on March 29, 2016 based on similar grounds. (April 25, 2016
15 Ruling, at page 1.) The Hearing Officers also dismissed that motion, explaining that the
16 “[p]arties raised similar concerns about petition completeness during the pre-hearing
17 conference, and this issue was addressed in our February 11, 2016 ruling.” (April 25,
18 2016 Ruling, at page 3.)

20 A number of Protestants through written objections to Petitioners’ testimony and
21 exhibits, also raised issues concerning the timing of the hearing relative to other
22 regulatory processes, and the Hearing Officers noted these arguments were reviewed
23 and considered in the February 11, 2016 Ruling, and will not be reexamined. (July 22,
24 2016 Ruling, at pages 2-3.) Finally, in their August 31, 2016 joint opening statement,
25 Protestant Friends of the River and others included a joint motion to reconsider their
26 previous motions to dismiss based on the timing of the proceeding and adequacy of
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1 relevant documents. (October 7, 2016 Ruling, at page 7.) The Hearing Officers
2 indicated, again, that these issues have been addressed multiple times and will not be
3 revisited. (*Ibid.*)

4 **C. Motions to dismiss are unfounded and untimely.**

5 The motions ignore the Board's admonition not to submit duplicative motions.
6 Protestants Friends of the River's first motion to dismiss, dated March 29, 2016, argues
7 the petition did not contain enough information (Motion, March 29, 2016, at page 2), and
8 its second motion to dismiss, dated April 1, 2016, again argues the project description
9 was deficient, but this time because of the terms of the settlement agreement with
10 Contra Costa Water District. (Motion, March 29, 2016, at pages 1-2.) In its April 20,
11 2016 motion, San Joaquin Tributaries Authority and others² (SJTA) also argued that the
12 petition was deficient, reasoning that it should have included appropriate Delta flow
13 criteria and information on operations. (SJTA Motion, April 20, 2016, at page 13.)
14 However, the Board had already ruled on February 11, 2016, before any of these
15 motions were filed, that the petition contained sufficient information and Petitioners could
16 submit additional information in their cases-in-chief. (February 11, 2016 Ruling, at pages
17 5-6.)
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20 SJTA's argument that the petition was deficient because it did not contain
21 "appropriate Delta flow criteria" as required by the Sacramento-San Joaquin Delta
22 Reform Act of 2009 is flawed. What Water Code section 85086, subdivision (c)(2)
23 requires is that "[a]ny order approving a change in the point of diversion [of the SWP or
24 CVP] . . . to a point on the Sacramento River shall include appropriate Delta flow criteria
25" The Board's regulations do not require this information to be included in a petition
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27 ² The other parties are Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin
28 Irrigation District, Turlock Irrigation District, and the San Francisco Public Utilities Commission.

1 (see Cal. Code Regs., tit. 23, § 794), and as noted above, the Board had already ruled
2 that the petition contained sufficient information. (February 11, 2016 Ruling, at pages
3 5-6.) SJTA also took this opportunity to raise its repeated argument that there should be
4 a full hearing on "appropriate flow criteria," and the issue should not be deferred to Part
5 2 of the hearing, topics which were discussed extensively in the Board's March 4, 2016
6 Ruling. (At pages 4-5.)

7 Protestant Friends of the River's third motion, dated August 31, 2016, argues for
8 dismissal because of outside regulatory processes such as the CEQA/NEPA processes,
9 issuance of the Biological Assessment and request for consultation, issuance of climate
10 change guidance by the Council on Environmental Quality, and recent court decisions.
11 (Motion, August 31, 2016, at pages 21-23.) The Hearing Officers already ruled that
12 these processes are not at issue in this proceeding in a lengthy discussion in their
13 February 11, 2016 Ruling. (At pages 1-9.)

14 Pacific Coast Federation of Fishermen's Associations' and the Institute for
15 Fisheries Resources' (PCFFA's) motion to dismiss dated October 7, 2016 contains all
16 the deficiencies described above and also includes objections to Petitioners' evidence.
17 First, it argues the petition is deficient (at pages 5-7). Then it criticizes Petitioner's
18 modeling data and how they chose to present their cases-in-chief (at pages 7-10). Next,
19 it argues for dismissal because of outside regulatory processes (at pages 10-23).
20 Finally, PCFFA decides that Petitioners failed to show there will be no harm to legal
21 users of water (at pages 24-29), attempting to usurp the Board's fact-finding and
22 decision-making roles.
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26 PCFFA also includes flawed and disingenuous arguments that Petitioners'
27 modeling data is unreliable because it does not meet the *Kelly-Frye* standard for
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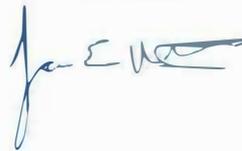
1 admissibility (at pages 7-9) and “[t]he absence of [] required validation” is a “fatal
2 deficiency” (at page 26). The *Kelly/Frye* line of cases do not apply to administrative
3 proceedings of the Board, because the reasons for applying it to control the admissibility
4 of scientific evidence do not fully translate to the administrative context. (See March 18,
5 2016 Letter in the Board’s enforcement actions against BBID/WSID, at page 3.³)
6 PCFFA’s claim that “[t]he absence of [] required validation” is a “fatal deficiency” ignores
7 information that DWR provided to PCFFA and its consultant California Water Research
8 in 49 pages of discovery responses and responsive pleadings dated July 29, 2016 and
9 August 1, 2016. (DWR’s Response to Various Filings of California Water Research,
10 August 1, 2016.⁴) None of these arguments are valid grounds to dismiss the Petition.

12 **D. Conclusion**

13 DWR opposes the motions and joinders listed in Attachment A and requests that if
14 the Hearing Officers decide to consider any of these or any other future motions, that
15 they schedule a hearing so that the issues can be clearly stated and fully briefed.

17 Dated: October 19, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



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25 ³ Available at:

26 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/wisdbbid/wsiddbid_proceduralruling031816.pdf.

27 ⁴ Available at:

28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160801_dwr_resp.pdf.

Attachment A

Attachment A
DWR's Opposition to Motions to Dismiss and Joinders

Number	Date Filed 2	Name of the Pleading
1	3/28/2016	Planning and Conservation League et al.'s Request for Dismissal of Petitioners' Water Right Change Petition
2	4/1/2016	REVISED Planning and Conservation League et al.'s Second Request for Dismissal of Petitioners' Water Right Change Petition
3	4/1/2016	Planning and Conservation League et al.'s Second Request for Dismissal of Petitioners' Water Right Change Petition
4	4/20/2016	San Joaquin Tributaries Authority's Application to Dismiss the Joint Petition for Changes in Water Rights for the California WaterFix Project
5	8/31/2016	Friends of the River et al.'s Joint Motion for Reconsideration, Motion to Dismiss Petition and Request for Official Notice
6	10/6/2016	County of San Joaquin, et al.'s Joinder to Friends of the River, et al.'s August 31, 2016 Joint Motion for Reconsideration and to Dismiss Petition
7	10/7/2016	Pacific Coast Federation of Fishermen's Associations' and the Institute for Fisheries Resources' Motion to Dismiss Petition
8	10/7/2016	South Delta Water Agency, Central Delta Water Agency, et al.'s Joinder to Friends of the River, et al.'s August 31, 2016 Motion for Reconsideration and to Dismiss Petition
9	10/7/2016	California Sportfishing Protection Alliance, et al.'s Joinder to Friends of the River, et al.'s August 31, 2016 Motion for Reconsideration and to Dismiss Petition

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 submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

DWR's Opposition to Motions to Dismiss and Joinders

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 October 6, 2016, 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:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

I caused a true and correct **hard copy** of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:

Method of Service: U.S. Postal

I certify that the foregoing is true and correct and that this document was executed on October 19, 2016

Date

Signature: _____



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