

1 THOMAS H. KEELING (SBN 114979)
FREEMAN FIRM
2 1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207
3 Telephone: (209) 474-1818
4 Facsimile: (209) 474-1245
Email: tkeeling@freemanfirm.com

5 J. MARK MYLES (SBN 200823)
6 Office of the County Counsel
County of San Joaquin
7 44 N. San Joaquin Street, Suite 679
8 Stockton, CA 95202-2931
Telephone: (209) 468-2980
9 Facsimile: (209) 468-0315
Email: jmyles@sigov.org

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11 [ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

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

14
15 HEARING IN THE MATTER OF
16 CALIFORNIA DEPARTMENT OF
17 WATER RESOURCES AND UNITED
18 STATES BUREAU OF RECLAMATION
19 REQUEST FOR A CHANGE IN POINT
20 OF DIVERSION FOR CALIFORNIA
21 WATER FIX

WRITTEN TESTIMONY OF TIM STROSHANE

(Part 2 Rebuttal)

1 MICHAEL B. JACKSON (SBN 53808)
2 P.O. Box 207
3 75 Court Street
4 Quincy, CA 95971
5 Telephone: (530) 283-1007
6 Facsimile: (530) 283-4999
7 Email: mjatty@sbcglobal.net

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Attorneys for California Sportfishing Protection Alliance,
California Water Impact Network, and AquAlliance

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2 **I, Tim Stroshane, declare:**

3 I am self-employed, primarily as a consulting policy analyst with Restore the
4 Delta and, at times, for other entities seeking expert review and analysis on
5 environmental and water resources issues. My qualifications have been previously
6 submitted in this proceeding in Exhibit RTD-1. In addition to my qualifications in RTD-1,
7 University of Nevada Press published my 2016 book, *Drought, Water Law, and the*
8 *Origins of California's Central Valley Project*, which examines the historical role of water
9 rights in the design of key components of California's largest public water system. In this
10 rebuttal phase, I testify as an expert based upon my education and knowledge of the
11 public trust doctrine, the California State Water Project and federal Central Valley
12 Project, the 2009 Delta Reform Act, Petitioners' proposed Delta Tunnels California
13 WaterFix Project ("Petition Facilities"), and my participation in SWRCB water quality
14 control plan phases 1 and 2 and parts 1 and 2 of the California WaterFix change petition
15 proceeding. I am not an expert in endangered species law.

16
17 **BASES FOR REBUTTAL TESTIMONY**

18 There are two separate bases for my rebuttal testimony. First, I rebut the
19 "reasonable protection" standard offered in Petitioners' Part 2 written and oral testimony
20 as insufficient to meet the public trust standard of protection. Second, I address as
21 misleadingly incomplete Petitioners' written testimony as to the source of water for
22 anticipated maintenance of and increases in long-term average deliveries to south-of-
23 Delta water service contractors of the CWF H3+ scenario over the No Action
24 Alternative. While both address public trust issues, they are for purposes of my
25 testimony separate matters.

26 Standards of Protection. Petitioners assert that the Petition Facilities, if approved
27 and operated as proposed, will be reasonably protective of public trust resources,
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1 specifically fishery resources in the Sacramento-San Joaquin Delta (“Delta”) (See, e.g.,
2 Exhibit DWR-1012 [Greenwood Testimony] at pp. 4:27-5:15; 6:13-9:7; 12:18-26:9;
3 28:10-29:4; 32:18-74:17 [Greenwood testifying that CWF will be reasonably protective
4 of Delta fisheries]; Hearing Transcript of February 23, 2018, pp. 109:11-150:24
5 [Greenwood testifying that CWF H3+ will be “reasonably protective” or “protective” of
6 Delta Smelt, Long-Fin Smelt, Salmonids, Green Sturgeon, Short-Fin Smelt, and unlisted
7 species of fish.]; Exhibit DWR-1013, at pp. 2:25-3:2; 4:6-8; 6:20-7:28; pp. 8-61 [Wilder
8 testifying that CWF will be reasonably protective of upstream fisheries]; Hearing
9 Transcript of February 23, 2018, pp. 164:22-166:9 and 173:5-179:13 [Wilder testifying
10 that CWF will protect or be “reasonably protective of” upstream fisheries].)

11 Petitioners seek to apply to the Petition Facilities a distinct, lower standard for
12 “reasonable protection” of fishery resources in this proceeding than is required to satisfy
13 the Board’s obligation to apply a public trust analysis.¹ Petitioner witness Marin
14 Greenwood stated in his testimony:

15 Throughout my testimony, I describe various measures that will be
16 included in the CWF [Petition Facilities] for the protection of fisheries. For
17 those species that are protected by the Endangered Species Act (ESA),
18 the level of protection that I have analyzed is consistent with the
19 requirements of the ESA, pertinent biological opinions and other
20 applicable requirements, including the Fish and Game Code and Water
21 Code, which I have determined also meets the standard for
22 reasonableness. For those species that are not subject to the ESA, etc.,
23 my analysis only considers the standard of reasonableness regarding
24 impacts on fish and wildlife.

25 ¹ The Board’s obligation to apply a public trust analysis, including a determination as to
26 water availability in the system, is not to be confused with the Board’s obligation in the
27 context of considering an application for a new water right to demand a “water
28 availability analysis.” In that context, “water availability analysis” is a term of art. In my
testimony, I am not using “water availability analysis” or any similar phrase as a term of
art or otherwise referring to an analysis of the availability of water for purposes of an
application for a new water right. The water availability issue addressed herein is a
broader public trust issue: have Petitioners established that there is enough actual
water (not “paper” water) in the Delta system to both protect the public trust and allow
the project, as proposed, to proceed?

1 (DWR-1012, p. 3:25-28, footnote 2.) An identical footnote appears in the testimony of
 2 Petitioner witness Richard Wilder. (DWR-1013-signed, p. 6:26-28, footnote 2.)

3 Petitioners' witnesses' assurances that Petition Facilities will be reasonably
 4 protective of fishery resources in the Delta represent a lower standard of protection than
 5 that called for by SWRCB public trust obligations, as set forth in California decisional
 6 and statutory law. (See, for example, *National Audubon Society v. Superior Court*
 7 (1983) 33 Cal.3d 419, 444, 446-447 [explaining the State's continuing duty to consider
 8 and protect public trust resources]; *United States v. State Water Resources Control*
 9 *Board* (1986) 182 Cal.App.3d 82 [the "Racanelli Decision"], at pp. 150-151 [explaining
 10 the Board's continuing duty under *National Audubon*].) I contrast these standards of
 11 protection below.

12 Maintenance of and Increases in SWP Deliveries. My Part 2 Rebuttal Testimony
 13 also addresses the following assertions by DWR Part 2 witnesses Gwen Buchholz and
 14 Erik Reyes:

15 CWF H3+ will modernize and add flexibility to the state's water system by
 16 aligning water operations to reflect natural seasonal flow patterns due to
 17 the creation of new water diversions in the north Delta equipped with
 18 state-of-the-art fish screens and reduced reliance on south Delta exports.
 19 CWF H3+ will capture additional flow during wetter periods when
 20 unregulated flows are available. CWF H3+ will increase average annual
 deliveries of water conveyed through the Delta as compared to the No
 Action Alternative over the long-term, and especially in wetter water years.
 (See Exhibits SWRCB-102 and DWR-1016.)

21 (DWR-1010, p. 11:19-26.)

22 Simulated long-term average deliveries to CVP and SWP north of Delta
 23 and south of Delta water service contractors were similar or higher than
 24 NAA under CWF H3+ scenario.

25 (DWR-1016, p. 3:25-27.)

26 The July 2, 2018 ruling stated that San Joaquin County et al. parties "may offer
 27 testimony concerning the potential for the WaterFix Project to cause an increase in
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1 diversions from the Delta during Part 2 rebuttal, provided that the testimony identifies
2 the Part 2 case-in-chief evidence to which it is responsive.”

3 As explained below, these and other similar statements by Petitioners’ witnesses
4 are misleadingly incomplete because they ignore or mask the role of water transfers in
5 maintaining and increasing reliance on Delta water exports under CWF H3+. In fact, in
6 discussing deliveries under CWF H3+, Petitioners’ Part 2 witnesses avoided mention of
7 water transfers in their written testimony. (SJC-351.) The significance of that omission—
8 and its implications for the public trust and the public interest—are explicated in my
9 testimony, below. Water transfers are market-based actions to supplement contractors’
10 Table A SWP contract amounts during years when Table A allocations by DWR are
11 reduced because of SWP’s junior water rights relative to decreased hydrologic flows
12 (especially from the Feather River). They are intended to facilitate movement of water
13 from north-of-Delta willing sellers (who are often senior water right holders) through the
14 Delta in exchange for monetary compensation or related consideration.

15 Water transfers are demonstrably important to expected operational use of
16 Petition Facilities. (RTD-158, pp. 192-198; RTD-130, pp. 21-23; RTD-12, pp. 8-12, 49-
17 59.) A key question in the long-term with Petition Facilities in place (from the standpoint
18 of project objectives, purpose, and need) is when and under what project allocation
19 conditions water from north of the Delta moves—under SWP contract terms or under
20 market-based transfer activity seeking to meet supplemental demand? As I summarized
21 evidence in my Part 2 testimony for Restore the Delta (RTD-12) market-based water
22 transfers are obscured in the Change Petition and Petition Facilities’ environmental
23 compliance documentation. Yet, many public statements and recent SWP contract
24 amendment negotiations concerning California WaterFix and other water management
25 tools exhibit widespread understanding by Petitioner DWR and SWP water service
26 contractors that water transfers and exchanges are considered integral to successful
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1 operation of California WaterFix and the future of the SWP as a whole. (SJC-340, SJC-
2 341, SJC-342, SJC-343, SJC-344, SJC-345, SJC-346, SJC-347.)

3 My testimony addresses the serious and misleading omission in the above-
4 referenced Part 2 testimony of DWR witnesses concerning deliveries under CWF of any
5 discussion concerning the importance of water transfers to Petition Facilities' successful
6 operation. Their silence in Part 2 of this Hearing contrasts with the open, visible, and
7 active negotiations undertaken by DWR and its SWP water contractors since February
8 2018 to amend SWP contracts to allocate costs of Petition Facilities and create new
9 "water management tools," an important component of which is mechanisms to increase
10 water transfers and exchanges facilitated by Petition Facilities. (SJC-343, SJC-344.)

11 Analysis performed by California Water Impact Network for a Phase 2 water
12 quality control plan Workshop 3 (RTD-131) raises serious doubts about whether such
13 water transfers—and the water rights on which they are based—are available to be
14 transferred in light of SWRCB public trust flows identified in its 2010 Delta Flow Criteria
15 Report. (SWRCB-25.)

16 My Part 2 rebuttal testimony will first briefly compare and contrast the standards
17 of protection identified above, and, second, describe the scope of public trust analysis,
18 including factors to be considered in completing public trust deliberations concerning the
19 California WaterFix Change Petition. Such factors include: the beneficial uses of the
20 Delta, including public, fishery, and ecological uses (SWRCB-27; RTD-20, pp. 22:20-
21 23:26); whether water is available to serve these uses (*State Water Resources Control
22 Board v. United States* (1986) 182 Cal.App.3d 82, 103 [the Board must consider
23 amounts of water required for recreation, and preservation and enhancement of fish and
24 wildlife resources]); an economic evaluation of the uses to be served (CSPA-27); and
25 the regional scale impact of the project. (RTD-12, p. 63:14-66:23.)
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27 THE LOWER STANDARD OF REASONABLE PROTECTION

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1 Among the primary objectives of both state and federal endangered species acts
2 (ESAs) are avoidance or reduction of take of listed species by permitted actions, and
3 avoidance of jeopardy to the continued existence of listed species—that is, the
4 avoidance or prevention of their extinction. While it is a goal of both ESAs’ species
5 management to recover listed species to population levels sufficient to de-list them,
6 regulatory actions under the ESAs focus instead on incidental take limits and prevention
7 of extinction rather than enlisting permittees (e.g., through incidental take permit
8 conditions, Section 7 reasonable and prudent alternatives, or Section 10 habitat
9 conservation plans) *per se* in the project of species recovery.

10 The SWRCB elsewhere summarized the present 2009 incidental take permit
11 (ITP) concerning longfin smelt for the SWP, as well as the 2008 Delta smelt and 2009
12 salmonid biological opinions. (SWRCB-25, pp. 20-24.) It is my understanding that a
13 draft ITP and biological opinions have been issued for Petition Facilities. (SWRCB-105;
14 SWRCB-106; SWRCB-107.)

15 The SWRCB has stated:

16 Recent flow regimes in the Delta have contributed to the decline of native
17 species and encouraged non-native species. Flows into and within the
18 estuary affect turbidity, salinity, aquatic plant communities, and nutrients
19 that are important to both native and non-native species. However, flows
20 and habitat structure are often mismatched and now favor non-native
21 species.

22 (SWRCB-25, p. 40.) In this context, the phrase “recent flow regimes” includes those set
23 forth in the ITP and the biological opinions, as well as the flow regimes reflected in
24 water quality objectives of SWRCB’s Water Rights Decision 1641 and 2006 Water
25 Quality Control Plan. The SWRCB also stated:

26 There is sufficient scientific information to support the need for increased
27 flows to protect public trust resources; while there is uncertainty regarding
28 specific numeric criteria, scientific certainty is not the standard for agency
decision making.

1 (*Id.*, p. 4.)

2 Recent Delta flows are insufficient to support native Delta fishes for
3 today's habitats. Flow modification is one of the immediate actions
4 available although the links between flows and fish response are often
5 indirect and are not fully resolved. Flow and physical habitat interact in
6 many ways, but are not interchangeable.

7 (*Id.*, p. 5.)

8 These last two passages from SWRCB's 2010 Delta Flow Criteria (DFC) Report
9 indicate that SWRCB recognizes that the present regulatory regime for flows and other
10 water quality and endangered species protections do not adequately protect listed
11 native and other aquatic Delta species, while providing conditions more conducive to
12 non-native species. This is confirmed by continued declines of Delta smelt and salmonid
13 abundances. (SJC-352, SJC-353, SJC-354, SJC-355, SJC-356, SJC-357, SJC-358,
14 SJC-359.)

15 Despite being a state agency, Petitioner DWR ignores its own public trust
16 responsibilities in its case in chief. I conducted computer searches of DWR's Part 2
17 case-in-chief documents (including the Written Testimony of its Part 2 witnesses), as
18 well as of the Hearing transcripts of DWR's Part 2 witnesses' direct testimony. None of
19 DWR's Part 2 witnesses' testimony exhibits contained express "public trust"
20 References. (SJC-348, SJC-349.) In the rest of DWR's case in chief I found just five
21 exhibits that contained references to "public trust": Exhibits DWR-1043 (a UC Davis
22 Ph.D. dissertation on hydrodynamics and water quality); DWR-1095 (California
23 Department of Fish and Wildlife's signed incidental take permit for the Change Petition
24 facilities, containing just one textual reference to "public trust"); DWR-1098 (a 1997
25 recreation survey by the California Department of Fish and Game for the Delta
26 Protection Commission, containing a single reference with "public trust"); and DWR-
27 1107 (Volume 1 of the 1995 Anadromous Fish Restoration Program Working Paper,
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1 which contained a table of contents for Volume 2—which is not included in the exhibit—
2 containing a “public trust doctrine” section).

3 Rather than expressly addressing the “public trust” as such (that is, using the
4 term “public trust”), Petitioners elected to assure the SWRCB that Petition Facilities
5 would be “reasonably protective” of fisheries, a public trust resource. (See the citations
6 to the Greenwood and Wilder Testimony, above, at pp. 4-5 herein.)
7

8 **THE HIGHER STANDARD OF PUBLIC TRUST PROTECTION**

9 The most relevant of Petitioners’ exhibits concerning public trust resources is the
10 fifth exhibit, DWR-1120, a 1996 California Department of Fish and Game (DFG) report
11 on statewide steelhead trout restoration and management which briefly discusses public
12 trust resources and obligations. This report acknowledged DFG’s public trust obligations
13 as “argu[ing] for early implementation of the Steelhead Plan,” which included provisions
14 for, among other regions, the Central Valley (DWR-1120, p. v); that despite “several
15 favorable court decisions affirming fish and wildlife under the Public Trust Doctrine,
16 those resources held in trust in many areas of the State continue to decline” and that
17 “DFG needs a more effective means to identify, maintain, and achieve adequate flows
18 for steelhead throughout their range.” (*Id.*, p. 3.) Moreover, the report states that the
19 public trust doctrine “requires the SWRCB to ‘balance’ the potential value of a proposed
20 or existing diversion with the impact on the trust resources. Fish and wildlife are public
21 trust resources in the custodial care of DFG.” (*Id.*, p. 71.) DWR-1120 underscores the
22 obligations of the State of California to protect fish and wildlife as public trust resources.

23 The SWRCB’s own interpretation of its Delta flow criteria charge articulates a
24 higher standard of public trust resource protection, including for fisheries:

25 In determining the extent of protection to be afforded public trust
26 resources through the development of the flow criteria, the State Water
27 Board considered the broad goals of the planning efforts the criteria are
28

1 intended to inform, including restoring and promoting viable, self-
2 sustaining populations of aquatic species.

3 (SWRCB-25, p. 2.)

4 The 2010 DFC report was informational and non-binding. (*Id.*, p. 12.) But it
5 explained further the SWRCB's scope for its public trust considerations this way:

6 The State Water Board intends that the flow criteria developed in this
7 proceeding should meet the following general goal regarding the
8 protection of public trust resources:

- 9 • Halt the population decline and increase populations of native
10 species as well as species of commercial and recreational
11 importance by providing sufficient flow and water quality at
12 appropriate times to promote viable life stages of these species.

13 To meet this goal, the State Water Board also sought to develop criteria
14 that are comprehensive and that can be implemented without undue
15 complexity. This report is limited to consideration of flow criteria needed
16 under the existing physical conditions, so therefore does not consider or
17 anticipate changes in habitat or modification of water conveyance
18 facilities. The State Water Board does, however, identify other measures
19 that should be considered in conjunction with, and to complement, the flow
20 criteria.

21 (Id., p. 14.)

22 The standard of public trust protection is, as the SWRCB has stated, to protect
23 public trust resources to a point where such resources can be restored to viable, self-
24 sustaining populations by providing sufficient flow and water quality at appropriate times
25 to promote viable life stages of Delta aquatic species.

26 **MAINTENANCE OF AND INCREASE IN DELTA DIVERSIONS AND SWP 27 DELIVERIES SOUTH OF DELTA**

28 **Expected Increase in Diversions with Petition Facilities.** As noted above,
Petitioner DWR witnesses Buchholz and Reyes stated in their written testimony that
they expect an increase in deliveries to south of Delta contractors relative to the No
Action Alternative under Petition Facilities scenario H3+. (DWR-1010; DWR-1016.) An
important part of this increase, undisclosed by these witnesses, is Petitioner DWR's

1 expectation for increased demand for water transfers from north of the Delta. In my Part
2 2 testimony for Restore the Delta, I summarized what water transfers are and how state
3 and federal water projects accommodate them.² (RTD-12, p. 8-12.)

4 Reflecting existing conditions, Petitioner DWR issues a biannual SWP delivery
5 capability report that, among other things, compares total Table A contractual demand
6 of its 29 water service contractors with its record of deliveries over the previous ten
7 years (in the 2017 report, 2007-2016). (SJC-338.) Current maximum Table A amount for
8 the SWP is 4,133 thousand acre-feet (TAF) per year, and SWP long-term average
9 Table A deliveries are 2,571 TAF per year. (*Id.*, p. 21, Table 5-3.) Compared with the
10 long-term hydrology (1921-2003), this level of Table A delivery can occur in about 62
11 percent of years. (*Id.*, p. 25, Table 5-5.) Article 21 “surplus” water in the SWP system
12 has an 84 percent chance of delivery of 20 TAF or less annually, according to this
13 report. (*Id.*, p. 27, Figure 5-6.) These reliability estimates are based on present SWP
14 facilities and do not include Petition Facilities, nor do they reflect adjustments for future
15 climate change.

16 Transfers represent the state and federal water system’s adaptation to over-
17 appropriated water. Petitioner DWR’s SWP water rights are junior to those of a large
18 number of senior water right holders north of and in the Delta. The present level of
19 water supply reliability of the SWP results from its junior water rights coming up against
20 other senior rights and overall declining snowpack and runoff hydrology. California
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25 _____
26 ² In summary, I argued at that time that the expectations for water transfers violate
27 Water Code section 85021 which requires reduced reliance on the Delta for California’s
28 future water needs, because water transfers represent a continuation of reliance on the
Delta at similar or increased levels, depending on future water transfer market activity. I
do not reiterate that argument in this rebuttal testimony.

1 Water Impact Network documented through a watershed-wide analysis that there are
2 over five acre-feet of water rights claims for each acre-foot of historical average annual
3 flow in the Sacramento River Basin, without accounting for public trust or other in-
4 stream flows. (RTD-131, p. 12, Table 2.)

5 Water transfers between willing sellers and willing buyers are employed to
6 overcome allocation limits imposed on SWP contractors. Buyers offer compensation to
7 sellers willing to part with some or all of their senior surface water rights so that
8 buyers—who are typically south of the Delta—may receive water delivered currently
9 through the Delta. In the event that Petition Facilities are constructed and operated,
10 such transfers would be routed under, rather than through, the Delta. In addition, the
11 north Delta location of Petition Facilities' intakes would ensure that better quality
12 Sacramento River water would be diverted, since that water would no longer mix with
13 Delta waters in western and central Delta channels.

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16 Petition Facilities are expected to provide separate, cross-Delta tunnels with a
17 longer transfer window than currently allowed under current regulatory constraints.
18 (SWRCB-102, Chapter 5, p. 5-177:22-29; RTD-12, pp. 8:20-27, 9:24-10:15.) Relative to
19 the No Action Alternative, the Final EIR/EIS anticipates more Table A allocations and
20 fewer transfers, yet the CEQA conclusion for existing conditions anticipates that Petition
21 Facilities would increase water transfer demand relative to existing conditions. (*Id.*,
22 Chapter 5, p. 5-177:30-41.) No numerical or modeled analysis is provided in the Final
23 EIR/EIS for these conclusions. The NEPA conclusion agrees with Petitioners' witnesses
24 Buchholz and Reyes that overall deliveries would increase with operation of Petition
25 Facilities. The CEQA conclusion concerning increased transfer remains relevant,
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1 however, since existing conditions are presently known and relatively certain, while No
2 Action Alternative future conditions are based on assumptions about future water
3 contractor behavior and hydrologic conditions affected by climate change.

4 In recent months, Petitioner DWR and its SWP contractors have acted
5 independently of this Change Petition proceeding to increase water transfer activity in
6 the existing SWP system. Former DWR director, Grant Davis, issued Notice 17-11 on
7 December 18, 2017 to “pursue water management actions that ensure supplies from
8 the [SWP] are used effectively.” (SJC-339, p. 1.) These included greater flexibility for
9 “how SWP supplies are transferred, exchanged, and managed over extended periods of
10 time.” (*Id.*) This notice addressed bona fide exchanges of water and multi-year transfers
11 of Table A water. (*Id.*, pp. 2-3.) Such changes in approach by Petitioner DWR are
12 independent of contractors’ supplemental demand conditions and climate change
13 effects.
14

15
16 Petitioner DWR’s director, Karla Nemeth, announced in early 2018 that DWR and
17 SWP contractors (calling themselves “public water agencies” or “PWAs”) would begin
18 SWP contract amendment negotiations in early February 2018 concerning allocation of
19 California WaterFix costs and water management tools. (SJC-340.) The provisions of
20 Notice 17-11 shaped the initial talking points and objective statements of the negotiating
21 parties. (SJC-341; SJC-342; SJC-343.) They concluded a Draft Agreement in Principle
22 on June 27, 2018 that addresses water transfers, exchanges, transfers and exchanges,
23 carryover storage, California WaterFix cost allocation, transparency amongst PWAs to
24 ensure no harm to other PWAs, and setting of water delivery priorities. (SJC-344; SJC-
25 345; SJC-346; SJC-347.) DWR and its PWAs agreed on June 27, 2018 that they would
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1 soon issue a notice of preparation for an environmental impact report on these and
2 other related SWP contract amendments. The speed with which these parties
3 completed California WaterFix and other water management tools contract amendment
4 negotiations for the SWP indicates the importance they attach to increasing water
5 transfer and exchange opportunities in the SWP now and with Petition Facilities. They
6 intend the amendments to maximize flexibility of Petition Facilities' operations and
7 capacity utilization independent of supplemental demand conditions and climate
8 change.
9

10 **Public trust analysis.** Public trust analysis, broadly, is the array of practical
11 professional methods and scientific methods employed to arrive at a balanced and
12 feasible level of public trust protection.
13

14 Justice Ronald B. Robie has written that, "Simply put, in administering water
15 rights, the [State Water] Board must consider public trust values." (SJC-360, p. 1162.)
16 Such consideration must be undertaken with a method. Public trust analytic methods
17 reasonably include an analysis to determine whether sufficient water exists in the
18 affected water system to both support a proposed project or action and, at the same
19 time, protect public trust resources.
20

21 Justice Robie points out that SWRCB must consider public trust values in the
22 context of currently held water rights, including the CVP and the SWP; determination of
23 rights to a stream system, whether appropriative, riparian or other basis of right;
24 undertaking all appropriate proceedings concerning prevention of waste, unreasonable
25 use, unreasonable method of use, or unreasonable method of diversion of water; and
26 when acting under its statutory power to serve as a referee investigating "any or all of
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1 the physical facts involved” in state or federal courts. In fulfilling its public trust
2 obligation, SWRCB must avail itself of information on water rights and stream flows in a
3 comprehensive fashion in a number of administrative contexts, not just new water right
4 appropriations. (SJC-360, pp. 1162-1165.)

5
6 SWRCB nears a point in this Change Petition proceeding where it will need to
7 conduct and provide a public trust analysis in its order. Petitioners have not provided or
8 conducted such an analysis, as reflected in their stated reliance on a reasonable
9 protection standard avoiding extinction of fishery resources. (SJC-348, SJC-349.) As
10 noted, there is no reference to “public trust” in Petitioners’ witness testimony.

11 In its 2010 DFC Report, SWRCB acknowledged that a future use of this report
12 would arise when Petitioners would “request the State Water Board to amend the water
13 rights permits for the [SWP] and/or [CVP] to move the authorized points of diversion for
14 the projects from the southern Delta to the Sacramento River...” conditioned with
15 appropriate Delta flow criteria. SWRCB added:

16 That decision will be informed by the analysis in this report, but will also take into
17 account many other factors into consideration, including any newly developed
18 scientific information, habitat conditions at the time, and other policies of the
19 State, including the relative benefit to be derived from all beneficial uses of water.
The flow criteria in this report are not predecisional in regard to any State Water
Board action. [citation]

20 The information in this report illustrates to the State Water Board the need for an
21 integrated approach to management of the Delta.

22 (SWRCB-25, pp. 3-4.)

23 Law professor Brian E. Gray summarizes an “integrated approach” to public trust
24 analysis as weighing and accommodating

25 public trust and extractive uses in a careful sequence that (1) identifies public
26 trust needs, (2) analyzes the effects of the extractive uses (usually water
27 impoundments, diversions, and alterations of flows) on the public trust, (3)
28 evaluates the uses that are served by the diversions of water, and (4) determines

1 the feasibility of altering or limiting the extractive uses to provide reasonable
2 protection for public trust requirements.

3 (SJC-361, p. 1016.)

4 In my opinion, Gray's analytic point (2) would reasonably and necessarily
5 require—at a minimum—a determination as to whether sufficient water exists in the
6 Delta system to both protect the public trust and allow for construction and operation of
7 Petition Facilities.

8 The 2010 DFC Report (and Water Code § 85086) recognizes the need for flow
9 criteria to be developed for Petition Facilities prior to issuance of a permit that would
10 allow new diversions on the Sacramento River, as currently proposed by Petitioners.
11 Appropriate permit terms and conditions to implement such flow criteria can only be
12 developed in the context of detailed information regarding the availability of water in the
13 locations proposed for new diversions. Thus, a critical step in any public trust analysis,
14 particularly with respect to Delta fisheries, is to determine whether there is sufficient
15 water in the Delta system to both approve Petition Facilities, as proposed, and
16 adequately protect Delta fisheries, a critical public trust resource.

17 18 **CONCLUSION**

19 Key sources of water for the Petitioner DWR and the PWAs in the negotiation
20 process are the senior water rights holders north of the Delta. Their contribution both to
21 public trust protective flows and to water supply for water transfer market activities
22 remains unexamined and needs to be examined through public trust analysis as part of
23 SWRCB action on this Change Petition.
24

25 Without a determination as to whether sufficient surplus water exists in the north
26 of Delta watershed system to both protect Delta public trust resources and allow
27 construction and operation of Petition Facilities to proceed as proposed, the SWRCB
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1 will not be in a position to accurately assess future water transfer market activity for the
2 purposes of protecting Delta public trust values. Ignoring its own public trust obligations,
3 Petitioner DWR neglected to prepare such an analysis, preferring instead to mask the
4 crucial role played by the water transfer market in advancing the Change Petition.
5 Further, the absence of such an analysis masks the proposed project's reliance on
6 senior water right holders north of the Delta to maintain or increase Delta exports.
7

8 For the reasons discussed above, Petitioners' failure to establish the existence of
9 sufficient water in the Delta system to assure adequate protection of the public trust if
10 the proposed project is approved renders the Petition incomplete and inadequate.
11 Granting the Petition in the absence of such an analysis would run counter to California
12 law governing the public trust obligations of this Board, imperil constitutionally protected
13 public trust resources, and, for the same reason, undermine the public interest.
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15 Dated: July 12, 2018

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Tim Strohane