

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](mailto:mjatty@sbcglobal.net)

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

10 OSHA R. MESERVE (SBN 204240)  
11 SOLURI MESERVE, A LAW CORPORATION  
12 1010 F Street, Suite 100  
13 Sacramento, CA 95814  
14 Telephone: (916) 455-7300  
15 Facsimile: (916) 244-7300  
16 Email: [osha@semlawyers.com](mailto:osha@semlawyers.com)

17 Attorneys for Protestants Local Agencies of the North Delta  
18 Bogle Vineyards / Delta Watershed Landowner Coalition  
19 Diablo Vineyards and Brad Lange / Delta Watershed Landowner Coalition  
20 Stillwater Orchards / Delta Watershed Landowner Coalition

21 [ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

22 **BEFORE THE**  
23 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

24 HEARING IN THE MATTER OF  
25 CALIFORNIA DEPARTMENT OF WATER  
26 RESOURCES AND UNITED STATES  
27 BUREAU OF RECLAMATION  
28 REQUEST FOR A CHANGE IN POINT OF  
DIVERSION FOR CALIFORNIA WATER  
FIX

**WRITTEN REBUTTAL TESTIMONY OF  
MARC DEL PIERO -REVISED**

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

8 J. MARK MYLES (SBN 200823)  
9 Office of the County Counsel  
10 County of San Joaquin  
11 44 N. San Joaquin Street, Suite 679  
12 Stockton, CA 95202-2931  
13 Telephone: (209) 468-2980  
14 Facsimile: (209) 468-0315  
15 Email: [jmyles@sigov.org](mailto:jmyles@sigov.org)

16 JENNIFER SPALETTA (SBN 200032)  
17 SPALETTA LAW PC  
18 P.O. BOX 2660  
19 LODI, CA 95241  
20 Telephone: (209) 224-5568  
21 Facsimile: (209) 224-5589  
22 Email: [jennifer@spalettalaw.com](mailto:jennifer@spalettalaw.com)

23 Attorneys for Protestants County of San Joaquin,  
24 San Joaquin County Flood Control and  
25 Water Conservation District, and  
26 Mokelumne River Water and Power Authority  
27  
28

1 I, Marc Del Piero, declare:

2 I am an attorney, licensed to practice law in the State of California since 1980 (CA. Bar  
3 #91644). During the course of my professional career and during the last three decades, my  
4 public sector and private activities, employment, and practice have encompassed broad and  
5 complex issues related both to the law of water rights and water quality issues within  
6 California. I received both a Bachelor of Arts degree in History, with emphasis on California  
7 history, and a Juris Doctorate (J.D.) from Santa Clara University in 1975 and 1978,  
8 respectively. In 1981, I was elected to the Monterey County Board of Supervisors, and in that  
9 capacity served from 1981-1992 as a member, and twice as Chair, of the Board of Directors  
10 of the Monterey County Water Resources Agency, the largest surface water rights  
11 (appropriative rights) holder within that jurisdiction. During my tenure, I personally wrote and  
12 implemented many County land use plans and policies mandating the protection and  
13 preservation of surface water and groundwater resources, protected coastal wetlands,  
14 endangered species, and prime and productive agricultural lands. The vast majority of these  
15 mandatory policies remain in full force and effect within that jurisdiction. Additionally, during  
16 my tenure in that position, I served from 1981-1986 as the Monterey County Board of  
17 Supervisors' appointee to the local agency board of the San Felipe Division of the Central  
18 Valley Project (CVP).

19 From 1992-2011, I also served as an adjunct instructor at the Santa Clara University  
20 School of Law where I team taught water law.

21 From 1992-1999, I served as the Vice-Chair of the State Water Resources Control  
22 Board (SWRCB). In 1992 and 1993, while I was serving on the SWRCB, we came very close  
23 to adopting a Water Rights Decision (Draft Decision 1630) ~~that would have addressed many if~~  
24 ~~not all of those desired outcomes sought for the Delta today.~~ I supported that draft and its  
25 policies. However, the then-administration intervened to keep the Board majority from  
26 adopting the draft decision, which subsequently led to adoption of the Bay Delta Accord in  
27 1994, followed by the establishment of the CalFED process, and the DWR-initiated "Monterey  
28 Amendments" to the State Water Project ("SWP") contracts. ~~These band-aid, compromise~~

1 ~~actions clearly failed to keep the promise of "balance" and to protect the public trust resources~~  
2 ~~in the Delta. Further, the condition of the Delta, its eco-systems, its environmental and~~  
3 ~~agricultural resources, and its endangered species became even worse by the actions of a~~  
4 ~~subsequent administration that allowed DWR to increase real exports from the Delta in 2004~~  
5 ~~that pushed the ecosystem into near-collapse by 2007. The intervening years have brought no~~  
6 ~~improvement to the crisis in the Delta in spite of DWR's often repeated, but undelivered,~~  
7 ~~promises of "no changes" in their operations.~~

8 I am testifying as an expert based upon my personal and special knowledge, personal  
9 experiences, practice and education about the California law of water rights and water quality  
10 issues as they relate to the Delta, and about the rights, mandated duties, and legal obligations  
11 (both met and unmet) of the water rights holders whose diversions of water directly and  
12 significantly impact the ~~environmental, public trust,~~ agricultural, and potable water supplies of  
13 the Sacramento-San Joaquin Delta. My Statement of Qualifications is being submitted  
14 concurrently herewith. (See SJC-77, Qualifications of Marc del Piero.)

15 My testimony will respond to and rebut assertions made in the testimony of Petitioners'  
16 witnesses, including but not limited to Maureen Sergent, Jennifer Pierre and John Bednarski.  
17 My testimony will rebut Petitioners' statements about whether the Petition constitutes a  
18 request for a new water right (DWR-53, Testimony of Maureen Sergent, pp. 9-10; DWR-51,  
19 Testimony of Jennifer Pierre, pp. 10-14) and testimony on DWR's conclusion that granting the  
20 Petition would not harm any legal users of water (DWR-53, Testimony of Maureen Sergent,  
21 pp. 10-15; DWR-57, Testimony of John Bednarski, p. 28]. In addition, I will rebut Petitioners'  
22 testimony that there would be no injury to groundwater users. (DWR-57, Testimony of John  
23 Bednarski, p. 23:16-17.) My testimony also rebuts DWR's testimony suggesting that use of  
24 the boundary approach ensures that the Project would not injure legal water users. (DWR-51,  
25 Testimony of Jennifer Pierre, p.10; see also DWR-53, Testimony of Maureen Sergent, pp. 9-  
26 10.) In addition, Petitioners have, contrary to Jennifer Pierre's testimony, assumed "changes  
27 to the permit's sources of water, quantities, rates of diversion, timing of diversion," and other  
28 changes both to DWR's and Reclamation's permits. (DWR-51, p. 2.)

## I. Summary of Testimony

My rebuttal testimony is intended to present factual information relevant to senior legal users of water and Petitioners' junior water rights and permits for diversions of water from the Delta, and the lack thereof, covered in the first part (Part 1) of the SWRCB hearing process. The focus of my rebuttal testimony is on the significant and unaddressed injury to legal users of water likely to result from the "California Water Fix" ("CWF") as proposed, the unavoidable and irremediable legal deficiencies in actual water rights held by Petitioners, and the defective and intentionally nuanced (minimalized) treatment of the "injury" question in the evidence upon which the CWF application has been predicated. In my opinion, the CWF has the significant potential to, and will, result in significant and irreparable injury to other legal users of water from the Delta, including water rights holders who rights are senior to those held by the SWP and the CVP.

Based on my review of the testimony and other material submitted in support of the Petition, it has become clear to me that Petitioners' explanation of how the CWF will be implemented and operated is shrouded in obfuscation and misdirection, in spite of clearly identifiable injury that will result to senior water rights holders and, in-Delta water rights holders, ~~and constitutionally protected public trust resources~~. Petitioners' misleading characterization of the proposed project, which I will explain, is rooted largely in Petitioners' representation that it will comply with the "terms" of the four (4) now ancient, and incurably defective (due to huge over-estimations of available water) SWP water rights permits, granted to DWR's predecessor agencies ~~before most current retirees of the DWR were born~~.

These four water rights permits have been long recognized as containing massive amounts of "paper water." Contrary to Petitioners' position, authorized diversions provided for in a SWRCB permit do not mean that the water to which they refer ever existed. (See, generally, RTD-131, Tim Stroshane, Testimony on Water Availability Analysis, submitted for Phase 2 of State Water Resources Control Board, Bay-Delta Water Quality Control Plan Update, October 26, 2012, pp. 8-13 [discussing causes and impacts of "paper water"].) Not

1 infrequently, “paper water” results from (or is “created” by) the flawed representations of over-  
2 enthusiastic design engineers promising that there is more “wet” water in a river system than  
3 actually exists. These mistakes sometimes happened because of a lack of reliable hydrologic  
4 information. Sometimes (it has been postulated), during historically difficult economic times in  
5 the state, sufficiently large “water” yields needed to be identified by the designers to decision  
6 makers because the project would not be built (and the engineers no longer employed) if  
7 identified (to-be-developed) water supplies were inadequate to support the sale of  
8 construction bonds secured by the anticipated cash flow of the project water sales to potential  
9 customers.

10 Current Petitioner testimonials supporting the flawed CWF proposal continue to refer  
11 back to decisions and water contracts entered into in the 1960’s. Petitioners would have the  
12 SWRCB members ignore the history and consequences of DWR’s water use and the massive  
13 population growth and corresponding development of the State of California and expansion of  
14 its attendant legal mandates, ~~including the Public Trust doctrine~~, over the past 50+ years.  
15 The truth is that, ~~without the requisite Water Availability Analysis and~~ without evaluating  
16 potential harm to other water users, Petitioners are asking for a new water rights permit that  
17 will allow the SWP and CVP to increase the amount of water diverted from the Delta by  
18 characterizing that increase, euphemistically and deceptively, in terms of “improved reliability.”  
19 In fact, the proposed change will constitute a new water right, as part of the range of  
20 operations expands an existing right to appropriate a greater amount of water (1.2 million acre  
21 feet) in Boundary 1, lesser amounts in H3 and H4, and uses a different source of water:  
22 additional flows from below rim dams diverted underneath the Bay-Delta. This is unlawful  
23 under Cal. Code Regs., title 23 § 699 and *Jackson Rancho County Water District v. State*  
24 *Water Rights Board* (1965) 235 Cal.App. 2d 863, 879. (See also SJC-78, WR 2009-0061, pp.  
25 5-6.)

26 “Paper water” is the empty legacy left by former state employees over fifty years ago.  
27 Those grants of “fictitious water” should have been revised both through SWRCB reviews of  
28 the terms and mandates of the four junior water rights permits held by SWP and through

1 mandatory reductions in permitted diversions (eliminating the fictitious “paper water” and the  
 2 troubling continuing reliance of Petitioners thereon) during the intervening decades. Those  
 3 water rights permits, ~~which have not been exposed to the constitutionally required reviews~~  
 4 ~~and modifications articulated in the National Audubon decision (*National Audubon Society v.*~~  
 5 ~~*Superior Court* (1983) 33 Cal.3d 419),~~ suffer from serious and irremediable defects and have  
 6 resulted in significant and adverse environmental impacts in the Delta, ~~as well as illegal~~  
 7 ~~adverse impacts affecting senior water rights holders in the Delta~~ that I will address in my  
 8 testimony. SWP water exports from the Delta should have been reviewed, accurately  
 9 quantified, and reduced by the SWRCB based upon hydrologic data from the last seven  
 10 decades. These basic and urgently needed measures have been systematically ignored or  
 11 side-stepped during recent years, further imperiling the Delta.

12 I will also address:

- 13 1. The lack of the required water rights for Petitioners to pursue the CWF, ~~making the~~  
 14 ~~Petition a request for a new water right, which requires a Water Availability Analysis~~  
 15 ~~(“WAA”);~~
- 16 2. Petitioners’ failure to consider all legal water users and all injury types in their attempt  
 17 to comply with “No Injury” rule; and
- 18 3. Petitioners’ legally incorrect reliance on the concept of Adaptive Management as a tool  
 19 to avoid their current obligation to produce a full, complete, and comprehensible project  
 20 description for the requested water rights changes.

## 21 **II. Background Facts Pertinent to the “No Injury” Analysis**

22 The Central Valley Project and the State Water Project have some of the most junior  
 23 appropriative rights in California, with a listed “face value” of approximately 65 million acre-  
 24 feet. A significant portion of that water doesn't even exist except in the wettest of years. By  
 25 themselves, the listed face value of state and federal consumptive water rights in the Delta  
 26 watershed exceed average annual Central Valley watershed runoff of approximately 29  
 27 million acre-feet. And, the 65 million acre feet figure does not include senior consumptive  
 28 water rights in these watersheds.

1 The California Department of Finance originally filed for these permits back in 1927,  
2 while other rights were filed for in the late 1930s. In terms of water appropriations, this is quite  
3 late in California history, since some pre-1914 appropriations date to Gold Rush days.  
4 California has constitutional provisions prohibiting unreasonable use and diversion of water, a  
5 comprehensive Water Code, ~~the California Environmental Quality Act, Public Resources~~  
6 ~~Code, §§ 21000 et seq. (“CEQA”), state and federal endangered species acts, and~~ water  
7 quality acts, ~~environmental review acts and a Fish and Game Code~~ that - while imperfect -  
8 assist in the equitable distribution of available water, preserve the entitlements of senior water  
9 rights holders (including riparian, pre-1914 appropriators, and appropriators whose rights  
10 precede those of the SWP and CVP), and allow for the appropriation of water by junior water  
11 rights holders (SWP and CVP), ~~and, arguably, protect pelagic and salmonid fisheries~~. The  
12 state has regulatory and resource agencies charged with implementing and enforcing these  
13 laws. ~~The present history (the last 17 years) of shortages would have been prevented if these~~  
14 ~~laws had been complied with and enforced. They have generally been ignored because the~~  
15 ~~resources decisions necessitated by their enforcement are consequential and very difficult for~~  
16 ~~the state and many interested parties that receive the benefits of water exported from the~~  
17 ~~Delta.~~

18 Since at least 1979, the SWRCB recognized that “To provide full mitigation of project  
19 ~~[CVP and SWP] impacts on all fishery species now would require the virtual shutting down of~~  
20 ~~the export pumps.” (See SWRCB-23, SWRCB D-1485, p. 13.) Since that time, SWP pumping~~  
21 ~~by DWR, and pumping from the Delta by the CVP, have steadily increased to the point that~~  
22 ~~the courts have intervened to curtail illegal pumping to try to mitigate, in part, the serious~~  
23 ~~adverse consequences of the continuing conduct of DWR and the Bureau of Reclamation with~~  
24 ~~respect to SWP/CVP pumping on the eco-systems of the Delta and the senior water rights~~  
25 ~~holders and users therein.~~

26 Notably, since the original appropriative permits were secured and subsequently  
27 implemented by DWR in the 1960’s, certain unanticipated acts and actions have taken place.  
28 These acts and actions developments prohibit 21<sup>st</sup> Century decision makers, who are being

1 asked to rule on new “projects” as defined by CEQA, from simplistically relying on permits  
2 from the “good old days” without demanding the production of significant, comprehensive,  
3 legally required factual updates and acknowledgements of the changed circumstances in the  
4 Sacramento-San Joaquin Delta. Petitioners fail to acknowledge that these acts-developments  
5 have reduced the water yields originally expected from the SWP and the CVP.

6 Among these acts-developments were the failure to construct and/or termination of  
7 proposed SWP reservoirs and facilities, like the Eel River reservoir that was terminated by  
8 Governor Reagan and the Peripheral Canal which was and remains a massively unpopular  
9 project with many of California’s voters. ~~Further, the legislative adoption of CEQA in 1973,  
10 and the California Supreme Court’s “Audubon Decision” in 1983 have both expanded and  
11 placed far greater mandatory, legally enforceable burdens on lead agencies (in this case  
12 DWR) and upon regulatory agencies, including the SWRCB.~~ These agencies must now  
13 produce detailed and comprehensive evaluations ~~and specifically enforceable mitigations of  
14 the potential adverse environmental consequences of their public projects,~~ and quantifiable  
15 determinations of actual available “wet” water (to which a proponent holds actual water rights)  
16 to avoid injury adverse impacts to “~~public trust~~”, ~~fishery, and environmental resources and to~~  
17 legal users of water who are entitled to protection under the “No Injury” rule.

### 18 **III. Petitioners’ Permits Have Expired, and They Are Asking for a New Water** 19 **Right**

20 In her written testimony, DWR witness Maureen Sergent stated that it was her  
21 understanding that under the Water Code, DWR’s Petition would not create a new water right.  
22 (DWR-53, Testimony of Maureen Sergent, p. 9:8-10:23.) Yet, during cross examination, Ms.  
23 Sergent confirmed that DWR has never diverted a drop of water from the Hood location where  
24 DWR claims it has an authorized point of diversion. (September 23, 2016, Spaletta Cross of  
25 Maureen Sergent, p. 129:15-22.)

26 As described below, the CWF, and its new Petition for Change is a new project, with  
27 new points of diversion. The effort by Petitioners to cloak the CWF in the archaic and out-of-  
28 date findings of old water rights permits (See SWRCB-1 and SWRCB-2 [Petition and

1 Addendum and Errata]) fails to meet the SWRCB regulatory and, legal, ~~and environmental~~  
2 ~~standards standards~~ for a project in the 21st Century world of water rights.

### 3 **A. Petitioners' Permits for Diversions in the Northern Delta Have Expired**

4 Petitioners' imply that because DWR filed a "Petition for Time Extension" to build  
5 facilities to put their "paper water" to beneficial use eight (8) years ago (2009), they can  
6 thereby avoid the reality that the permits for the CWF have expired. The expiration dates have  
7 come and gone. Petitioners know that the SWRCB cannot grant a petition based upon "paper  
8 water". (See *Planning & Conservation League v. Department of Water Resources* (2000) 83  
9 Cal. App. 4<sup>th</sup> 892, 908, fnt.5.)

10 In eight (8) years, the SWRCB itself has never taken any action to extend DWR's  
11 permits. Actions by SWRCB staff cannot extend these permits. The SWRCB itself has not  
12 publicly noticed any hearings, nor taken any actions, nor directed the preparation of any  
13 record pursuant to that DWR request, in spite of there being no limitations on the SWRCB's  
14 power to do so. Importantly, DWR has filed no action (Petition for a Writ of Mandate) against  
15 the SWRCB to compel such a Board hearing on its petition to take place. The SWRCB has  
16 ignored the extension petition, and DWR has done nothing for eight years to advance its own  
17 interests.

18 Moreover, other SWRCB decisions compel the conclusion that the permits have  
19 expired. Order WR 2008-0045 (revoking SWRCB Permits 16209, 16210, 16211, and 16212 –  
20 Auburn Dam) and its findings identify expiration of the subject DWR permits as the only  
21 reasonable conclusion after eight years of inaction by DWR and the SWRCB. (SJC-79.)  
22 Additionally, the currently proposed points of diversion by DWR are not even in the same  
23 locations as what DWR had applied for and allowed to expire due to the passage of time.  
24 Clearly, DWR and the SWP now lack the requisite water rights to advance the CWF until new  
25 applications for new water rights have been prepared, filed, ~~subjected to CEQA equivalency~~  
26 ~~review~~, and ruled upon by the SWRCB itself.

### 27 **B. The Petition Requests a New Water Right**

28

1 Contrary to DWR witness Maureen Sergent's assertions, the Petition for Change  
2 constitutes a request for a new water right. (DWR-53, Testimony of Maureen Sergent, pp. 9-  
3 10.) Sergent relies on State Water Resources Control Board Order WR 2009-0061 ("WR  
4 2009-0061" included as SJC-78) to claim that "the fundamental difference between an  
5 application for a new right or a change to an existing right is that the new right seeks to  
6 increase the diversion at a given time." (DWR-53, Testimony of Maureen Sergent, pp. 9-10.)  
7 This misstates the analysis in WR 2009-0061. In that proceeding, the Board considered  
8 whether the City of Santa Cruz's petition to change its diversion permit to allow for direct  
9 diversion where the current permit only allowed diversion for storage would constitute a new  
10 water right. (SJC-78, WR 2009-0061, p. 1.) The Board observed that the "common feature  
11 among the changes that have been found to constitute the creation of a new right, as  
12 opposed to a change in an existing right, is that the changes that initiate a new right increase  
13 the amount of water taken from a water source at a given time." (SJC-78, WR 2009-0061, p.  
14 6.) The actual language WR 2009-0061 indicates that water *source* is relevant to whether a  
15 petition requests a new water right. Under the reasoning of WR 2009-0061, the facts here  
16 establish that the Petition is indeed a request for a new water right. Because there is no  
17 existing water right at the diversion points contained in the Petition, it requires a new water  
18 right. In the alternative, the Petition indicates that it requests an increase in diversion. Finally,  
19 even if the Board determines that the Petition does not request an increase to an existing  
20 diversion, changing the location of the diversion point will change the source of the diverted  
21 water. Doing so would constitute an "increase [in] the amount of water taken from a water  
22 source at a given time." (SJC-78, WR 2009-0061, p. 6.)

23 The Petition constitutes a request for a new water right because the Petition would  
24 require either increasing the amount of water being diverted under an existing permit, or  
25 approving a new permit. In addition, there is no existing water right to be changed for the  
26 Project because the prior application requesting diversion at the Hood intake expired before  
27 DWR perfected the water right. Permits 16478, 16479, 16481, and 16482 have expired on  
28 their face. The other permits held by DWR have never been used. DWR and Reclamation

1 have petitioned the State Water Board for Extensions of time, but those petitions have never  
2 been heard. CSPA et al. have protested the extensions of those petitions. (See CSPA-4-  
3 Revised, Chris Shutes Testimony – Revised, pp. 4-5.) In addition, the point of diversion for  
4 which an application was previously filed is not even the same as the diversion “points” (each  
5 of which is approximately 1/3 of a mile long) now sought. (See SWRCB-1, Petition for  
6 Change, Figures dated May, 4, 2016 [pdf pp, 34, 38], showing point of diversion/rediversion  
7 from expired application in green and proposed diversion/rediversion points in tan; see also,  
8 SWRCB-1, Location of Point of Diversion Table [pdf p. 39], listing different coordinates.)

9 Thus, ~~any water right~~ granted Petitioners’ request now would result in ~~be~~ an  
10 increase of presently permitted diversion in the northern Delta, which is zero, and would  
11 therefore constitute a new water right. Even if there is an existing water right, the Petition will  
12 create an increase in diversion if operated under Boundary 1 (1.2 million acre feet increase),  
13 requiring a new water right. Despite Petitioners’ representations that they are not requesting  
14 an increase in water diversions (DWR-53, Testimony of Maureen Sergent, p. 10:1-15), the  
15 Project will also increase the amount of water that can physically be diverted by Petitioners  
16 collectively by 9,000 cfs. (SWRCB-3, BDCP/CWF RDEIR/EIS, p. 3-18 [Alternative 4A].)

17 Sergent inaccurately claimed that WR2009-0061 settled this issue by finding that a  
18 water right change petition can be conditioned to maintain the prior limits on the diversion  
19 even if there is an increase in diversion capacity. (DWR-53, p. 10:1-15.) Though WR2009-  
20 0061 contains language to this effect, the referenced discussion was hypothetical dicta, as the  
21 issue was not before the Board at the time. (Exh. SJC-78, WR2009-0061, p. 7.) Further, no  
22 authority is cited in WR2009-0061 to support the position that permit conditions are sufficient  
23 to prevent a water rights change that involves increased diversion capacity from becoming a  
24 new water right. (*Ibid.*)

25 Finally, admitted evidence establishes that changing the diversion point of the water  
26 will change its source. This means that some sources will have increased diversions if the  
27 Petition is granted. About this, WR2009-0061 is clear: a new water right “increase[s] the  
28

1 amount of water taken from a water source at a given time.” (SJC-78, WR2009-0061, p. 6.)<sup>1</sup>  
 2 Thus, even if the total amount of water diverted does not change, an increase from any  
 3 source transforms this change petition to a request for a new right. DWR has produced  
 4 model hydrodynamic analyses of source fingerprinting of water at various locations in the  
 5 Delta. The analyses identify what source the water has come from. Source water  
 6 fingerprinting results indicate that the composition of water sources will change significantly  
 7 from those presently relied upon under existing water rights permits. (See RTD-10-rev-2,  
 8 Testimony of Tim Stroshane, p. 7, ¶¶ 22-23.) Presently, Sacramento River water makes up  
 9 nearly 60 percent of Banks water in January, and drops to about 30 percent in June. With the  
 10 proposed new diversions in place, over 80% of the water pumped through Banks in January  
 11 would be Sacramento River water, and between 45% to 55% of the water pumped in June  
 12 would also be from the Sacramento River. (See RTD-10-rev-2, Testimony of Tim Stroshane,  
 13 ¶ 23 [citing RTD-130, p. 60, Figure 5, which is generated from data contained in SWRCB-3,  
 14 Appendix B, Section B.4.2, pp. B-209 to B-212, B-231-234, and B-253-256].) Diverting more  
 15 Sacramento River water through the new points of diversion would constitute an increased  
 16 diversion from a source, and the Petition therefore requests a new water right.

#### **IV. A Water Availability Analysis Was Required**

17  
 18 ~~As the Petition requests a new water right, a WAA was required.~~ (See Wat. Code, § §  
 19 1260, subd. (k).) ~~The Water Code requires that every application for a new water right~~  
 20 ~~submitted to the Board must include "sufficient information to demonstrate a reasonable~~  
 21 ~~likelihood that unappropriated water is available for appropriation." (*Ibid.*) It is a prerequisite~~  
 22 ~~to issuing a permit that "[t]here must be unappropriated water available to supply the~~  
 23 ~~applicant." (Wat. Code, § § 1375, subd. (d).) Such an analysis would quantify actual "wet"~~  
 24 ~~water availability remaining under DWR's old permits. Omission of this mandatory~~  
 25 ~~quantification is fatal to Petitioners' Petition and their case in chief. By failing to produce a~~  
 26 ~~WAA, Petitioners have ignored (and are asking the SWRCB to ignore) over seven decades of~~  
 27

28 <sup>1</sup> WR2009-0061 did not address a situation where a party requested a change that would increase the amount of water diverted from one of several sources.

1 ~~hydrologic records related to rainfall, runoff, increasing in-Delta and out-of-Delta permanent~~  
2 ~~consumptive uses, water quality changes, flow data, and their own modelling that Petitioners~~  
3 ~~are obligated to use to quantify how much actual “wet” water actually exists for their proposed~~  
4 ~~purposes.~~

5 As early as 1934, discussions occurred between the State and Reclamation over a  
6 judicial resolution of competing water rights claims in the Sacramento and San Joaquin  
7 Basins. Engineers and attorneys in both Reclamation and the old California Water Rights  
8 Board advocated for an adjudication of water rights throughout the 1930s because they  
9 questioned whether the CVP had sufficient water rights. In 1939, Frank W. Clark, Chairman  
10 of the Water Protection Authority of California wrote to Walker R. Young, Supervising  
11 Engineer of the U.S. Bureau of Reclamation in Sacramento, that he concurred with the state  
12 engineer that “a judicial determination of existing water rights on the Sacramento and San  
13 Joaquin Rivers is necessary in order to operate the Central Valley Project efficiently and  
14 successfully and such determination should be effected before the project is placed in  
15 operation.” (SJC-80 Holsinger-related CVP Documents, 1939-1942, p. 758.)

16 Adjudication is simply a legal proceeding to correlate water rights to actual water, in  
17 accordance with the Wwater Code. In 1960, during consideration of the Burns-Porter Act  
18 (approving the State Water Project), Senator Stephen Teale, Chairman of the California  
19 Senate Interim Committee on Water Projects, asked legendary water rights attorney Walter  
20 M. Gleason to submit a legal assessment of the proposed State Water Project. In a 72-page  
21 opinion, Mr. Gleason observed that there wasn’t “any accurate or proper administrative  
22 determination by the State of the extent of the ‘**surplus**’ water which is or will be available in  
23 the Central Valley for export.” (SJC-81, Opinion of Attorney Water M. Gleason Regarding  
24 Various Legal Aspects of Burns-Porter Act, October 4, 1960, p. 17.)- Gleason described the  
25 consequences of a failure to identify and quantify vested rights, prophetically detailed the  
26 likely collapse of the Delta in the absence of adjudication and said the export schemes were  
27 based wholly and entirely on assumptions. (See, generally, SJC-81; see, also, SJC-80, p.  
28 775 [Holsinger observing that the CVP analysis consisted “wholly and entirely in

1 assumptions”].) The legislature narrowly approved the State Water Project. Adjudication  
2 never occurred – likely because decision makers knew that adjudication would doom the  
3 projects.

4 This looming reality was also described in DWR Bulletin No. 76 (Delta Water Facilities)  
5 in 1960. Bulletin No. 76 states that, after 1981, operation of the SWP and CVP “will  
6 necessitate importation of about 5,000,000 acre-feet of water annually to the Delta from north  
7 coastal streams...” (SDWA-169, Bulletin 76 Report to the Legislature, December 1960, p.  
8 13.) This water would come from the Klamath, Smith, Van Duzen, Eel and Trinity Rivers.  
9 However, with the exception of diversions from the Trinity River, **that water never**  
10 **materialized** because of the 1968 passage of the Wild & Scenic Rivers Act. None of that  
11 water was ever developed, which means that the system starts off each year 5 MAF short.

12 The State Board began a round of hearings leading up to a Water Quality Control Plan  
13 that was adopted in 1995. The Board then proceeded to hold long evidentiary water rights  
14 hearings that led to D-1641 in late 2000, which implemented the 1995 water quality control  
15 plan. The Monterey Agreement later removed the permanent shortage section 18(b) from the  
16 State contracts, which would have required DWR to permanently reduce allocations to  
17 contractors based on actual supply available. This, of course, was part of the continuing  
18 pattern of intentionally avoiding the implications and consequences of the fact that the water  
19 supply is limited. (See, generally, Exhibit SDWA-169, Bulletin 76 Report to the Legislature,  
20 December 1960.)

21 ~~A water availability analysis, which would likely need to be preceded by an~~  
22 ~~adjudication, is essential to separating real water from paper water and addressing the legal~~  
23 ~~rights to it. Assessment of availability is an initial step in addressing a seriously~~  
24 ~~oversubscribed system, operating in deficit, and incapable of meeting competing demands.~~  
25 ~~The necessary second step is a comprehensive water quality analysis to evaluate the impacts~~  
26 ~~to pollutant concentration and residence time from diverting additional dilution flows around an~~  
27 ~~already degraded estuary. These two steps are initial requirements before the state Board~~  
28 ~~may approve the currently requested change in point of diversion.~~

1 ~~A WAA is necessary and required to determine if any water is available for a proposed~~  
 2 ~~project. The lack of a WAA strongly suggests that Petitioners know that the limited amount of~~  
 3 ~~“wet” water remaining in its junior water rights permits would be deeply troubling to decision~~  
 4 ~~makers who are obligated to balance accepting billions in additional public debt with the~~  
 5 ~~actual potential of new water being generated by a project.~~ Importantly, it must be  
 6 remembered that building new diversions and tunnels will never generate a drop of additional  
 7 water for the state.

8 **IV. ~~V.~~ Petitioners Have Failed to Perform an Adequate “No Injury” Analysis That**  
 9 **Considers All Types of Injury and All Legal Water Users**

10 Based on past operations, it is reasonable to assume that the Delta Tunnels would be  
 11 operated by Petitioners without sufficient protections to prevent injury to Delta farmers and  
 12 cause unreasonable effects on Delta ecosystems. So-called "dual conveyance" would remove  
 13 fresh water supplies from Delta ecosystems, ~~further reduce the diversity of aquatic habitats for~~  
 14 ~~failing species,~~ and literally de-water the water rights of sustainable Delta farms and  
 15 communities with senior water rights. This statement is not conjecture; it is the ONLY  
 16 conclusion that can be reached as a result of the initial failure of Petitioners to even  
 17 acknowledge that there were other legal, and senior, water users and water rights holders in  
 18 the Delta that had the potential to be adversely affected by the CWF. (SWRCB-1, Petition for  
 19 Change, dated August 25, 2015, p. 2 [stating “N/A” diversions that may be affected due to  
 20 proposed change].) This action to initially ignore all other legal water users is concerning as  
 21 Petitioners have a duty to show “no injury” (see Water Code, § 1702) in order for the Petition  
 22 to be granted.

23 **A. Petitioners Failed to Consider Potential Injuries to Individual Water Rights**  
 24 **that Grant of the Petition May Cause**

25 The Board may only grant permission to change a water right where the petitioner  
 26 shows that “the change will not operate to the injury of any legal user of the water involved”  
 27 (Wat. Code, § 1702), and the petition itself must include “sufficient information to demonstrate  
 28 a reasonable likelihood that the proposed change will not injure” any legal water user (Wat.  
 Code, § 1701.2, subd. (e); see also Cal. Code Regs., tit. 23, § 794, subd. (a)). Implicit in this

1 provision is the concept that in showing that the change will not injure “any legal user” of the  
2 water, the petitioner must consider individual harm to individual users. (See generally, *Lester*  
3 *v. Doestch* (1935) 7 Cal.App.2d 551 [court considers specific impacts to the water rights of  
4 potentially injured party].)

5 Petitioners have failed to address this “No Injury” mandate, even though a list of Delta  
6 water users was later added to the Petition. (SWRCB-2, Errata Addendum to Petition, Exhibit  
7 C, dated September 11, 2015.) There is still no identification of legal users of groundwater  
8 along the path of the tunnel alignment that has been produced by Petitioners. (See SJC-70-75  
9 [testimony and mapping showing known groundwater wells in the vicinity of the proposed  
10 Tunnels and other related project components].) Protestants in this hearing submitted  
11 evidence concerning the diversions that could be potentially injured by grant of the Petition.  
12 (See, e.g., LAND-62, Exhibit C [Water Rights within LAND Area]; II-38 [Islands, Inc. water  
13 rights]; LAND-5 and LAND-75 [Bogle water rights protest to Petition, Exhibits A and B], LAND-  
14 6 and LAND-76 [Diablo water rights protest to Petition, Exhibits A and B], LAND-7 and LAND-  
15 77 [Elliot/Stillwater water rights protest to Petition, Exhibits A and B], and II-38 [Ryer Island  
16 diversions].)<sup>2</sup> Petitioners’ witnesses repeatedly confirmed, however, that their injury analysis  
17 did not consider harm to individual water rights or specific representative regions of the Delta.  
18 (September 23, 2016, Meserve Cross Exam of Maureen Sergent, pp. 41:4-42:1 [“Let’s note  
19 that to everyone. They did not investigate individual diversions.”], August 5, 2016, Meserve  
20 Cross Exam of John Bednarski, pp. 180:18-184:18 [second DWR witness confirming that  
21 engineering team had not considered injury to specific LAND member water rights].) Thus,  
22 any conclusion that granting the Petition would cause “no injury” to legal water users is fatally  
23 flawed, as DWR has failed to analyze whether any individual users would be harmed if the  
24 Board grants the Petition.

25 Any properly conducted, and legally sustainable, “No Injury” analysis would require, as  
26 a predicate, a proper and complete study of the existing water rights and legal uses of water

---

27  
28 <sup>2</sup> These Exhibits include reliable listings and/or maps with an accurate and undisputed  
description of the water rights associated with these protestants.

1 that may be injured by construction and operation of the proposed tunnels. (See Wat. Code,  
2 §§ 1701.2, subd. (d), 1702.) DWR's failure to conduct this analysis renders Petitioners' "no  
3 injury" conclusions completely unsubstantiated.

4 **B. Petitioners have Failed to Evaluate Adverse Impacts to Groundwater and**  
5 **Injury to Groundwater Rights Holders and Users**

6 Petitioners' description and defense of the proposed CWF is fatally defective because  
7 it fails to acknowledge, identify, or evaluate groundwater rights users (well water users) whose  
8 groundwater supplies will be interrupted or permanently lost as a consequence of the  
9 construction of the CWF and the proposed tunnel alignment and other project components in  
10 both Sacramento and San Joaquin Counties.

11 Groundwater well information is readily available from within DWR itself, along with  
12 other sources. Along the identified "tunnel" route, one can see, with the naked eye, hundreds  
13 of houses, farms, and industrial and commercial developments, many of which rely upon  
14 groundwater as their sole source of potable water. Petitioners have failed to identify these  
15 properties.

16 Even without on-site field investigations, Petitioners could easily have obtained this  
17 information, and they surely would have done so if they had even considered the potential  
18 injury to legal users of groundwater if the proposed CWF project is approved. The Written  
19 Rebuttal Testimony of Brandon Nakagawa, San Joaquin County's Water Resources  
20 Coordinator, and the exhibits to Mr. Nakagawa's written testimony, clearly illustrate the  
21 feasibility of identifying legal users of water within close proximity to the proposed tunnel  
22 alignment and related tunnel components. (See Exh. **SJC-70**, Written Testimony of Brandon  
23 Nakagawa, and **SJC-72, SJC-73, SJC-74**, and **SJC-75** [Well Log Spreadsheet and Maps  
24 showing well locations near the proposed tunnel alignment].) Using DWR's own Well  
25 Completion Request Form, Mr. Nakagawa's department requested all well completion reports  
26 in the townships, ranges, and sections along the proposed tunnel alignment. (SJC-70, pp. 5-  
27 6.) In response, DWR provided a compact disk containing 134 well completion reports and an  
28 indexed spreadsheet of well records. (SJC-70, p. 6.)

1 As described in Mr. Nakagawa's testimony, from this DWR-provided data Mr.  
2 Nakagawa's department was able to identify the locations of domestic, irrigation, and public  
3 supply wells in the vicinity of the proposed tunnels. (*Ibid.*) As reflected on the Well Log  
4 Spreadsheet (SJC-72) and the three maps (SJC-73, SJC-74, and SJC-75), in this manner Mr.  
5 Nakagawa's department was able to identify and locate seventy-six (76) well sites within the  
6 vicinity of the proposed tunnels.

7 What is noteworthy in this is not that the San Joaquin County's Water Resources  
8 Coordinator was able to locate the well sites using information from DWR itself. Rather, the  
9 critically important point is that Petitioners did **not** avail themselves of DWR's well completion  
10 report database to identify groundwater uses that could be injured by construction and  
11 operation of the proposed tunnels. (See SJC-70, p. 7 [Mr. Nakagawa's opinion concerning  
12 specific potential injury to users of groundwater]; see, also, LAND-35 (Revised), Written  
13 Testimony of Josef Tootle, pp. 1-6, [potential injury to groundwater users in the vicinity of the  
14 proposed tunnels].) Plainly, having not even bothered to identify legal users of groundwater  
15 within the vicinity of the proposed tunnels, Petitioners are in no position to assert that they  
16 evaluated potential injury to such users and legal uses of groundwater. They have failed  
17 utterly to carry their burden of proof under Water Code sections 1701 and 1702.

18 Of significant importance under California water rights law, groundwater rights may not  
19 be severed by condemnation from the overlying lands beneath which the groundwater is  
20 located. Hence, the taking of groundwater rights, or the interference with percolation of water  
21 into groundwater aquifers, or the loss of recharge as a direct or indirect consequence of the  
22 construction of the tunnels, necessitates the condemnation of the overlying land as well.  
23 These anticipated takings will result in the significant displacement of farms, residences, and  
24 industrial and commercial enterprises, and further result in significant adverse environmental  
25 impacts that DWR appears to have failed to identify as part of its defective analysis of the  
26 consequences of their CWF proposal. Petitioners' failure to recognize the necessity of a full  
27 and comprehensive CEQA evaluation of these potentially adverse impacts to groundwater  
28 rights holder and users demonstrates the paucity of Petitioners' efforts to fully mitigate the

1 significant adverse environmental impacts of their CWF on private landowners along the  
2 tunnel route.

3 Groundwater injuries are not limited to the Delta. According to Project documents,  
4 preferred Alternative 4A “would increase water transfer demand compared to existing  
5 conditions.” (SWRCB-3, SDEIS/RDEIR, p. 4.3.1-9.) As presented by Protestant  
6 AquaAlliance in its case in chief, injury to groundwater pumping in the Sacramento Valley  
7 would increase as a result of grant of the Petition. (See Aqua-1-Revised-2, Vlamis  
8 Testimony, pp. 7-8.) Further groundwater depletion in the Sacramento Valley from  
9 groundwater substitution if additional water is transferred as a result of the operation of the  
10 Delta Tunnels would deplete already stressed Sacramento Valley groundwater supplies and  
11 also do great damage to the Sacramento Valley economy, including agricultural and municipal  
12 water users north of the Delta.

13 **C. Petitioners Have Failed to Consider Injuries to Legal Water Users in the**  
14 **Region Downstream of the Project.**

15 Petitioners proposed changes to water diversions in the Delta. The CWF would shift  
16 the point of diversion at which Sacramento River water is exported to a new point in the  
17 northern Delta. This would shift the impacts of export diversions directly to the Sacramento  
18 River (and away from the San Joaquin), ~~the last river in the Valley supporting substantial, but~~  
19 ~~vulnerable salmon and steelhead populations.~~ In spite of this massive change, Petitioners  
20 have failed to show that the proposed change would not injury other legal users and uses of  
21 water.

22 Petitioners failed because they provided *no analysis* of the effects of their proposal on  
23 the other legal users of water in the Delta region downstream of the proposed new diversions.  
24 In short, to address the rule’s requirement to show that the proposal would spare all legal  
25 users of water from injury, the Petitioners should have described the proposal’s causal  
26 sequence of effects and substantiated the underlying explanations of those effects. They also  
27 should have substantiated the risks and uncertainties associated with these effects.  
28 Moreover, they should have evaluated these effects on each, every, and all of the other legal

1 users of water in the Delta region. Petitioners have not made any attempt to evaluate the  
2 effects of the proposed change on even one---let alone all---legal users of water in the Delta  
3 region.

4       Operation of the proposed Tunnels would decrease freshwater inflows and increase  
5 the residence time of river flows in the Delta not otherwise diverted into the proposed Tunnels.  
6 (See SJC-4, pp. 4-5, 11 [discussing how operations would create a drought equivalent  
7 condition on the Sacramento River and increase residence times].) The attendant significant  
8 economic costs resulting therefrom, slower and lower water flows would increase pollutant  
9 concentrations, water temperatures, and dissolved oxygen problems in the Delta—all of which  
10 further compromise water supplies for senior water rights holders, ~~fish habitat~~, recreational  
11 activities and land uses, ~~and protected and declining fisheries~~ and other beneficial uses of  
12 water. Petitioners have not even acknowledged that these significant new expenses that will  
13 be borne by legal users of water as a direct result of the CWF in the context of the no injury  
14 standard, let alone conducted an ~~environmental and~~ economic analysis of these  
15 consequences to disclose these facts to the SWRCB.

16       **D.     Petitioners Impermissibly Rely Upon Compliance With D-1641 to Attempt**  
17       **to Satisfy the “No Injury” Rule**

18       Petitioners’ representatives incorrectly rely upon the CWF’s projected compliance with  
19 the requirements of SWRCB D-1641 as their “solution” to their failure to comprehensively  
20 evaluate and address the “No Injury” rule, and the anticipated victims of the environmental  
21 damage to be caused by the Delta Tunnels. (See, e.g., DWR-3, slide 8, DWR-4 Errata, slide  
22 23.) DWR witness Sergent testified that DWR relied on statutory requirements, including  
23 compliance with D-1641 to determine whether the Petition would cause injury to water users.  
24 (DWR-53, Testimony of Maureen Sergent, pp. 4:9-16, 13:7-20; see also September 23, 2016  
25 Cross Examination of Maureen Sergent, p. 36:7-25.) Sergent’s testimony clarified DWR’s  
26 position that a reduction in water quality that does not violate D-1641 “would not interfere with  
27 the ability of other legal users to put water to beneficial use.” (Id., p. 13:7-20.) Testimony by  
28 a DWR modelling expert further indicated that DWR had not considered potential injuries to

1 water users not caused by a D-1641 exceedance. (August 24, 2016, Meserve Cross-Exam of  
2 Parviz Nader-Tehrani, pp. 236:3-237:8.)

3 DWR's modelling expert stated that he had examined D-1641 compliance at points  
4 throughout the Delta, but that his testimony included only those points he thought were  
5 "representative." (August 24, 2016, Meserve Cross-Exam of Parviz Nader-Tehrani, pp. 236:3-  
6 237:13.) Dr. Nader-Tehrani testified "D-1641 locations . . . would be the best representation of  
7 . . . making an assessment on whether there is a – an impact to water quality for legal users  
8 of water." (August 24, 2016, Meserve Cross-Exam of Parviz Nader-Tehrani, p. 237;4-8.)  
9 While Dr. Nader-Tehrani explained that he looked at representative locations, Hearing Chair  
10 Dudoc confirmed that "that information is in the modeling result, but not necessarily in the  
11 testimony." (Id. at p. 237:9-13.)

12 Yet, the SWRCB Water Quality Control Plan does not define water rights; it was not  
13 intended to, nor does it address the issues related with the rights and protections afforded to  
14 legal users of water in the Delta. Petitioners' statements and conclusions regarding this matter  
15 are legally and factually incorrect. According to the Basin Plan itself, it "is not to be construed  
16 as establishing the quantities of water that any particular water right holder or group of water  
17 right holders may be required to release or forego to meet the objectives of this plan."  
18 (SWRCB-27, p. 3.)

19 **E. Petitioners Have Failed to Consider Several Types of Injury that a Petition**  
20 **Grant Could Cause to Legal Users of Water**

21 Though Petitioners reasoned that legal water users would only be injured if the Project  
22 caused violations of D-1641, this ignores other ways that legal water users can be injured.  
23 Testimony given by Petitioners' water rights witness, Maureen Sergent, that "(a)lthough there  
24 may be changes in SWP/CVP storage levels or releases. . . . this would not injure other legal  
25 users because it is my understanding that such water users do not have a right to stored  
26 water releases from the SWP/CVP" is factually incorrect. (DWR-53, Testimony of Maureen  
27 Sergent, p. 11:10-19.) Legal Users in the Delta are entitled to realize the water quality  
28 benefits of release flows from DWR storage facilities because the SWRCB mandates that

1 DWR release of those waters to protect and preserve Delta water quality, in part for the  
2 benefit of legal users. (Wat. Code. §§ 11460, 12205.) Both CVP and SWP are required to  
3 obey the county of origin laws (Wat. Code §§ 10505, 10505.5), and both must supply stored  
4 water to protect Delta water needs and supply flow by the Delta Protection Act.

5         Petitioners cannot “track” stored water once it is released from storage, rather,  
6 Petitioners rely on meeting water quality flows and objectives to determine when water can be  
7 diverted. (See generally, September 23, 2016, Meserve Cross Exam of Maureen Sergent,  
8 pp. 35-37.) Consequently, the newly proposed diversion points would result in the diversion  
9 of water from the Sacramento River watershed that is not currently being diverted. (See RTD-  
10 10-rev-2, Testimony of Tim Stroshane, p. 7, ¶¶ 22-23 [discussing different source water  
11 proposed for diversion by Petitioners].)

12         Reduction of Sacramento River flows through the Delta will cause injury to legal users  
13 within the South and Eastern Delta. Petitioners and their contractors have an obligation to  
14 ensure that legal downstream users do not suffer increases in the concentration of agricultural  
15 runoff and pollutants from within the contractors’ areas/places of use. The diversion of water  
16 by the Delta Tunnels from the newly proposed North Delta diversion points will cause such an  
17 increase in contamination and pollution of the waters to which the South Delta and Eastern  
18 Delta senior legal users are entitled, and Petitioners have an obligation to fully identify and  
19 prevent injury before the Delta Tunnels may be permitted by the SWRCB.

20         Moreover, the specific and quantifiable remedies and specific mitigations for these  
21 clearly expected injuries, in violation of the “No Injury” rule, have not been identified by  
22 Petitioners. Inasmuch as these injuries, if the promises made by Petitioners’ representatives  
23 are left unfulfilled, will result in tens of millions of dollars in annual damages to legal users of  
24 water. As a result, annualized cash expenses to pay the injured legal users of water,  
25 dependent upon rainfall years, should be fully calculated (after all of the affected legal users  
26 and their points of diversions are identified and evaluated) using a “to-be-developed” actuarial  
27 model, and incorporated into the estimated sale price of water from the CWF to the  
28 Petitioners’ various contractors.

1 Petitioners should accept the financial burden of paying the injured parties annually as  
2 a condition/term of any permit that they might secure for the CWF. Prior practices by which  
3 the Board relied on erroneous promises and mistakes that resulted in massive unintended  
4 expenses and injury being passed onto unsuspecting victims of poorly conceived “public  
5 projects” are contrary to laws and regulatory enactments to avoid such injury that currently  
6 apply in California.

7 **F. Petitioners’ Reliance on Mitigation Measures that Purportedly**  
8 **Reduce Impacts on Water Users to Less than Significant Levels as**  
9 **Equivalent to “No Injury” is Incorrect**

10 The Board only has the discretion to grant permission to change a water right  
11 where the petitioner shows that “the change will not operate to the injury of any legal  
12 user of the water involved” (Wat. Code, § 1702), and the petition itself must include  
13 “sufficient information to demonstrate a reasonable likelihood that the proposed  
14 change will not injure” any legal water user. (Wat. Code, § 1701.2, subd. (e); see also  
15 *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1365.) Instead of attempting to  
16 demonstrate that the petition change would satisfy the “no injury” standard, it appears  
17 that Petitioners may be relying upon mitigation measures designed to satisfy the  
18 requirements of CEQA. There is no evidence, however, that implementing mitigation  
19 measures would be sufficient to demonstrate that the petition change will not cause  
20 injury to legal users of water.

21 CEQA requires agencies to perform environmental review of all projects that  
22 require discretionary approvals, and where the project may cause significant  
23 environmental impacts, the agency must propose “feasible” mitigation measures which  
24 are designed to “minimize significant environmental impacts, not necessarily to  
25 eliminate them.” (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality  
26 Act (Cont.Ed.Bar 2016) § 14.2, p. 14-4 [citing 14 Cal. Code Regs, tit. 14 (“CEQA  
27 Guidelines”), § 15126.4, subd. (a)]; Pub. Resource Code, § 21002.) Moreover, CEQA  
28 permits an agency to approve a project even though it will cause impacts whose  
significance cannot be mitigated; the agency need only adopt a “statement of

1 overriding consideration.” (Pub. Resources Code, § 21081.) If the lead agency makes  
2 findings that mitigating certain impacts is within the jurisdiction of another agency, or  
3 would be economically, socially, legally, or otherwise infeasible, it may approve the  
4 project despite the existence of significant environmental impacts. (*Ibid.*; CEQA  
5 Guidelines, § 15091.) In contrast, the “no injury” rule does not provide the Board  
6 discretion to approve a petition even if granting it causes injury. (Cf. Wat. Code, §  
7 1701.)

8  
9 Even assuming the mitigation measures would be effective in reducing impacts  
10 that may be correlated to water users and uses to less than significant levels under  
11 CEQA, that cannot be equated to “no injury” under applicable water law principles. A  
12 determination of significance under CEQA is based on the significance of an impact  
13 based on the adopted threshold. (CEQA Guidelines, § 15064.7.) If a project causes  
14 impacts that do not reach this threshold, no mitigation is necessary. There is no  
15 parallel authority under the “no injury” rule that allows the Board to adopt a threshold  
16 that allows some injury to water users without mitigating that injury. Section 1702 is  
17 unambiguous that the Board “shall” find that the change “will not operate to the injury  
18 of any legal user” before allowing a change. (Wat. Code, § 1702.) The difference in  
19 structure between the “no injury” rule and the CEQA process indicates that the two are  
20 not equivalent, and Petitioners have presented no authority indicating otherwise.

21 Petitioners cannot rely on future implementation of mitigation measures  
22 proposed in the uncompleted environmental review documents to establish that the  
23 Project will not injure legal water users because, as explained, the two standards are  
24 designed for different purposes. (Cf. *Guinnane v. San Francisco City Planning Comm.*  
25 (1989) 209 Cal.App.3d 732, 742 [CEQA process not equivalent to other regulatory  
26 review processes].) Moreover, even where the environmental review documents  
27 indicate that the level of significance after mitigation may be “less than significant,” that  
28

1 conclusion (which is still in draft form) does not equate to no injury under water rights  
2 laws.

3 **V. ~~VI.~~ Petitioners' Reliance on the Concept of Adaptive Management**  
4 **Demonstrates that they have Failed to Properly Characterize, Describe, and**  
5 **Evaluate the Proposed Project**

6 Petitioners' proposal to use the legislatively undefined concept of "Adaptive  
7 Management" (AM) to disguise or simply wish away significant deficiencies in the CWF  
8 proposal renders the project, as proposed, untenable. With this dearth of critical information,  
9 including a meaningful project description and a predicate Water Availability Analysis, it is not  
10 possible to perform a responsible "no injury" analysis. The testimony of Jennifer Pierre uses  
11 the concept of adaptive management exactly as the Petition for Change of Point of Diversion  
12 does, to avoid defining the project, with the result that legal users of water cannot identify  
13 injury from the approval of the project. (DWR-51, Testimony of Jennifer Pierre, pp. 10-14.)

14 The National Research Council [NRC] reviewed the Bay-Delta Conservation Plan  
15 [BDCP], the predecessor of the Water/Fix, and prepared a report titled "A Review of the Use  
16 of Science and Adaptive Management in California's Draft Bay-Delta Conservation Plan."  
17 The NRC observed: "Despite numerous attempts to develop and implement adaptive  
18 environmental management strategies, many of them have not been successful. (Gregory et  
19 al., 2006; Walters 2007) Walters (2007) concluded that most of more than 100 adaptive  
20 management efforts worldwide have failed primarily because of institutional problems that  
21 include lack of resources necessary for expanded monitoring; unwillingness of decision-  
22 makers to admit and embrace uncertainties in making policy choices; and lack of leadership in  
23 implementation." (CSPA-24, National Research Council, A Review of the Use of Science and  
24 Adaptive Management in California's Draft Bay Delta Conservation Plan, 2011, p. 6.)

25 DWR has repeatedly asserted that it operates its projects for DWR's contractors. It  
26 has never admitted that it has a greater legal obligation to the SWRCB for compliance with all  
27 of the terms of the water rights permits that the SWRCB has issued to DWR. In fact, DWR  
28 has made a long record of failing to comply with the SWRCB mandates with respect to its  
water quality obligations and its water rights permits by using its' stronger bargaining position,

1 in spite of the fact that it has junior water rights, to exact contractual agreements from in-Delta  
 2 senior water rights holders to avoid lawsuits of DWR's failure to meet mandatory water quality  
 3 standards in the Delta. Given the obvious and multitudinous deficiencies of the Petition,  
 4 adaptive management cannot save the Petition; it has become little more than a catch phrase  
 5 that is meaningless even to Petitioners' own representatives.

6 **VI. ~~VII.~~ CONCLUSION**

7 Contrary to Petitioners' characterizations, the proposed Petition is not a minor change.  
 8 Petitioners would have this Board believe that adding 9,000 cfs of diversion capacity to the  
 9 northern Delta, some 35 miles away from Petitioners' existing diversions is somehow a "minor  
 10 change." As presented in the cases in chief of various protestants, this change would have  
 11 an existential effect on water users and beneficial water uses in the Delta.

12 In their case in chief, Petitioners largely ignored the injury to the thousands of  
 13 diversions that would be downstream of the newly proposed intakes. Petitioners failed to  
 14 even attempt to specifically identify potential injury to thousands of legal users of water to  
 15 whom they owe a duty of "No Injury", let alone include sufficient information to demonstrate a  
 16 reasonable likelihood that the proposed change will not injure any other legal user of water.  
 17 (Wat Code, § 1701.2, subd. (d).) This cavalier approach affirms the fears of the other legal  
 18 users of Delta water that any promises from Petitioners made now would be meaningless  
 19 after they secure the permits they desire. Petitioners' reliance on a broad range of proposed  
 20 operations (B1 to B2) and the application of adaptive management to guide future operations  
 21 does nothing to prevent injury to legal users of water because Petitioners have made no effort  
 22 to know who they are and how they use their senior water rights. For these reasons and the  
 23 reasons discussed above, the Petition is incomplete and inadequate, and to grant it would  
 24 both violate California law and be contrary to the public interest.

25  
 26 Dated: ~~March 23~~ April 19, 2017

  
 \_\_\_\_\_  
 Marc Del Piero