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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES BUREAU OF RECLAMATION REQUEST FOR A CHANGE IN POINT OF DIVERSION FOR CALIFORNIA WATER FIX	**WRITTEN TESTIMONY OF MARC DEL PIERO** **(Part 2 Case in Chief)**

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Mokelumne River Water and Power Authority

I, Marc Del Piero, declare:

I am an attorney, licensed to practice law in the State of California since 1980 (CA. Bar #91644). During the course of my professional career and during the last four decades, my public sector and private activities, employment, and practice have encompassed broad and complex issues related to the California law of water rights, the California Environmental Quality Act (CEQA), water quality issues within California, and the Public Trust Doctrine. I received both a Bachelor of Arts degree in History, with emphasis on California history, and a Juris Doctorate (J.D.) from Santa Clara University in 1975 and 1978, respectively. From 1978 through 1980, I served as the Vice-Chair of the Monterey County Planning Commission.

In 1981, I was elected to the Monterey County Board of Supervisors, and in that capacity served from 1981-1992 as a member, and twice as Chair, of the Board of Directors of the Monterey County Water Resources Agency, the largest surface water rights (appropriative rights) holder within that jurisdiction. During my tenure, I personally wrote and implemented many County land use plans, general plans and their attendant CEQA documents, local coastal plans prepared pursuant to the California Coastal Act, and environmental policies mandating the protection and preservation of surface water and groundwater resources, protected coastal wetlands, endangered species, and prime and productive agricultural lands. The vast majority of these mandatory policies remain in full force and effect within that jurisdiction. Additionally, during my tenure in that position, I served from 1981-1986 as the Monterey County Board of Supervisors' appointee to the local agency board of the San Felipe Division of the Central Valley Project (CVP). During my career in public service and as a regulator, I have been responsible for, reviewed, and voted (either for approval or denial) upon the certification of over 150 Environmental Impact Reports (EIR's) and hundreds of negative declarations on projects subject to CEQA.

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

From 1992-1999, I served as the Vice-Chair of the State Water Resources Control Board (SWRCB). In 1992 and 1993, while I was serving on the SWRCB, we came very close

to adopting a Water Rights Decision (Draft Decision 1630) that would have addressed many if not all of those desired outcomes sought for the Delta today. I supported that draft and its policies. However, the then-administration intervened to keep the Board majority from adopting the draft decision, which subsequently led to adoption of the Bay Delta Accord in 1994, followed by the establishment of the CalFED process, and the DWR-initiated "Monterey Amendments" to the State Water Project ("SWP") contracts. These band-aid, compromise actions clearly failed to keep the promise of "balance" and to protect the public trust resources in the Delta. Further, the condition of the Delta, its eco-systems, its public trust and agricultural resources, and its endangered species and fisheries became even worse by the actions of a subsequent administration that allowed DWR to increase real exports from the Delta in 2001 that pushed the ecosystem into near collapse by 2007.

I participated in most of the evidentiary hearings leading up to the adoption of SWRCB Decision 1641 prior to the end of my tenure on the SWRCB in 1999. D-1641, which was intended to effectively implement the rushed Water Quality Plan objectives of 1995, was and is a failure. Its "teeth" were knocked out prior to its subsequent adoption in 2000. It has failed to provide adequate Delta outflow to San Francisco Bay. It has failed to protect the Delta public trust resources and protected fisheries. It failed to obligate major rights holders to actually meet or exceed all of the water quality standards that the Board adopted to guarantee the sustained health of the estuary and its public trust resources. It has failed to guarantee equivalency for the protection of environmental resources as against the needs of export contractors. Moreover, the Petitioners have effectively ignored D-1641 when strict compliance with its mandates became inconvenient due to export demands on the projects. Petitioners' assurances to the SWRCB that they will comply with water quality standards in the revised 2006 Water Quality Plan update if their dual tunnels are approved lack sincerity, intellectual honesty, and a successful past track record. It is clear now that precise, detailed, and measurably enforceable terms amended onto the Petitioners' permits, with financially punitive penalties for violations by the Petitioners and their customers, are the only way to

stop the Petitioners' periodic and errant violations of water quality standards and of the senior water rights of other innocent parties in the Delta and that serve Delta communities generally.

The intervening years have brought no improvement to the crisis in the Delta in spite of DWR's and the CVP's often repeated, but undelivered, promises of "no changes" in their operations. Fisheries have collapsed, massive public trust resource declines have been ignored in spite of the state's duty to protect and preserve them, and no affirmative actions to address the failure to produce needed in-Delta water supplies and water quality improvements to meet SWRCB adopted objectives have been implemented with any level of success. In 2009, as a private citizen, I drafted and delivered my concerns in an e-mail, and advised the senior consultant to the Assembly Water, Parks, and Wildlife Committee (Mr. Alf Brandt) of my concerns related to the package of bills related to the Delta and its massive environmental problems. (See attached e-mail dated August 30, 2009).

Moreover, the legislative mandates intended to be achieved by the Delta Reform Act of 2009 (i.e. the co-equal goals both of Delta environmental habitat restoration with constitutionally mandated public trust resources protection/enhancement and of water resource development), which were intended and anticipated to be addressed concurrently in the Bay Delta Conservation Plan (BDCP) have been intentionally abandoned by the Petitioners. The intent of the 2009 Act demonstrates why a single EIR/EIS was required for the Delta and these projects. The cumulative adverse impacts of the "tunnels' have been ignored. By 2010, most of the Delta fisheries and fish populations, including those protected under both the state and federal ESA's, were either collapsed, or in "free fall". The August 3, 2010 SWRCB Final Report on Delta Flow Criteria (Res. 2010-0039) (www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/final_rpt.shtml) calls out the necessity of increasing real wet water flows into the Delta to save its constitutionally protected public trust fisheries. The legislatively mandated "in stream flow" criteria (CA Water Code Sec. 85086) for Delta ecosystem protection of public trust resources has been ignored by the Petitioners, because to acknowledge the state's duty to provide those mandatory public trust flows would necessitate a public admission by the Petitioners

that there is no longer any water in the Delta to fill the "twin tunnels" of the so-called California WaterFix.

Petitioners are in violation of the CEQA Guidelines prohibiting "piecemealing" of the mandatory comprehensive identifications, evaluations, and mitigations of the devastating "significant adverse effects" of the so-called California WaterFix on what remains of the Sacramento-San Joaquin Delta eco-system. The CEQA Guidelines (See Guidelines Sec.15165) mandate that potential adverse environmental impacts from a complex, multi-faceted "project" must be evaluated pursuant to the guidelines at the earliest time during the environmental review process and in a comprehensive manner.

The intentional abandonment by the California Department of Water Resources/Petitioners of the comprehensive BDCP, and with it the legislatively mandated habitat conservation and restoration component of the "co-equal" goals for the Delta (which is now euphemistically referred to in the SWRCB Notice as the under-funded and stalled "California EcoRestore"), directly violates the long-standing CEQA mandates prohibiting "piecemealing" of the evaluations of large projects that are clearly articulated in the *Laurel Heights* case (47 Cal. 3rd 376 (1988)) and its progeny. The results of the Petitioners' wrongful bifurcation of their CEQA duties, and the abandonment of BDCP in 2015, was and is intended to obfuscate, to not evaluate, and to not mitigate the massive adverse, cumulative, and unmitigated environmental impacts and damages to public trust resources, particularly fisheries, of the California WaterFix that the Petitioners are ill-prepared and under-funded to address in the manner that the Legislature promised to the public would take place. These actions by Petitioners undercut the validity and credibility of the EIR and the EIR process and necessitates a determination by the SWRCB that the lead agency (CA DWR) has knowingly, intentionally, and impermissibly biased the now incomplete CEQA document to promote DWR's self-selected "preferred alternative". The EIR process is defective due to Petitioners' failure to fairly produce a CEQA required, unbiased "alternative analysis" and Petitioners' intentional omission of the adverse impacts of the WaterFix and the necessitated mitigations, particularly for fisheries, in the Delta. Petitioners' implying that it is premature to

address/mitigate these identifiable adverse impacts, hence their reference to the "future" CA EcoRestore, is a violation of CEQA. CEQA prohibits reliance upon speculative future actions by regulatory agencies as satisfying the Petitioners obligations to identify and implement meaningful and enforceable mitigations for its adverse impacts. These are grounds for the SWRCB, that bears the constitutional mandate and burden of protecting public trust resources, to deny the project under CEQA.

Of particular note, and indicative of the absence of any meaningful activities by Petitioners to restore, or even preserve, public trust fisheries and resources in the Delta, it is the first time of which I am aware that none of the fisheries and environmental resources experts from the SWRCB's 2010 hearings to establish Delta Flow Criteria are participating in the current hearings. Given the paucity of participation by the resource and fishery protection agencies, I hereby incorporate by reference into my submissions, for CEQA and all other purposes, the comments and particularly answers to SWRCB-posed questions which were presented to the SWRCB during the 2010 hearing by the California Water Impact Network, the California Department of Fish and Game, U.S. National Marine Fisheries Service and the U.S. Department of the Interior, all of which are listed on the SWRCB website. Given the lack of additional data and new information presented during these current hearings, these statements and answers from the agencies charged with the protection of our state's natural, public trust, and fisheries resources must be considered the most current and applicable submissions for the SWRCB to consider and utilize in its deliberation as to whether to approve or deny the California WaterFix. (See SWRCB web link below.)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/

I herein incorporate by reference, as my own, each, every, and all documents, laws, regulations, correspondence, citations, cases, reports, exhibits, and any other references and resources referred to in my testimony as my own comments related to CEQA compliance of the CA WaterFix environmental documents and for all other purposes. I further incorporate by reference my prior "Written Rebuttal Testimony" which I presented to the SWRCB on April 19, 2017 (SJC 76R).

I am testifying as an expert based upon my personal and special knowledge, personal experiences, practice and education about the California law of water rights and water quality issues as they relate to the Delta, about the California Environmental Quality Act (CEQA), and about the rights, mandated duties, and legal obligations (both met and unmet) of the water rights holders whose diversions of water directly and significantly impact the environmental, public trust, agricultural, water quality, and potable water supplies of the Sacramento-San Joaquin Delta. My Statement of Qualifications is being submitted concurrently herewith. (See Statement of Qualifications of Marc Del Piero, Exhibit CSPA-209.)

1. Summary of Testimony

My testimony is intended to address my tenure at the State Water Resources Control Board, the decisions and hearings in which I was a participant and/or Hearing Officer for the Board, the development and application of SWRCB protections of the public trust resources in the Mono Lake and Big Bear cases as the result of the holdings in the *Audubon* and Racanelli decisions, the Board's public trust duties in the context of "Delta eco-system collapse", and the application of these to the subject petition and its related issues pending before the SWRCB. I will testify that there is not currently enough water left in the Delta to sustain the Public Trust resources of the Delta, and that the Petitioners are wrongfully relying on ancient water rights that are nothing more than worthless "paper water rights."

I will testify that the so-called WaterFix will have massive adverse environmental impacts on the Delta eco-system's constitutionally protected public trust resources and massive adverse environmental impacts and displacement of other beneficial land uses of water by senior water rights holders that cannot be mitigated pursuant to CEQA guidelines because all of the surplus water in the Delta is gone. I will assert that the State has "over-committed" on paper (paper water rights) the available water resources of the Delta. I will also testify as to the massive inadequacy and lack of specificity or enforcement that any acceptance by the SWRCB of the Petitioners' proposed "adaptive management" concepts would impose upon regulatory staff charged with protecting the public trust resources of the

Delta or with enforcing Delta flow requirements as against junior, or even senior appropriators. “Adaptive management” by its definition means that the Petitioners have not identified or developed the CEQA-required environmental information to establish a “baseline” upon which to predicate (and fund) a comprehensive, measurable, and enforceable mitigation program to offset the massive adverse environmental impacts that the WaterFix will cause. “Adaptive management”, I will testify, has systematically failed (where it has been applied) to protect environmental and public trust resources, and sadly has now become the Petitioners’ replacement for the old adage of “Kicking the can down the road”. I will also testify as to the lack of public benefit, and the potentially withering economic costs that the dual tunnels will have on the residents of California.

2. Pertinent Background Facts

Since the permits underlying the California WaterFix were issued back in the 1920s and 1930s, California has enacted constitutional provisions prohibiting unreasonable use and diversion of water, a comprehensive Water Code, the California Environmental Quality Act, Public Resources Code, §§ 21000 et seq. (“CEQA”), state endangered species acts, water quality acts, environmental review acts and a Fish and Game Code that - while imperfect - assist in the equitable distribution of available water and, arguably, protection of pelagic and salmonid fisheries. California’s regulatory and resource agencies are charged with implementing and enforcing these laws. The present history (the last 17 years) of shortages would have been prevented if these laws had been complied with and enforced. They have generally been ignored because the resources decisions necessitated by their enforcement are consequential and very difficult for the state and many interested parties that receive the benefits of water exported from the Delta.

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

Further, the legislative adoption of CEQA in 1973, and the California Supreme Court's "Audubon Decision" in 1983 have both expanded and placed far greater mandatory, legally enforceable burdens on lead agencies (in this case DWR) and upon regulatory agencies, including the SWRCB. These agencies must now produce detailed and comprehensive evaluations and specifically enforceable mitigations of the potential adverse environmental consequences of their public projects, and quantifiable determinations of actual available "wet" water (to which a proponent holds actual water rights) to avoid adverse impacts to "public trust", fishery, and environmental resources.

I served for over seven years as the "attorney member" of the California State Water Resources Control Board. My tenure was perhaps best characterized for the widely heralded SWRCB Decision 1631, the "Mono Lake Decision", and the lesser known SWRCB WR 95-4 (the "Big Bear" decision). Both addressed significant "public trust" issues that were resolved by the SWRCB. The Mono Lake hearing lasted for 44 days, involved 14 parties and 19 attorneys, and ended twenty years of litigation and controversy between the Los Angeles Department of Water and Power and the Committee to Save Mono Lake/National Audubon Society. I was the sole hearing officer for this matter and also on the Big Bear case. Both the Mono Lake case and the Big Bear case were brought before the SWRCB because of the holdings in the 1983 National Audubon case (33 Cal.3d 419) and the 1986 Racanelli Decision [182 Cal. App. 3d 97], and the duties and mandates placed upon the SWRCB which flowed therefrom.

The holdings in the *National Audubon* case are widely known. The California Supreme Court held that the water rights permits and licenses held by the Los Angeles Department of Water and Power (DWP) were granted by the State of California in absence of consideration of the effects of the diversions on the public trust resources of the Mono Basin, and that the allocation of water from the basin streams should be reconsidered. The state has a *"duty"* to protect the public's *"common heritage of streams, lakes, marshlands, and tidelands".* This duty is reflected in and flows from Article X, Sec. 2 of the California Constitution and the "reasonableness of use doctrine". The court also ruled that the State Water Resource Control Board (SWRCB) and the courts have concurrent jurisdiction to consider the effect of water diversions on public trust resources. The court ordered a comprehensive EIR/EIS to be prepared (and heard by the SWRCB) to determine the adverse impacts of DWP's diversions upon the public trust resources of Mono Lake.

Unlike the current matter before the SWRCB, the SWRCB conducted the Mono Lake evidentiary hearings after the full draft EIR/EIS had been completed, given to the Board, and circulated to the public for comment. In other words, the Board got to read the full final draft EIR/EIS before holding its evidentiary hearing so that it was able to fully understand the nature and context of the complex testimony related to the environmental issues that the Board needed to resolve. Unlike the current situation, the EIR/EIS was not under the exclusive control of a self-interested Petitioner facing massive, unfunded mitigation expenses and the loss of wet water supplies, due to the need to mitigate its' historic adverse impacts upon the Delta's public trust resources and eco-system. This is particularly true if the Board, as part of additional CEQA mitigations, choses to implement and compels compliance with its' adopted 2010 Delta Flow criteria (SWRCB Res. 2010-0039) by requiring water releases (pursuant to those legislatively mandated, SWRCB adopted flow standards) from the Petitioners pursuant to the Racanelli decision. (See Below). Moreover, in the Mono Lake case, the SWRCB acted, subject to final approval by the court, as the lead in determining the magnitude, extent, and length of mitigations of the adverse impacts of the DWP diversions upon the Mono eco-system.

The Racanelli decision followed the *Audubon* decision by three years and addressed the water quality, water rights, and public trust issues of the Sacramento – San Joaquin Delta. It did so within the context of the articulated duties and powers of the SWRCB found in the *Audubon* decision. Judge Racanelli, who passed away in October of 2017, found in his written

decision that the SWRCB “has the power and the duty to provide water quality protection to the fish and wildlife that make up the delicate ecosystem within the Delta.” It goes without saying that Justice Racanelli assumed that there would be at least some fresh water necessary to sustain fisheries remaining in the Delta eco-system.

Further, although he did not live to see his charge to the SWRCB achieved, Justice Racanelli concluded, without equivocation, “that the modification of the projects’ permits (Petitioner DWR and CVP projects’ permits that are the subject of the current hearing) in order to implement the water quality standards is a proper exercise of the Board’s water rights authority.” This modification referred to the necessary reduction of water diversions in order to preserve and protect in-Delta water quality for public trust resources, including fishing, recreation, boating, and aesthetic values and uses.

The Court specifically went on to say, “Nonconsumptive” or "instream uses," too, are expressly included within the category of beneficial uses to be protected in the public interest. Thus, the Board must likewise consider the amounts of water required "for recreation and preservation and enhancement of fish and wildlife resources" (Water Code § 1243)”. Finally, Justice Racanelli stated, “In its water quality role of setting the level of water quality protection, the Board's task is not to protect water rights, but to protect "beneficial uses." The Board is obligated to adopt a water quality control plan consistent with the overall statewide interest in water quality (§ 13240) which will ensure "the reasonable protection of beneficial uses" (§ 13241, italics added). Its legislated mission is to protect the "quality of all the waters of the state ... for use and enjoyment by the people of the state." (§ 13000, 1st par., italics added.) In his decision, Judge Racanelli went on to state that in its role of issuing appropriation permits, “the Board has two primary duties: 1) to determine if surplus water is available and 2) to protect the public interest.” Further, and perhaps most applicable and damning of the current process and hearing, Justice Racanelli ruled that “Section 1375 declares the basic principle that: "As a prerequisite to the issuance of a permit to appropriate water ... [t]here must be unappropriated water available to supply the applicant." (Subd. (d).) [4]). Accordingly, in reviewing the permit application, the Board must first determine whether surplus water is available, a decision requiring an examination of prior riparian and appropriative rights. (*Temescal Water Co. v. Dept. Public Works* [182 Cal. App. 3d 103] (1955) 44 Cal. 2d 90 [280 P.2d 1].) In exercising its permit power, the Board's first concern is recognition and protection of prior rights to beneficial use of the water stream.

(*Meridian, Ltd. v. San Francisco*, supra, 13 Cal. 2d 424, 450.) Yet, "the Board's estimate of available surplus water is in no way an adjudication of the rights of other water right holders (*Temescal Water Co. v. Dept. Public Works*, supra, 44 Cal.2d at p. 103); the rights of the riparians and senior appropriators remain unaffected by the issuance of an appropriation permit." (*Duckworth v. Watsonville Water etc. Co.* (1915) 170 Cal. 425, 431 [150 P. 58].)

This clear and unequivocal articulation of the law by Justice Racanelli, when coupled with the equally clear and articulated continuing mandatory duty of the SWRCB to supervise, monitor, preserve, and protect public trust resources, as stated by the California Supreme Court in the Audubon decision, has demonstrated the massive deficiencies and intentional flaws and violations of CEQA in the current matter before the Board.

In the CEQA review currently being produced by the Petitioners, there has been no detailed evaluation, or even identification, of available "surplus water" (no required Water Availability

Petitioners contend that analysis has been conducted that would allow them to fill their proposed twin tunnels after the constitutional mandates of protecting public trust resources have been satisfied. Compliance with CEQA and Water Law mandates, such an analysis by the "lead agency" of the actual water supply, have not been conducted. In fact, rather than conducting comprehensive modelling to factually determine the actual availability of "wet water" that may be appropriated without adverse environmental effects on public trust resources in the Delta, the current Petitioners are taking the same position that was held by the Los Angeles Department of Water and Power in the Mono Lake case. DWP refused to consider that it was knowingly causing massive and unmitigated environmental damage to the Mono Lake eco-system because it said that it had pre-existing water rights permits. They held that position until Superior Court Judge Figone ordered the preparation of an independent, unbiased EIR/EIS. The order to prepare an unbiased CEQA document to truthfully reveal the actual condition of the massive environmental damage to the public trust resources being caused by DWP diversions effectively overturned DWR's historic "immunity claim" and its misplaced reliance upon old permits that were granted in violation of the prerequisite environmental criteria required to be considered pursuant to the *Audubon* decision.

Here, Petitioners are also ignoring the reality that their misplaced reliance on their very old appropriative permits have contributed mightily to the near collapse of the second largest estuarine eco-system on the west coast of North America. Absent the 5,000,000 maf of water

that was never developed from North Coast reservoirs that were never built for the SWP, Petitioners continue holding onto the legal fiction that their WaterFix's massive adverse environmental impacts, and the huge mitigation requirements necessitated thereby, are avoidable because their old, 1960's era water rights permits provide Petitioners with a false armor against their obligations to comply with the past fifty years of legal mandates found in CEQA, *Audubon*, Racanelli, the Reasonable Use doctrine, and the Public Trust doctrine. Petitioners could have affirmatively accepted the facts that Delta fisheries are in collapse and initiated their own reduction in diversions to address the obvious environmental and public trust damages that Petitioners have cause for decades, but they did not. Petitioners could have acknowledged the duties of the SWRCB, as stated by *Audubon* and Racanelli, and petitioned the SWRCB to pre-emptively evaluate Petitioners' permits and paper water rights to determine the true baseline of the Delta, as required by CEQA, but they have not. For the past thirty years, Petitioners could have affirmatively "Done the Right Thing" to protect the Delta's public trust resources by being good "trustees of the state's natural resources", but they have not. Petitioners have systematically placed their contractors' private interests before their obligation to be good stewards of the state's public trust resources. And clearly, as the environmental crisis in the Delta grows worse and as public trust resources collapse, Petitioners, according to their Petition, have continued to promote the fiction that their proposed "increased reliability" (the export of more water) from their planned dual tunnels will not have any additional adverse environmental impacts, and will achieve "protecting, restoring, and enhancing the Delta ecosystem". They will not.

Clearly, *National Audubon Society v. Superior Court*, supra, 33 Cal. 3d 419, clarified the scope of the "public trust doctrine" and held that the state as trustee of the public trust retains supervisory control over the state's waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust. fn. 41 (Id, at p. 445.) [43] "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions". [182 Cal. App. 3d 150] No vested rights bar such reconsideration."(33 Cal.3d at p. 447, italics added.).

Finally, both the *Audubon* Court and Justice Racanelli agreed that, "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." I believe it is feasible now. Now is the time for the SWRCB to exercise its' authority and duty of continuing supervision, before acting on Petitioners' WaterFix application. The SWRCB has adequate evidence before it that Petitioners' application will unreasonably and adversely affect endangered fish and wildlife, and other protected public trust values and resources, by allowing the wrongful removal and export of more water from the Delta than may be allowed because of the failure to establish and affirmatively enforce permit terms to implement adopted Delta flow criteria for the protection of public trust resources.

Affirmative and decisive actions like those that are called for here are not previously unheard of at the SWRCB. The SWRCB exercised these powers and authorities in both the Mono Lake decision and the Big Bear water rights order. The adopted SWRCB standards to deal with public trust issues are well stated in SWRCB WR 95-4 (Big Bear):

"This Order is an exercise of the SWRCB's continuing authority under the "public trust doctrine" and the "reasonableness doctrine". Under the public trust doctrine, the State retains supervisory control over navigable waters and the lands beneath those waters, as well as non-navigable waters that support a fishery. The purpose of the public trust is to protect navigation, fishing, recreation, fish and wildlife habitat and aesthetics. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 189 Cal.Rptr. 346, 357, cert. denied, 464 U.S. 977.) No person can acquire a vested right to appropriate water in a manner harmful to interests protected by the public trust. But if the public interest in the diversion outweighs the harm to public trust values, water may be appropriated despite harm to public trust values. When it 'applies the public trust doctrine, the SWRCB has the power to reconsider past water allocations, and it has a duty of continuing supervision over the taking and use of appropriated water. (*National Audubon Society*, 189 Cal.Rptr. at 363-366.)

The SWRCB and the courts have concurrent jurisdiction to conduct proceedings applying the public trust doctrine. In recognizing the SWRCB's jurisdiction over diversion and use of all waters, the California Supreme Court in *National Audubon Society* emphasized the SWRCB's broad authority over allocation of water, including the power to adjudicate all competing claims; even riparian claims. Measures required under the public trust doctrine

must, in accordance with the decision in *National Audubon Society* at 189 Cal.Rptr. 362, meet the test of reasonableness under California Constitution Article X, section 2. Since this Order establishes requirements for protection of the public trust uses of Bear Creek, the SWRCB has applied the reasonableness doctrine to the flow requirements in this Order. The reasonableness doctrine, which is set forth at California Constitution Article X, section 2, applies to the use of all waters of the state. It limits every water right. (*Peabodv v. Valleio* (1935) 2 Cal.2d 351, 40 P.2d 486.) The SWRCB and the courts have concurrent jurisdiction to conduct proceedings to adjudicate issues under the reasonableness doctrine. (*Environmental Defense Fund, Inc. v. East Bav Municipal Utility District* (1980) 26 Cal.3d 183, 161 Cal.Rptr. 466) The SWRCB has jurisdiction to conduct administrative proceedings applying the reasonableness doctrine to all water rights, including pre-1914 water rights that are not subject to the permit and license system administered by the SWRCB. (Imperial Irrigation District v. State Water Resources Control Board (1986) 186 Cal.App.3d 1160, 231 Cal.Rptr. 283.) To determine what constitutes a reasonable use or diversion the SWRCB must consider the totality of the circumstances. The reasonableness of a use or diversion varies as conditions change, and is dependent on the facts of the case. (*Environmental Defense Fund, Inc*., supra.) To determine the reasonableness of a particular use, it is necessary to consider the effect of that use on other uses. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 158 Cal.Rptr. 350.) In this case, both the stream fishery uses and the numerous uses of the lake are beneficial uses."

Herein, the SWRCB has embodied, in one of its earliest water rights orders addressing public trust protection, the guidance, standards and procedures that the Board needs to follow to effectively address and comply with its constitutional obligations and legal duty to protect and preserve the public trust resources of California. This "formula" was also included in the order to give future guidance to SWRCB members so as to avoid the withering criticism of the Board's inaction in addressing the public trust issues (two years before my appointment) that was memorialized in the 1990 "Cal Trout II" decision (218 Cal. App. 3d 187). This is the "formula" that should have been followed, but has not been pursued, to resolve the continuing decline and collapse of the Delta over the past 17 years. This is the "formula" that the SWRCB should now follow to comply with its duties under CEQA and *Audubon*, and to protect its Delta public trust resources, instead of continuing with the fatally flawed California WaterFix process.

Although the Mono Lake case lasted far longer (46 hearing days) and was far more complex than Big Bear, the "formula" referenced above was largely the format that the SWRCB followed to meet and satisfy its public trust duties and its' CEQA obligations. Ultimately, that decision, which required the City of Los Angeles to increase lake levels and restore much of the lake's tributary ecosystems, set the precedent for the protection and restoration of public trust resources in California streams. It also guaranteed a sustainable, long term water supply for the City of Los Angeles. None of the litigants appealed the decision, in spite of tremendous threats made by multiple parties to sue the SWRCB prior to our adoption of the final decision ordering the restoration of the Lake and its public trust resources. Clearly, in the current WaterFix case, the SWRCB should take guidance from this previous experience wherein appropriative water rights were reduced to protect and preserve our public trust resources over the objection of a water rights holder.

3. The Dual Tunnels are not in the Public Interest

While Vice-Chair of the SWRCB, I was appointed by CalEPA Secretary James Strock as the California Environmental Protection Agency's Dredging Coordinator for all dredging and related water quality and port issues in the State. A significant portion of this additional assignment included particular emphasis on the protection of the San Francisco Bay and the Delta of the Sacramento-San Joaquin Rivers. I served on the 20-member group with the U.S. Army Corps of Engineers that prepared the Long Term Dredging Disposal Plan for all harbors in San Francisco Bay/Delta. I raise these facts because the dual tunnel project now proposes to build conveyance facilities that will allow up to an additional 9000 cfs of Delta water to be diverted to the tunnels.

The removal and export of that magnitude of water from the Sacramento River will significantly and irreversibly adversely affect the natural scouring that takes place in Delta channels, particularly during peak winter flows. The reduction of these scouring flows will have significant adverse and unmitigated environmental and economic effects upon the protected public trust values of boating, navigation, shipping, and recreational on-water uses. The long-term adverse effects of the WaterFix on navigation are not in the public interest. Moreover, the removal of this massive magnitude of flowing water, and the resultant lowering and slowing of flows in the Delta, will have a huge adverse environmental impact upon water quality, temperature, the protected public trust values of aesthetics and Delta riparian habitat.

These significant adverse environmental effects and the necessary and expensive dredging mitigation measures to resolve and mitigate these impacts on public trust lands/resources have not been considered nor mitigated by the Petitioners as required by CEQA.

Additionally, the proposed WaterFix has been proven not to be in the public interest because evidence from Petitioners' own contractors, and their sub-contractors, demonstrate that the WaterFix is both unsustainable and unaffordable. These detailed and extensive findings and the factual evidence validating these findings and conclusions are embodied and demonstrated in the California Water Impact Network's November, 2017 report titled "The Unaffordable and Unsustainable Twin Tunnels: Why the Santa Barbara Experience Matters". (CWIN-210) This report, which I incorporate by reference, demonstrates definitively that the WaterFix will not result in any increased reliability in water deliveries to Santa Barbara County recipients of SWP water. These conclusions were reached by using far more precise and accurate data than has been offered by Petitioners to the SWRCB. Further, the anticipated costs (increased monthly water bills) that will be borne by average residential rate-payers in that county will increase by staggeringly high amounts to service the bonded indebtedness that the Petitioners will assume to build the tunnels. In other words, the WaterFix cannot be found to be in the "public interest" because it will significantly raise water bills of customers who are already receiving the service without providing those customers with any significant enhancement of water service.

The WaterFix would, however, effectively, and wrongfully, pass the capital costs of infrastructure development for developers of future housing projects/developments onto the unsuspecting existing residential rate-payers of agencies receiving Petitioners' water. It is not reasonable for the SWRCB to conclude that the WaterFix is in "the public's interest" when Petitioners' WaterFix plan is really a "bait and switch" scheme that results in innocent residential customers being unknowingly compelled to pay for and subsidize the infrastructure expenses of future private developers that currently lack water supplies for their projects. Moreover, and equally troubling, is the information as is concluded in the ECONorthwest 2013 report titled "Bay-Delta Water Economics of Choice", which I incorporate by reference. (CWIN-205) Given that Petitioners have refused to produce a Water Availability Analysis either as a separate document or as part of their CEQA obligations, a serious question presents itself that would once again call into question the absence of any benefit to the "public interest". It is the lack of identified, real "wet water", which is surplus to the needs of

beneficial uses in the Delta and the needs of senior water rights holders to which the Petitioners owe a duty of "no harm".

As I have previously testified, the WaterFix currently lacks the necessary appropriative water rights permits to properly pursue Petitioners' proposed project. (See my prior testimony presented to the SWRCB on April 19, 2017). The changes in the places of diversion and the massive uncertainty as to the source of the water to be appropriated through the tunnels has never been identified, explained, or clarified by Petitioners, nor have these issues been evaluated pursuant to CEQA/NEPA requirements and guidelines. Petitioners cannot continue to rely upon fictitious "paper water" to rationalize or justify the validity of their application. Without question, the Petitioners need a new appropriative water rights permit before they can proceed.

This is important because the SWRCB may draw upon the wisdom of Justice Racanelli's decision once again to determine if the WaterFix is contrary to or in support of the "public interest". In his decision, Justice Racanelli succinctly stated, "In its role of issuing appropriation permits, the Board has two primary duties: 1) to determine if surplus water is available and 2) to protect the public interest." In other words, as part of its' deliberative and regulatory processes and its CEQA considerations, the SWRCB must ask, and receive decisive, meaningful, and specific answers to, questions that will reveal whether the WaterFix is in the "public interest" of the residents of California. These mandatory, but not so complex, questions that the SWRCB must ask to reveal the "public interest" of a project include:

1. Where is the water coming from? Are any senior rights being placed at risk by the proposal? Why? It is in the "public interest" to preserve the hierarchy of appropriative water rights and the beneficial uses resulting therefrom from increased disputes and environmental litigation.
2. Are there potential adverse environmental impacts from the proposal? Why? It is in the "public interest" to avoid significant adverse environmental impacts or effects resulting from new development proposals.
3. In spite of possible violations of state water law and CEQA, why is such an application for a new appropriation (that places senior water rights holder interests at risk) being sought? It is in the "public interest" to not pursue applications with CEQA

consequences before regulatory bodies and decision makers if the proposals contain possible violations of state law/regulations on their face.

4. Was a Water Availability Analysis (WAA) conducted that shows available surplus water and to comply with CEQA? If not, why not? It is in the "public interest" for regulators to know if surplus water exists before acting on new water rights permits that may result in conflicts or litigation between senior water rights holders, new petitioners, and the SWRCB.
5. Will diversions diminish in-Delta water quality? By how much? It is in the "public interest" and a legal mandate that the SWRCB know if SWRCB adopted water quality standards are going to be compromised by a petitioner's application, particularly if the SWRCB is not in control of the preparation of an independent, unbiased CEQA review.
6. What are the likely significant adverse environmental effects of the diversions and how will Petitioners guarantee long-term fresh water supplies in the Delta to mitigate the significant adverse impacts of their proposed tunnels on Delta water quality and protected public trust resources? It is in the "public interest" for identified mitigations for a Petitioner's significant adverse environmental impacts are compelled to be fully implemented and sustained of the long-term period of the impacts to protect the public and environmental resources, including public trust resources.
7. Are Petitioners prepared to accept precise, specific, and detailed enforcement terms amended into their permits and controlled by the SWRCB to guarantee to the SWRCB that Petitioners will meet or exceed mandates to protect senior water rights holders' interests and protected public trust resources? It is in the "public interest" to make public agencies comply with their legal duties and obligations, including CEQA compliance and protection of public trust resources, to avoid regulatory decisions that fester litigation or disputes.
8. How can the SWRCB insure independent confirmation of Petitioners' long-term compliance with on-going mitigation requirements? It is in the "public interest" for the authority of the SWRCB to be respected and for the public to have confidence in the SWRCB to take enforcement actions to protect, preserve, and defend public trust resources and "the public's interests".
9. Will Petitioners affirmatively accept that the SWRCB must meet its' constitutional duties to protect public trust resources by exercising SWRCB control and independent review

of Petitioners' operational plans, Petitioners compliance with those plans, and permit terms, and Petitioners' compliance with SWRCB directives? It is in the "public interest" to ensure that the eco-system of the Delta, its public trust resources, and the interests of senior water rights holders and the residents of the state are protected pursuant to the requirements of the state constitution, the regulatory and quasi-judicial decisions of the SWRCB, the requirements of the Water Code, and the requirements of CEQA. Absent definitive and affirmative answers to these questions, the WaterFix is not in the public interest.

The ultimate result of the SWRCB refusing to proceed with the consideration of the WaterFix until these questions are asked and answered in a fashion that guarantees the protection of Delta public trust resources and Petitioners' full and effective compliance with CEQA, including accepting (and paying for) enforceable and sustained implementation of mitigation measures and programs, will be to finally compel the Petitioners to comply with their legal duties and obligations as articulated over 30 years ago in the Audubon and Racanelli decisions.

4. Old Paper and New Pipes Do Not Produce New Water Resources

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 constitutionally protected public trust resources, senior water rights holders, and in-Delta water rights holders. Petitioners' misleading characterization of the proposed project 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. To put Petitioners' reliance on their old water rights permits into context, there have been 5 Popes, 16 Olympic Games, and 12 U.S. Presidents since the old California Water Rights Board issued those four ancient permits without any environmental review or CEQA compliance (CEQA became law over a decade later).

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 infrequently, "paper water" results from (or is "created" by) the flawed representations of over-enthusiastic design engineers promising that there is more "wet" water in a river system than actually exists. These mistakes sometimes happened because of a lack of reliable hydrologic information. Sometimes (it has been postulated), during historically difficult economic times in the state, sufficiently large "water" yields needed to be identified by the designers to decision makers because the project would not be built (and the engineers no longer employed) if identified (to-be-developed) water supplies were inadequate to support the sale of construction bonds secured by the anticipated cash flow of the project water sales to potential customers. These are the historic systemic "flaws" now identified in the 2013 ECONorthwest "Bay-Delta Water Economics of Choice" report. (CWIN-205) These are the kinds of misrepresentations in the deliberative and regulatory approval process that CEQA was enacted (in part) to prohibit.

Current Petitioner testimonials supporting the flawed WaterFix proposal continue to refer back to decisions and water contracts entered into in the 1960's. Petitioners would have the SWRCB members ignore the 60 years of history and consequences of DWR's water use and the massive population growth and corresponding development of the State of California and expansion of its attendant legal mandates, including the Public Trust doctrine, over the past 50+ years. The truth is that, without the requisite Water Availability Analysis, that is required to comply with CEQA guidelines, and without evaluating potential harm to public trust resources and other water users, Petitioners are asking for a new water rights permit that will allow the SWP and CVP to increase the amount of water diverted from the Delta by characterizing that increase, euphemistically and deceptively, in terms of "improved reliability." In fact, the proposed change will constitute a new water right, as part of the range of operations expands an existing right to appropriate a greater amount of water (1.2 million-acre feet) in Boundary 1, lesser amounts in H3 and H4, and uses a different source of water: additional flows from below rim dams diverted underneath the Bay-Delta. This is unlawful under Cal. Code Regs., title 23 § 699 and *Jackson Rancho County Water District v. State Water Rights Board* (1965) 235 Cal.App. 2d 863, 879. (See also SJC-78, WR 2009-0061, pp. 5-6.)

"Paper water" is the empty legacy left by former state employees over fifty years ago. Those grants of "fictitious water" should have been revised both through SWRCB reviews of the terms and mandates of the four junior water rights permits held by SWP and through mandatory reductions in permitted diversions (eliminating the fictitious "paper water" and the troubling continuing reliance of Petitioners thereon) during the intervening decades. CEQA now requires, before a decision on a project may be made, that a full evaluation and analysis of these old permits be conducted (a Water Availability analysis) to determine exactly how much real "wet" water exists that is surplus to the needs of current beneficial uses and current senior water rights holders. Those water rights permits, which have not been exposed to the constitutionally required reviews and modifications articulated in the National Audubon decision (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419), suffer from serious and irremediable defects and have resulted in significant and adverse environmental impacts in the Delta, as well as illegal adverse impacts affecting public trust resources, particularly fisheries, and senior water rights holders in the Delta. Petitioners have failed, as part of their legal obligations under CEQA and the Water Code, to conduct these required studies and identify required mitigations, and consequently, the WaterFix will cause unmitigated, significant, adverse and unreasonable effects and impacts upon public trust resources, particularly fisheries, and other land uses and legal water users within the Delta.

The WaterFix and its dual tunnels are proposed by Petitioners as new enhanced conveyance mechanisms to take water across the Delta for increased reliability. As has been disclosed here and previously, these new "pipes" do not impound or store any more water than is already present in the collapsing eco-system of the Sacramento-San Joaquin Delta. The dual tunnels do not create any new water resources and are completely reliant upon the fiction of "paper water" entitlements. Neither "new pipes" nor "old paper" have ever produced additional water resources for a thirsty state. Common sense, however, and the law of political expediency would indicate that a multi-billion dollar capital facilities pipeline will not be built to remain empty. Sooner or later, water to fill it will be taken from the least powerful sources with the least power to resist, the water-dependent public trust resources of the Delta and the fisheries and Delta communities that depend on those resources will be deemed expendable in the face of a massive demand for water from Southern California contractors who are obligated to pay for the otherwise empty pipes. This is the unstated ultimate consequence of the failure to establish specific, dedicated in-Delta water flows and

designated water supplies identified expressly to preserve and protect public trust resources and Delta water quality before billons are spent on "pipes with no water to fill them." One would be challenged to identify a project that is less consistent with "the public interest" than WaterFix.

The SWRCB has a duty to demand and require that a full, complete, and unbiased Water Availability Analysis as part of a full and complete EIR/EIS be presented to the Board, and available for full public comments and review, before the SWRCB conducts its final hearings on the WaterFix. The Board must not approve the WaterFix, as it constitutes an unquestioned source of injury to Delta communities and the public interest, and unmitigated significant adverse impacts upon protected public trust resources that the SWRCB is constitutionally and legislatively charged with protecting. Anything less will intentionally and knowingly undermine the public interest, struggling Delta fisheries, and the mandatory constitutional duties of the SWRCB as articulated in the *Audubon* and Racanelli cases.

5. Petitioners' Reliance on Mitigation Measures that Purportedly Reduce Impacts on Water Users to Less than Significant Levels is Incorrect

Petitioners are confused. The Petitioners are confused about the different standards with which they are mandated to comply under both the CA. Water Code and CEQA. The SWRCB only has the discretion to grant permission to change a water right where the petitioner shows that "the change will not operate to the injury of any legal user of the water involved" (Wat. Code, § 1702), and the petition itself must include "sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure" any legal water user. (Wat. Code, § 1701.2, subd. (e); see also *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1365.) As previously demonstrated, public trust resources, particularly endangered fisheries, are recognized legal users of water. It will be difficult – most likely impossible -- for Petitioners to meet this clear legal mandate since public trust resources in the Delta have collapsed due to Petitioners' excessive appropriations and are at all-time lows.

So, it appears that, instead of attempting to demonstrate that the petition change would satisfy the "no injury" rule, Petitioners are trying to make new law. It appears that they will be relying upon mitigation measures designed to satisfy the requirements of CEQA, in lieu of meeting the mandates of the Water Code in Sec. 1702. However, there is no "equivalency" between the Water Code "no injury" rule and CEQA requirements. If there was, there would be documentation of the state legislature's express intent for such equivalency in obligations.

There is no evidence that implementing mitigation measures would be sufficient to demonstrate that the petition change will not cause injury to fisheries, public trust resources, or the public interest. Alternatively, there is adequate evidence that the obligation to avoid damage to public trust resources has been frequently ignored by Petitioners. Simply put, Petitioners cannot and do not want to comply with the "no injury" rule, so they are seeking to comply with a less stringent standard, hoping to ultimately find a friendly court later that will re-write the Water Code for the benefit of Petitioners.

CEQA requires agencies to perform environmental review of all projects that require discretionary approvals, and where the project may cause significant environmental impacts, the agency must propose "feasible" mitigation measures which are designed to "minimize significant environmental impacts, not necessarily to eliminate them." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2016) § 14.2, p. 14-4 [citing 14 Cal. Code Regs, tit. 14 ("CEQA Guidelines"), § 15126.4, subd. (a)]; Pub. Resource Code, § 21002.). Petitioners, rather than proposing feasible mitigations for the adverse impacts on fisheries and public trust resources, have simply denied the existence of any adverse impacts of WaterFix on the Delta eco-system. Moreover, CEQA 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 overriding consideration." (Pub. Resources Code, § 21081.) If the lead agency makes findings that mitigating certain impacts is within the jurisdiction of another agency, or would be economically, socially, legally, or otherwise infeasible, it may approve the project despite the existence of significant environmental impacts. (*Ibid.*; CEQA Guidelines, § 15091.) In contrast, the "no injury" rule does not provide the Board discretion to approve a petition even if granting it causes injury. (Cf. Wat. Code, § 1701.)

Even assuming the mitigation measures would be effective in reducing impacts that may be correlated to water users and uses to less than significant levels under CEQA, that cannot be equated to "no injury" under applicable water law principles. A determination of significance under CEQA is based on the significance of an impact based on the adopted threshold. (CEQA Guidelines, § 15064.7.) If a project causes impacts that do not reach this threshold, no mitigation is necessary. There is no parallel authority under the "no injury" rule that allows the Board to adopt a threshold that allows some injury without mitigating that injury. Section 1702 is unambiguous that the Board "shall" find that the change "will not operate to the injury of any legal user" before allowing a change. (Wat. Code, § 1702.) The

difference in structure between the "no injury" rule and the CEQA process indicates that the two are not equivalent, and Petitioners have presented no authority indicating otherwise. As applied to Part 2 of this proceeding, that means that CEQA-based rationale are not available to Petitioners as a means of circumventing the fact that the proposed project will inflict significant injury on fisheries, public trust resources, and Delta communities generally.

Finally, Petitioners cannot rely on future implementation of mitigation measures proposed in the uncompleted environmental review documents to establish that the Project will not injure public trust resources, fisheries or Delta communities because, as explained, the two standards are designed for different purposes. (*Cf*. *Guinnane v. San Francisco City Planning Comm*. (1989) 209 Cal.App.3d 732, 742 [CEQA process not equivalent to other regulatory review processes].) Moreover, even where the environmental review documents indicate that the level of significance after mitigation may be "less than significant," that conclusion (which is still in draft form) does not equate to "no injury" to the interests at issue here, which are legally protected by the requirements of Water Code section 1702**.**

6. Petitioners' Reliance on the Concept of Adaptive Management Demonstrates that Petitioners Have Failed to Properly Characterize, Describe, and Evaluate the Proposed Project

Petitioners' proposal to use the legislatively undefined concept of "Adaptive Management" (AM) to disguise or simply wish away significant deficiencies in the WaterFix proposal renders the project, as proposed, untenable. The National Research Council [NRC] reviewed the Bay-Delta Conservation Plan [BDCP], the predecessor of the Water/Fix, and prepared a report titled "A Review of the Use of Science and Adaptive Management in California's Draft Bay-Delta Conservation Plan." The NRC observed: "Despite numerous attempts to develop and implement adaptive environmental management strategies, many of them have not been successful. (Gregory et al., 2006; Walters 2007) Walters (2007) concluded that most of more than 100 adaptive management efforts worldwide have failed primarily because of institutional problems that include lack of resources necessary for expanded monitoring; unwillingness of decision-makers to admit and embrace uncertainties in making policy choices; and lack of leadership in implementation." (CSPA-24, National Research Council, A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan, 2011, p. 6.)

DWR has repeatedly asserted that it operates its projects for DWR's contractors. It has never admitted that it has a greater legal obligation to the SWRCB for compliance with all of the terms of the water rights permits that the SWRCB has issued to DWR. In fact, DWR has made a long record of failing to comply with the SWRCB mandates of its water quality obligations and its water rights permits by using its stronger bargaining position, in spite of the fact that it has junior water rights, to exact contractual agreements from in-Delta senior water rights holders to avoid lawsuits of DWR's failure to meet mandatory water quality standards in the Delta. Given the obvious and multitudinous deficiencies of the Petition, adaptive management cannot save the Petition, and is simply "a catch phrase" that is meaningless even to Petitioners' own representatives.

Finally, The SWRCB may not accept the Petitioners' proposal to use "adaptive management" as this undefined concept is contrary to California law, and would constitute a wrongful "ultra vires" delegation of the SWRCB's constitutional duties and its statutory authority and powers to Petitioners.

7. A Water Availability Analysis Was Required

As the Petition requests a new water right, a WAA was required. (See Wat. Code, § 1260, subd. (k).) The Water Code requires that every application for a new water right submitted to the Board must include "sufficient information to demonstrate a reasonable likelihood that unappropriated water is available for appropriation." (*Ibid.*) It is a prerequisite to issuing a permit that "[t]here must be unappropriated water available to supply the applicant." (Wat. Code, § 1375, subd. (d).) Such an analysis would quantify actual "wet" water availability remaining under DWR's old permits. Omission of this mandatory quantification is fatal to Petitioners' Petition and their case in chief. By failing to produce a WAA, Petitioners have ignored (and are asking the SWRCB to ignore) over seven decades of hydrologic records related to rainfall, runoff, increasing in-Delta and out-of-Delta permanent consumptive uses, water quality changes, flow data, and their own modelling that Petitioners are obligated to use to quantify how much actual "wet" water actually exists for their proposed purposes.

As early as 1934, discussions occurred between the State and Reclamation over a judicial resolution of competing water rights claims in the Sacramento and San Joaquin Basins. Engineers and attorneys in both Reclamation and the old California Water Rights Board advocated for an adjudication of water rights throughout the 1930s because they

questioned whether the CVP had sufficient water rights. In 1939, Frank W. Clark, Chairman of the Water Protection Authority of California wrote to Walker R. Young, Supervising Engineer of the U.S. Bureau of Reclamation in Sacramento, that he concurred with the state engineer that "a judicial determination of existing water rights on the Sacramento and San Joaquin Rivers is necessary in order to operate the Central Valley Project efficiently and successfully and such determination should be effected before the project is placed in operation." (SJC-80 Holsinger-related CVP Documents, 1939-1942, p. 758.)

Adjudication is simply a legal proceeding to correlate water rights to actual water, in accordance with the water code. In 1960, during consideration of the Burns-Porter Act (approving the State Water Project), Senator Stephen Teale, Chairman of the California Senate Interim Committee on Water Projects, asked legendary water rights attorney Walter M. Gleason to submit a legal assessment of the proposed State Water Project. In a 72-page opinion, Mr. Gleason observed that there wasn't "any accurate or proper administrative determination by the State of the extent of the '**surplus'** water which is or will be available in the Central Valley for export." (SJC-81, Opinion of Attorney Water M. Gleason Regarding Various Legal Aspects of Burns-Porter Act, October 4, 1960, p. 17.)- Gleason described the consequences of a failure to identify and quantify vested rights, prophetically detailed the likely collapse of the Delta in the absence of adjudication and said the export schemes were based wholly and entirely on assumptions. (See, generally, SJC-81; see, also, SJC-80, p. 775 [Holsinger observing that the CVP analysis consisted "wholly and entirely in assumptions"].) The legislature narrowly approved the State Water Project. Adjudication never occurred – likely because decision makers knew that adjudication would doom the projects. The collapse of the Delta eco-system took less than 50 years.

The WaterFix, as proposed by Petitioners, will remove massive amounts of fresh water supplies from collapsing Delta eco-systems, further reduce the bio-diversity of aquatic habitats for failing protected species, and de-water the water resources and water rights of hundreds of residential, agricultural, and commercial properties without acknowledging any need for mitigations pursuant to CEQA.

A water availability analysis, which would likely need to be preceded by an adjudication, is essential to separating real water from paper water and addressing the legal rights to it. Assessment of availability is an initial step in addressing a seriously oversubscribed system, operating in deficit, and incapable of meeting competing demands.

The necessary second step is a comprehensive water quality analysis to evaluate the impacts to pollutant concentration and residence time from diverting additional dilution flows around an already degraded estuary. These two steps are initial requirements before the SWRCB may approve the currently requested change in point of diversion.

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

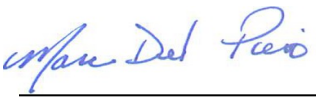
8. CONCLUSION

Contrary to Petitioners' characterizations, the proposed Petition is not a minor change. It is a massive project as defined by CEQA that will have huge and numerous significant adverse environmental impacts upon protected public trust resources and upon environmental resources in general. Petitioners would have this Board believe that adding 9,000 cfs of diversion capacity to the northern Delta, some 35 miles away from Petitioners' existing diversions is somehow a "minor change." As presented in the cases in chief of various protestants, this change would have an existential effect on water users and beneficial water uses in the Delta.

In their case in chief, Petitioners largely ignored the injury to the thousands of diversions that would be downstream of the newly proposed intakes. Petitioners have ignored their duties under CEQA and their obligation under Water Code Sec. 1702. Petitioners have ignored the public trust resources of the Delta and the adverse environmental effects of the WaterFix on those resources. Petitioners failed to even attempt to specifically identify potential injury to thousands of legal users of water to whom they owe a duty of "No Injury", let alone include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water. (Wat Code § 1701.2, subd. (d).) This cavalier approach affirms the fears of the other legal users of Delta water that any promises from Petitioners (to respect public trust resources and senior water rights holders) made now would be meaningless after they secure the permits they desire. Petitioners' reliance on a

broad range of proposed operations (B1 to B2) and the proposed application of adaptive management to guide future operations fails to comply with CEQA and does nothing to prevent injury to public trust resources and legal users of water because Petitioners have made no effort to know who they are and how they use their senior water rights. For these reasons and the reasons discussed above, the Petition is incomplete and inadequate, and to grant it would violate California law, damage constitutionally protected public trust resources, and be contrary to the public interest.

Dated: November 27, 2017



Marc Del Piero