State of California State Water Resources Control Board
**DIVISION OF WATER RIGHTS**

**P.O. Box 2000, Sacramento, CA 95812-2000**
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterboards.ca.gov/waterrights

# PROTEST– PETITION

**PETITION FOR CHANGE in water rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix Project**[1]_

**Elliot-Stillwater Orchards/Delta Watershed Landowner Coalition** has carefully read the Notice of Petition requesting changes in water rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix Project, and Notice of public hearing and pre-hearing conference to consider the above Petition:

Address, email address and phone number of protestant or authorized agent:

Osha Meserve
Soluri Meserve, A Law Corporation
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Sacramento, CA 95814
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**Protest based on the following CONSIDERATIONS**

- ☑ The Petition would cause injury to legal users of water
- ☑ The proposed action will not be within the State Water Resources Control Board's jurisdiction

**David J. Elliot & Sons/Stillwater Orchards** is a grower, packer, and shipper of fresh pears, apples, kiwifruit, and cherries located near Courtland California. The orchards around Courtland, next to the beautiful Sacramento River, are known to produce some of the best pears in the world. Farming in the Delta since 1860, the Elliot family takes pride in its family farming business and is committed to sustainably farming their orchards and protecting the California Delta for future generations.

**Delta Watershed Landowner Coalition** (DWLC) is an affiliation of Sacramento Delta landowners concerned about state and federal activities and projects, and how they may affect local agriculture, fishing, recreation and the environment. DWLC was founded in 2010 by Delta landowners. Other similarly situated landowners may share the objections and injuries described herein and may join Da-

vid J. Elliot & Sons/Stillwater Orchards/DWLC in the future to further elucidate on those injuries.

The above named parties protest against the approval thereof because to the best of our information and belief:

**The proposed Petition would harm legal users of water because of the impacts described below.**

**See description of water rights in Exhibit A and accompanying figure in Exhibit B.**

**Protest based on INJURY TO PRIOR RIGHTS**: To the best of my information and belief the proposed change will result in injury as follows:

As shown herein, the changes that would permit the Tunnels diversions proposed by junior appropriators will injure other legal users of water.

**Surface water level impacts –** The comparative modeling for river elevation (stage) identifies significant declines in stage of up to three feet as a result of the Project in the vicinity of the Tunnel intakes. This reduction in surface water in relationship to pump structures, fish screens, and siphon head elevation has not been fully analyzed. The analysis that has been completed, which is averaged over time and a narrow set of water years and only describes a narrow timeframe, still shows a significant impact to water elevation. In order to determine the full extent of injury, the Project must model and identify the lowest stage created under a full 9,000 cfs drawdown, during low tide, in average and dry water years. In any case, lowered water levels would interfere with the ability of existing diversions in the vicinity of the Tunnel intakes to divert water for beneficial uses. In particular, lower water levels can place diversions out of the water completely during low tides, making intakes unusable. For siphon diversions, even small changes in water level can reduce the rate of diversion, and make diversions less efficient.

The explanation in the Petition of how water level changes would not constitute an injury is insufficient. (Petition, p. 21.) The brief description includes no citation to relevant authority nor does it defend the use of average water levels to describe what will be an impact to other water users in real time. Here, the protestant owns diversions that may be within the vicinity of the CWF Tunnel intakes and would be subject to water level changes constituting an injury. (See Exhibit B.)

**Increased salinity –** The modeling data provided by the Project was only intended to be used for alternatives comparison, and constrains the outputs by us-

ing stored water to ensure compliance with D-1641. Under realistic operational scenarios, the Project would not run the reservoirs to dead pool, and would likely (and have) exceeded D-1641 and the North Delta Water Agency Contract. The locations of the Tunnels intakes allow for salinity to advect up the sloughs and up the Sacramento River. That salinity would reduce water quality, reduce crop values, potentially require new crop practices or types, and impair salinity control in the North Delta.

Fruit crops generally have a low tolerance to salt, and low salinity water historically available in the north Delta is beneficial for fruit orchards production. Increases in irrigation water salinity would lower productivity and lead to other crop damages that have not previously occurred in the north Delta. The Tunnels project would lead to higher salinity, including toxic ions such as chloride, sodium, and boron in the north Delta, which would constitute an injury to water rights.

Both salinity and toxic ion management require well drained soils, which are rare in the much of the Delta. Therefore, irrigation of saline water requires costly engineered drainage measures. Many Delta farms currently depend on high quality irrigation water to maintain low salt root zones on poorly drained soils.

The explanation in the Petition of how increased salinity would not constitute an injury is insufficient. (Petition, pp. 19-20.) For instance, general references to the supposed ability of real time operations to avoid injury are not credible. (Petition, pp. 19-20.) Just considering the past two years, Delta water quality objectives were routinely exceeded, even after relaxations were granted by the Board. There is no reason to believe that the applicants' operation of even more diversion capacity if the Petition is granted would ensure compliance with any standards. Moreover, it is well known that the current Water Quality Control Plan is outdated and is not adequate to protect beneficial uses within the watershed.

**Growth of aquatic weeds and algae –** The recent drought conditions provided an illustration of how operational conditions created by the Project's operations created high temperature, flow and stage conditions that lead to fish mortality, and correlated to widespread aquatic weed infestations in the Sacramento River. Those aquatic conditions would be similar to the effects of the Project under all but the highest flows by removing up to half of the flow of the River, and in droughts even worsened from the 2015 conditions. The growth of these weeds and algae can clog irrigation pumps, fish screens, and lead to toxicity. These impacts would interfere with existing beneficial uses of water and constitute injury.

The Petition does not address the potential for injury from growth of aquatic weeds or algae.

**Groundwater level impacts –** Dewatering during construction of the CWF (intakes, forebay and tunnels) would lower water levels in the shallow water table based on the modeling provided in the Petition. The Project's modeling is not at a sufficient resolution to identify specific impacts and their locations with any accuracy. In any case, it appears that groundwater level lowering from intake construction dewatering will lower the water table and impact agricultural and residential wells. Additionally, lower groundwater levels in irrigated areas would lead to the need for additional application of surface water to meet crop needs that previously were met by a higher water level. This would require additional surface water diversions and increase operational costs for agricultural operations.

Protestant Elliot/Stillwater Orchards grows fruit trees that may be within the area where reductions in groundwater levels are expected due to dewatering for construction of the intake facilities for the proposed Tunnels. Reduced groundwater levels in these areas may impair fruit growth and/or lead to the need for additional irrigation to meet consumptive water use demands.

The Petition does not address the potential for injury from changes in groundwater levels that would result from grant of the Petition.

**Destruction of Protestant Elliot/Stillwater Orchards' Diversion –** As shown in Exhibit B, the middle intake for the proposed CWF Tunnels is located on top of one of Protestant Elliot/Stillwater Orchards' Diversion. Moreover, the orchard irrigated by that Elliot/Stillwater Orchards intake is listed as a parcel that the Petitioners plan to take by eminent domain in order to construct the Tunnels project. The destruction of the Elliot/Stillwater Orchards diversion and the taking of all or part of the orchard served by it constitutes an injury to Elliot/Stillwater Orchard's legal water rights.

In conclusion, the Petition does not include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water from the changes discussed above. (Wat. Code, § 1701.2, subd. (d).) Moreover, mitigation measures designed to address environmental impacts related to water quality, surface water and other impacts would not protect other legal users of water from injury. Notable, many of the mitigation measures pointed at water quality contain a "menu of options" approach with no enforceable performance standard. As discussed above, a performance standard linked to compliance with D-1641 water quality standards is inadequate to protect existing beneficial water uses in that would be injured by the grant of the Petition.

The explanation in the Petition for the reason water users without a contract are not entitled to stored water is also inaccurate. While the Petition refers to "an accounting system" to ensure there are no diversions to storage except when "sufficient unregulated flow is available to satisfy downstream or Area of Origin Uses

(Petition, p. 19), it is also well known that Petitioners' and the state's system of stream gauges as well as modeling is incomplete and inaccurate. There is no credible reason to believe that Petitioners are not already illegally storing water when those flows are required downstream. Thus, the Petitioners have not established that they only store the excess water to which their junior water rights entitle them.

**The proposed action is not within the State Water Resources Control Board's jurisdiction because:**

A complete application for a change in water rights has not yet been submitted for the proposed change. In particular, the proposed operations of the new diversion facilities has not been provided, either individually or in concert with other project features, such as the Delta Cross-Channel, nor has an analysis of the resulting water quality and other impacts of the project been completed. The project water quality modeling and stage elevation estimations are based on assumptions that do not include likely (yet undisclosed) operational scenarios; and, were solely intended for comparative use between CEQA alternatives, and not predictors of actual operational conditions.

As a result of these and other deficiencies, the full nature and extent of injuries on legal users of water and fish and wildlife uses have not been identified and analyzed. The Notice of Petition concedes that inadequate information is available to adequately consider fish and wildlife issues in Part 2 of these proceedings. The same information that is necessary for an adequate analysis of injury to legal users of water. Moreover, harm to legal users of water is not synonymous with significance determinations in draft environmental documents. Here, the Tunnels Petition cites generally to the EIR/EIS as evidence "protective thresholds for beneficial uses currently enacted by the State Water Board will be met." (Petition, p. 19.) Yet the documents comprising the EIR/EIS take up about 48,000 pages, which in large part discuss other alternatives than the currently proposed CWF Tunnels.

The Petition does not contain the minimum information described in Water Code section 1701.2. The Petition deficiency, combined with the scale of the project, the severity of the effects, and the complexity of the analysis, severely constrain the ability of potentially injured legal users of water to effectively respond to the Petition. Based on the incomplete content of the Petition, it is premature and prejudicial for the Board to commence these proceedings on the change Petition at this time, and doing so is outside the Board's jurisdiction.

**Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)**

This protest may be disregarded and dismissed when the subject change Petition described above is withdrawn from consideration before the State Water Resources Control Board. Due to the failure of DWR/BOR to comply with existing permit conditions and to meet water quality standards in D-1641, compliance with additional conditions would not be considered adequate to warrant dismissal of this protest.

**All protests must be signed by the protestant or authorized representative:**

Signature:  Date: 1/5/2016

**All protests must be served on the petitioner**. The following persons were served with this protest by email on January 5, 2016:

| | | |
|---|---|---|
| California WaterFix Hearing Staff | State Water Resources Control Board, Division of Water Rights | CWFhearing@waterboards.ca.gov |
| James Mizell | California Department of Water Resources | James.Mizell@water.ca.gov |
| Amy Aufdemberge | US Department of Interior, Office of Regional Solicitor, Pacific Southwest Region | Amy.Aufdemberge@sol.doi.gov |

# EXHIBIT A

# EXHIBIT A
## Description of Elliot/Stillwater Orchards Water Rights

| Ranch Name | Statement of Water Diversion | Section, Township & Range | Source | Approximate Date First Use Made | Estimated Range of Amount Used per Year, 2010-2012 (Acre-Feet) | Diversion Season | Purpose(s) of Use |
|---|---|---|---|---|---|---|---|
| Rose | S016915 | NW/NW, Sec15, 6N, 4E | Sacramento River | TBD; late 1800s | 1446 - 1538 | Year Round | Irrigation |
| Delta 2 | S017096 | NE/SE, Sec 6, 5N, 4E | Sacramento River | TBD; late 1800s | 586 - 623 | Year Round | Irrigation |
| Sutter | S017383 | NW/NE, Sec 6, 5N, 4E | Sacranento River | TBD; late 1800s | 699 - 743 | Year Round | Irrigation |
| Tower | S018024 | NE/NE, Sec 17, 5N, 4E | Sacramento River | TBD; late 1800s | 471 - 471 | Year Round | Irrigation |
| Wheeler | S018579 | SE/NE, Sec 14, 5N, 3E | Sutter Slough | TBD; late 1800s | 1483 - 1577 | Year Round | Irrigation |
| Randall | S018859 | SW/SW, Sec 29, 6N, 4E | Sacramento River | TBD; late 1800s | 752 - 1045 | Year Round | Irrigation |
| Delta 4 | S018880 | NE/NW, Sec 1, 5N, 3E | Sutter Slough | TBD; late 1800s | 586 - 623 | Year Round | Irrigation |
| Delta 1 | S018886 | NE/SE, Sec 6, 5N, 4E | Sacramento River | TBD; late 1800s | 586 - 623 | Year Round | Irrigation |
| Wilcox | S019554 | SW/SW Sec 22, 6N, 4E | Sacramento River | TBD; late 1800s | 694 - 765 | Year Round | Irrigation |
| Wilson | S019707 | SW/NW Sec 28, 60N, 40E | Sacramento River | TBD; late 1800s | 254 - 270 | Year Round | Irrigation |

# EXHIBIT B

Rose
S016915

Wilcox
S019554

Wilson
S019707

Randall
S018859

Sutter
S017383

Delta-4
S018582

Delta-1
S018579

Delta-2
S018586

Wheeler
S108579

Tower
S018024

**Legend**

- Elliot Intakes
- Transmission Line
- Water Fix Intake
- Fuel Station
- Electrical Substation
- Concrete Batch Plant

Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AEX, Getmapping, Aerogrid, IGN, IGP, swisstopo, and the GIS User Community

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Feet

BSK Associates
Engineers & Laboratories

# Elliot/Stillwater Orchards
# Water Rights Injuries
# from CWF Tunnels