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

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

RESPONSE TO CALIFORNIA
DEPARTMENT OF WATER
RESOURCES' MASTER
OBJECTIONS TO PROTESTANTS'
CASES-IN-CHIEF COLLECTIVELY

1 **BACKGROUND**

2 The State Water Resource Control Board (“Board”) bifurcated the California WaterFix
3 water right change petition hearing into two parts, with Part 1 generally covering human uses of
4 water and Part 2 concerning environmental issues. (Notice of Petition And Notice of Public
5 Hearing and Pre-Hearing Conference to Consider the Petition, Oct. 30, 2015, at p. 2 (hereafter
6 “Notice of Petition”); Hearing Officers' Ruling on Pre-Hearing Conference Procedural Issues,
7 Feb. 11, 2016, at p. 10 (hereafter “Ruling, Feb. 11, 2016”).) The Board modified the scope of
8 Part 1 in response to comments from the January 28, 2016 pre-hearing conference and expressly
9 stated, “Part 1 may address human uses of water that extend beyond the strict definition of legal
10 users of water, including flood control issues and environmental justice concerns.” (Ruling, Feb.
11 11, 2016, at p. 10.) However, it qualified this statement by stating, “If a human use is associated
12 with the health of a fishery or recreation, testimony on this matter should be presented in Part 2.”
13 (*Id.*)

14 The Board later reaffirmed its delineation of the scope of issues between the two Parts by
15 re-stating that flood control issues, environmental justice concerns, or other impacts to human
16 uses of water were appropriate in Part 1, even if these impacts did not amount to injury to a legal
17 user of water within the meaning of Water Code section 1702. (Hearing Officers' Ruling on
18 Revised Hearing Schedule, Revised NOIs, Electronic Service and Submissions, and Other
19 Procedural Issues, March 4, 2016, at pp. 5-6 (hereafter “Ruling, March 4, 2016”).) This
20 delineation did not expand the legal definition of “legal users of water,” but instead served in
21 recognition that flood control issues and environmental justice concerns do not always easily fit
22 within a rigid framework of human uses or environmental concerns. (*Id.*) Further, the Board
23 expressly acknowledged the possibility that some issues might crossover from Part 1 and Part 2.
24 (Ruling, Feb. 11, 2016, at p. 10.)

1 **ARGUMENT**

2 **I. Defining the Scope of the Parts Falls Within the Board’s Discretion**

3 The WaterFix water right change petition hearing is governed primarily by Title 23 of the
4 California Code of Regulations. (Wat. Code, § 1058; Notice of Petition, Oct. 30, 2015, at p. 31.)
5 Adjudicative proceedings, including water right applications and other water right matters, are
6 conducted in the manner the Board deems most suitable for the particular case. (Cal. Code Regs.,
7 tit. 23, §§ 648, 648.5, 760.) The proceedings should be structured so as to secure relevant
8 information expeditiously without unnecessary delay and expense to the parties and to the Board.
9 (Cal. Code Regs., tit. 23, § 648.5, subd. (a).)

10 Here, the Board chose to bifurcate the petition hearing into two parts in order to expedite
11 the hearing process pending environmental review. (Notice of Petition, Oct. 30, 2015, at p. 2.)
12 The Board generally delineated Part 1 to cover human uses of water and Part 2 for environmental
13 impacts (as the second part is to be conducted after completion of CEQA, NEPA, ESA, and
14 CESA processes). (*Id.*) It was within the Board’s discretion to structure the hearing this way, as
15 provided by its broad guiding regulations. Further, the Board’s actions thus far conform with the
16 applicable regulations to structure adjudicative hearings to secure relevant information
17 expeditiously without unnecessary delay or expense to either the parties or the Board.

18
19 **II. The Department of Water Resources’ Objections Misstate the Law and Ignore the**
20 **Board’s Prior Rulings**

21 The Board expressly expanded the scope of Part 1 to cover more than the statutorily
22 required showing that the petition “will not operate to the injury of any legal user of the water
23 involved.” (Wat. Code, § 1702; Ruling, March 4, 2016, pp. 5-6.) This “no injury” showing is
24 only required to approve the petition and does not govern the admissibility of evidence. The
25 Department of Water Resources (DWR) disregards this point by arguing that certain protestants’
26 exhibits should be excluded as irrelevant because they fail to show an injury to a legal user of
27 water. (Department Of Water Resources’ Master Objections To Protestants’ Cases-In-Chief
28 Collectively, Sept. 21, 2016, at pp. 8-9 (hereafter “DWR’s Master Objections”); Department Of

1 Water Resources’ Objections to Restore The Delta Written Testimony and Exhibits Submitted by
2 Protestants in Support of Part 1b Case In Chief and Related Joinders, Sept. 21, 2016, at pp. 4-6
3 (hereafter “DWR’S Objections To Restore The Delta”).) In making these assertions, as described
4 below, DWR contradicts the Board’s prior rulings that expressly expanded the scope of Part 1,
5 mischaracterizes who carries the burden of showing “no injury” and when that burden must be
6 met, and misapplies the standards for relevance and admissibility.

7 A. Scope of the Hearing

8 Throughout its general and specific objections, DWR ignores the Board’s repeated
9 affirmations that Part 1 may include evidence regarding “impacts to human uses”, as well as the
10 more traditional “injury to legal users of water.” (see, e.g., DWR’S Objections To Restore The
11 Delta, Sept. 21, 2016.) Although DWR initially acknowledges human uses as validly within the
12 scope of Part 1, it dismisses the legitimacy of such impacts as a basis to submit evidence—unless
13 the protestant first identifies an “appropriately adopted and germane standard that establishes the
14 threshold of injury, along with information that provides the basis upon which the Board may
15 consider such a claim.” (DWR’s Master Objections, Sept. 21, 2016, at p. 8.) This has the effect
16 of completely negating the Board’s express scoping rulings, as the Board has not yet established
17 a regulatory threshold of injury related to “impacts to human uses” that a protestant could
18 possibly reference. Beyond this, there is no basis for the claim that submission of evidence,
19 under either rubric of “injury” or “impact”, must first identify a regulatory threshold of injury to
20 be admitted or even heard by the hearing officers. Requiring identification of a threshold of
21 injury mischaracterizes both the traditional definition of “injury” within the context of the “no
22 injury” rule, as well as the more expansive definition the Board clearly intended with the phrase,
23 “impacts to human uses.”

24 B. The “No Injury” Rule

25 Water Code section 1702 governs change petitions and provides, “Before permission to
26 make such a change is granted the petitioner shall establish, to the satisfaction of the board, and
27 it shall find, that the change will not operate to the injury of any legal user of the water
28 involved.” This is a codification of the common law “no injury” rule. (*State Water Resources*

1 *Control Bd. Cases* (2006) 136 Cal.App.4th 674, 738-743 [tracing the origins of California’s “no
2 injury” rule to at least the mid-nineteenth century].) It is inapposite that a regulatory threshold
3 could be required to show injury when the concept of injury itself pre-dates the administrative
4 state. Instead, the *State Water Resources Control Board Cases* hold that the proper inquiry is into
5 the adverse effect(s) to the *rights* of others involved. (*Id.*) Thus, exceedance of a regulatory
6 threshold is not required to show injury and certainly not required as a prerequisite to the
7 submission of evidence.

8 It follows, then, that the Board did not intend to require a showing of the exceedance of a
9 regulatory threshold as a prerequisite to presenting evidence intended to show an “impact,” as
10 this standard was meant to be more expansive than the traditional definition of “injury.”
11 Although the Board has not expressly defined the terms “water use impacts” or “human uses of
12 water,” it is clear that it intended these terms to be more expansive than the traditionally defined
13 injury to legal users of water. (Ruling, March 4, 2016, pp. 5-6.)

14 DWR also mischaracterizes who bears the burden of showing injury and when that
15 showing must be made. First, it is DWR as petitioner that must establish that the change will not
16 operate to the injury any legal user of water—in contrast, protestants bear no burden to
17 affirmatively show that the change will cause injury. (Wat. Code, § 1702.) Second, the showing
18 (and subsequent Board finding) of no injury need only occur before the Board grants permission
19 to change the point of diversion—not before evidence may be presented that will inform that
20 determination. DWR’s reliance on the legal standard for a finding of injury is misplaced, as
21 admissibility of evidence is bound by wholly separate legal doctrines, as discussed below.

22 C. Relevancy and Admissibility

23 The issues of relevancy and admissibility are inextricably tied to DWR’s objections based
24 on the scope of Part 1. Many of DWR’s objections based on relevancy or admissibility are
25 derivative of its own overly narrow interpretation of injury and impact.

26 The California Waterfix hearing is governed by chapter 4.5 of the Administrative
27 Procedure Act, Evidence Code sections 801-805, and Government Code section 11513. (Cal.
28 Code Regs., tit. 23, § 648(b).) Government Code section 11513(c) states, “The hearing need not

1 be conducted according to technical rules relating to evidence and witnesses . . . (a)ny relevant
2 evidence shall be admitted if it is the sort of evidence on which responsible persons are
3 accustomed to rely in the conduct of serious affairs, regardless of the existence of any common
4 law or statutory rule which might make improper the admission of the evidence over objection in
5 civil actions.” Further, the presiding officer(s) have discretion to exclude evidence only, “if its
6 probative value is substantially outweighed by the probability that its admission will necessitate
7 undue consumption of time.” (Gov. Code, § 11513, subd. (f).)

8 The phrases “water use impacts” and “human uses of water” are ambiguous, but the
9 Board clearly intended them to at least include “flood control issues and environmental justice
10 concerns.” (Ruling, March 4, 2016, at p. 6.) Environmental justice concerns are broad and far
11 reaching, covering topics from direct human contact with water, financial burdens to water utility
12 customers and domestic well owners, tribal concerns, to the right to safe, clean, affordable, and
13 accessible water adequate for human consumption, cooking, and sanitary purposes. The evidence
14 to support impact claims to these uses is similarly broad and far reaching.

15 It is within the discretion of this Board to exclude the proffered evidence only if its
16 probative value, as it relates to environmental justice concerns, is substantially outweighed by
17 the probability that its admission will necessitate undue consumption of time. (Gov. Code, §
18 11513, subd. (f).) DWR does not seem to contend that the proffered evidence should be excluded
19 entirely; instead it argues that most evidence is relevant only in Part 2. (see, e.g., DWR’s Master
20 Objections, Sept. 21, 2016, at p. 15; DWR’S Objections To Restore The Delta, Sept. 21, 2016, at
21 pp. 1-2 [“Because much of the testimony presented by the additional witnesses and Declarants
22 are [*sic*] irrelevant and cumulative DWR request this information be excluded until Part II of this
23 hearing and then resubmitted where it may be relevant.”].) As evidence relevant to
24 environmental justice concerns must be admitted at some point during the hearing, its probative
25 value in Part 1 will not be substantially outweighed by the probability that its admission will
26 necessitate undue consumption of time. Therefore, all evidence concerning impacts to human
27 uses of water, including flood control issues and environmental justice concerns, should not be
28 excluded at this time.

1 **CONCLUSION**

2 The tortured nature of these proceedings are, in part, a result of attempting to proceed
3 with impacts to human uses before the completion of all environmental review processes. Many
4 of the impacts proposed by protestants are hypothetical in nature precisely because specific
5 impacts have not yet been disclosed through final environmental documents, including the final
6 EIR/EIS and Biological Opinions. However, within the Board’s chosen framework,
7 environmental justice concerns fit within the rubrics of either injury to legal users of water or
8 impacts to water users. The two-part framework for this proceeding is within the Board’s
9 discretion to structure adjudicative proceedings as it deems most suitable. Thus, DWR’s motions
10 to exclude testimony and evidence based on differences in scope between Part 1 and Part 2
11 should not be granted.

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15 Dated: September 30, 2016



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STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING

Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following documents:

RESPONSE TO CALIFORNIA DEPARTMENT OF WATER RESOURCES' MASTER OBJECTIONS TO PROTESTANTS' CASES-IN-CHIEF COLLECTIVELY

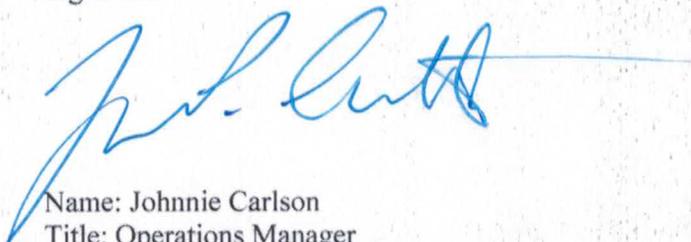
To be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated September 29, 2016, posted by the State Water Resources Control Board at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml.

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

I certify that the foregoing is true and correct and that this document was executed on September 30, 2016.

Signature:



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