

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
2 Robin McGinnis (SBN 276400)
DEPARTMENT OF WATER RESOURCES
3 Office of the Chief Counsel
1416 Ninth Street, Room 1104
4 Sacramento, CA 95814
Telephone: (916) 653-5966
5 E-mail: james.mizell@water.ca.gov

6 Attorneys for California Department of Water
Resources
7

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
9

10 HEARING IN THE MATTER OF
11 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
12 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
13 DIVERSION FOR CALIFORNIA WATER
FIX
14

**DEPARTMENT OF WATER
RESOURCES' OBJECTIONS TO
TESTIMONY AND EXHIBITS
SUBMITTED BY CITY OF
SACRAMENTO AND MOTION TO
STRIKE**

15 INTRODUCTION

16 California Department of Water Resources ("DWR") submits these objections,¹ to
17 the Part 1B testimony and exhibits (case-in-chief) submitted by City of Sacramento in the
18 matter of DWR and U.S. Bureau of Reclamation's (collectively "Petitioners") Request for
19 a Change in Point of Diversion for California Water Fix. DWR also concurrently moves
20 to strike the same written testimony and exhibits. Where applicable in these objections,
21 DWR cites to its concurrently-filed Objections to Protestants' Cases-In-Chief Collectively
22 ("Collective Objections"), which also provides a common Statement of Facts and Legal
23 Standards for DWR's separate responses to Protestants' cases-in-chief.

24 OBJECTIONS/REQUESTS TO EXCLUDE

- 25 I. **The Testimony of James Peifer (CITY SAC-1)**
26 A. **The Testimony of James Peifer (CITY SAC-1) Constitutes Legal
Conclusion**

27 ¹ DWR reserves the right to make additional evidentiary/procedural objections to
28 evidence and exhibits submitted by Protestants in support of their cases-in-chief.

1 Mr. Peifer states on page 2 at paragraph 6 that “Sacramento is a legal user of
2 both surface water and groundwater.” This conclusory statement is both a legal
3 conclusion and inappropriate in testimony, and should be reserved for legal briefing.
4 Furthermore, this statement is unsupported by any citation to document or evidence
5 supporting such a legal conclusion and is therefore inappropriate expert testimony even
6 in the circumstance such a conclusion is permissible in testimony.

7 **B. Lacks Foundation, Constitutes Surprise Testimony and is Not Expert**
8 **Opinion on Which a Responsible Person Would Rely**

9 On behalf of the City of Sacramento, Mr. Peifer provides expert opinion testimony
10 concerning the alleged superiority of the City of Sacramento’s water rights and potential
11 effects of the WaterFix. (CITY SAC-1.) Mr. Peifer fails to specifically support his
12 conclusions about actual impacts of the WaterFix, and therefore lacks sufficient bases or
13 citation to supporting evidence.

14 Expert testimony is required when related to a “subject that is sufficiently beyond
15 the common experience that the opinion of an expert would assist the trier of fact.”
16 (Evidence Code § 801; see also *Miller*, 8 Cal.3d at 702.) However, “[a]n expert opinion
17 has no value if its basis is unsound.” (*In re Lockheed Litigation Cases* (2004) 115
18 Cal.App.4th 558, 564.) “Expert opinion based on speculation or conjecture is
19 inadmissible.” (*Id.*)

20 Mr. Peifer states without any supporting evidence or citation that “Sacramento’s
21 publicly owned water supply is reported to be among the oldest in the State.” Besides
22 being entirely irrelevant if the City of Sacramento has one of the oldest water supply
23 systems in the state, this assertion is entirely without foundation or support. It should be
24 excluded for these reasons.

25 Mr. Peifer’s testimony regarding impacts of the WaterFix project is wholly
26 conclusory lacking sufficient bases or citation to any supporting evidence or independent
27 analysis other than his own general personal experience. His testimony makes
28

1 conclusions on the impacts of the WaterFix, which is entirely premised upon the
2 following statement:

3 However, my understanding is that even if operational criteria remain
4 unchanged at this time, according to the testimony of highly-credible experts
5 submitted in this proceeding, the CWF is very likely to cause the Projects to
6 be operated differently than existing and historical practices in order to meet a
7 central CWF objective of increasing capacity for exports south of Delta.
8 (CITY SAC-1, p. 9, ¶ 26.)

9 Similarly, Mr. Peifer makes conclusions about injury to the City of Sacramento
10 that are also entirely unsubstantiated or supported by any citation or evidence
11 whatsoever. He states, "CWF is likely to injure Sacramento by facilitating the export of
12 American River water that Sacramento otherwise would be able to divert and supply to
13 its retail and wholesale customers." (CITY SAC-1, p. 10, ¶ 28.) Other paragraphs in Mr.
14 Peifer's testimony may contain similar unsupported opinion testimony. As is evident
15 from the sentences cited above, Mr. Peifer's conclusion are merely conjecture about
16 possible or potential impacts given his personal experience rather than reasoned
17 conclusions of likely adverse impacts based on specific evidence or site-specific
18 conditions.

19 Mr. Peifer generally references the work of others without citing specifically the
20 evidence he relies upon to draw his conclusions. He also cites to no independent
21 analyses he performed to support his conclusions. For instance, Mr. Peifer relies upon
22 his conclusion that, "I understand that this has been analyzed by highly-credible experts
23 in this proceeding, who conclude through written testimony, exhibits and/or otherwise
24 that the frequency of Hodge Flow Conditions is likely to increase with CWF
25 implementation." (CITY SAC-1, p. 12, ¶ 236.) This statement is unsupported and based
26 upon the general reliance unable to be tested based upon the written testimony. It is the
27 policy of the Water Board to discourage the introduction of surprise testimony and
28 exhibits. (23 CCR 648.4(a).) The incorporation of general testimony of unknown
29 relevance constitutes impermissible surprise testimony because it is impossible to
30 determine exactly which parts of the incorporated testimony the witness actually intends

1 to use as direct testimony, and what additional conclusions are made for purposes of this
2 hearing.

3 Because Mr. Peifer's expert opinions lack foundation, and constitutes surprise
4 testimony, it is not testimony on which a responsible person would rely in the conduct of
5 serious affairs and should be excluded in its entirety. (Government Code § 11513(c).)

6 **C. The Testimony of James Peifer (CITY SAC-1) Materially Misstates**
7 **Petitioners' Testimony**

8 Mr. Peifer mischaracterizes the testimony of the Petitioners by stating that a
9 "central CVP objective" is "increasing capacity for exports south of Delta." (CITY SAC-1,
10 p. 9, ¶ 26.) Mr. Peifer fails to cite to where this characterization of the central objective is
11 found within the materials and testimony presented by the Petitioners. This
12 mischaracterization of the evidence is objectionable and the Petitioners' testimony
13 should speak for itself. Thus, this testimony should be excluded and stricken.

14 **II. The Testimony of Bonny L. Starr (CITY SAC-8) Lacks Foundation,**
15 **Constitutes Surprise Testimony and is Not Expert Opinion on Which a**
16 **Responsible Person Would Rely**

17 On behalf of the City of Sacramento, Ms. Starr provides expert opinion testimony
18 concerning the alleged superiority of the City of Sacramento's water rights and potential
19 effects of the WaterFix. (CITY SAC-8.) Ms. Starr fails to specifically support her
20 conclusions about actual impacts of the WaterFix, and therefore lacks sufficient bases or
21 citation to supporting evidence.

22 Expert testimony is required when related to a "subject that is sufficiently beyond
23 the common experience that the opinion of an expert would assist the trier of fact."
24 (Evidence Code § 801; see also *Miller*, 8 Cal.3d at 702.) However, "[a]n expert opinion
25 has no value if its basis is unsound." (*In re Lockheed Litigation Cases* (2004) 115
26 Cal.App.4th 558, 564.) "Expert opinion based on speculation or conjecture is
27 inadmissible." (*Id.*)
28

1 Ms. Starr's testimony regarding impacts of the WaterFix project is wholly
2 conclusory lacking sufficient bases or citation to any supporting evidence or independent
3 analysis other than her own general personal experience. For instance:

4 The key potential water quality impacts from the NDD Intakes operation to
5 Sacramento MUN supply presented in this testimony include:

- 6 • Reservoir operation changes causing increased source water
7 temperatures contributing to blue-green algae growth in the source
8 water and treated water DBP formation, and
- 9 • Increases in residence time/water column stability caused by
10 changing river flows and associated lower river velocities, resulting in
11 increased presence of blue-green algae in the source water.

12 (CITY SAC-8, p. 5-6, ¶ 12.)

13 Other paragraphs in Ms. Starr's testimony may contain similar unsupported
14 opinion testimony. As is evident from the sentences cited above, Ms. Starr's conclusion
15 are merely conjecture about possible or potential impacts given his personal experience
16 rather than reasoned conclusions of likely adverse impacts based on specific evidence
17 or site-specific conditions.

18 Ms. Starr generally references the work of others without citing specifically the
19 evidence she relies upon to draw her conclusions. She also cites to no independent
20 analyses she performed to support his conclusions. For instance, Ms. Starr relies upon
21 her conclusion that, "I understand that this has been analyzed by highly-credible experts
22 in this proceeding, who conclude through written testimony, exhibits and/or otherwise
23 that the frequency of Hodge Flow Conditions is likely to increase with CWF
24 implementation." (CITY SAC-1, p. 12, ¶ 236.) This statement is unsupported and based
25 upon the general reliance unable to be tested based upon the written testimony. It is the
26 policy of the Water Board to discourage the introduction of surprise testimony and
27 exhibits. (23 CCR 648.4(a).) The incorporation of general testimony of unknown
28 relevance constitutes impermissible surprise testimony because it is impossible to
determine exactly which parts of the incorporated testimony the witness actually intends

1 to use as direct testimony, and what additional conclusions are made for purposes of this
2 hearing.

3 Because Ms. Starr's expert opinions lack foundation, and constitutes surprise
4 testimony, it is not testimony on which a responsible person would rely in the conduct of
5 serious affairs and should be excluded in its entirety. (Government Code § 11513(c).)

6 **CONCLUSION**

7 For the foregoing reasons, Petitioner DWR respectfully requests that the Water
8 Board exclude the testimony.

9

10 Dated: September 21, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

11

12



13

James (Tripp) Mizell
Office of the Chief Counsel

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28