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TRIBUTARIES AUTHORITY
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9
10 BEFORE THE
11 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
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13 IN RE STATE WATER RESOURCES) **THE SAN JOAQUIN TRIBUTARIES**
14 CONTROL BOARD PETITION) **AUTHORITY'S PROCEDURAL AND**
15 REQUESTING CHANGES IN WATER) **EVIDENTIARY OBJECTIONS TO THE**
16 RIGHTS OF THE DEPARTMENT OF) **DEPARTMENT OF WATER RESOURCES**
17 WATER RESOURCES AND U.S. BUREAU) **AND U.S. BUREAU OF RECLAMATION'S**
OF RECLAMATION FOR THE) **CASE IN CHIEF IN SUPPORT OF CHANGE**
18 CALIFORNIA WATERFIX PROJECT.) **PETITION FOR THE CALIFORNIA**
) **WATERFIX PROJECT**

19 _____)
20 MODESTO IRRIGATION DISTRICT,)
OAKDALE IRRIGATION DISTRICT,)
21 SOUTH SAN JOAQUIN IRRIGATION)
DISTRICT, TURLOCK IRRIGATION)
22 DISTRICT, CITY AND COUNTY OF SAN)
FRANCISCO, a California municipal)
23 corporation, each individually, and)
collectively the SAN JOAQUIN)
24 TRIBUTARIES AUTHORITY,)

25 Interested Parties.)
26 _____)
27)
28)

1 Interested Parties MODESTO IRRIGATION DISTRICT, OAKDALE IRRIGATION
2 DISTRICT, SOUTH SAN JOAQUIN IRRIGATION DISTRICT, TURLOCK IRRIGATION
3 DISTRICT, all of which are California Irrigation Districts, the CITY AND COUNTY OF SAN
4 FRANCISCO, a California municipal corporation acting by and through its PUBLIC UTILITIES
5 COMMISSION, and the SAN JOAQUIN TRIBUTARIES AUTHORITY (all parties collectively
6 referred to as the SJTA), submit the following procedural and evidentiary objections to the proposed
7 case in chief evidence provided by Department of Water Resources (“DWR”) and United States
8 Bureau of Reclamation (“USBR”) (collectively Petitioners) in support of their joint change petition
9 for the California Waterfix project.

10 SJTA respectfully requests that the State Water Resources Control Board (“SWRCB” or
11 “Board”) rule on each of the following objections prior to admitting the subject testimony, exhibits
12 and other evidence into the record, and prior to ruling on Petitioners’ change petition.

13 **1. All testimony from Maureen Sergent addressing impacts to other legal users of water**
14 **should be precluded from admission into the record because it is irrelevant, lacks**
15 **proper foundation and constitutes unqualified and inadmissible opinion**

16 Petitioners have presented proposed written testimony from Maureen Sergent (DWR-53),
17 Senior Engineer with the Department of Water Resources, addressing the water rights that are the
18 subject of the Waterfix change petition. SJTA sets forth the following objections to Ms. Sergent’s
19 proposed testimony, and requests that she be precluded from providing any evidence or testimony
20 as to the impact, or lack thereof, of the Project on legal users of water, as such testimony lacks
21 proper foundation, is irrelevant and constitutes unqualified and inadmissible opinion. In the event
22 Petitioners submit Ms. Sergent’s proposed written testimony in DWR-53 for admission into the
23 record, SJTA requests that Section VI be precluded from admission for the same reasons.

24 Water Code section 1702 provides that the Board cannot grant permission to change a point
25 of diversion until Petitioners demonstrate “that the change will not operate to the injury of any legal
26 user of water involved.” Ms. Sergent acknowledges in her proposed written testimony that the
27 operations of the Waterfix project (and the associated changes in points of diversion) may cause
28 changes in SWP and CVP storage levels and releases. (DWR-53, 11:10, citing DWR-71, section

1 V.C.) However, Ms. Sergent concludes that these changes will not injure other legal users of water
2 because “such water users do not have a right to stored water releases from the SWP/CVP.” (DWR-
3 53, 11:12-13). She states, “[t]herefore, the quantity of water available for diversion by In-Basin
4 water users will not be affected by any changes in stored water releases that may occur as a result of
5 the CWF.” (DWR-53, 11:13-15.) These assertions are erroneous for several reasons, and must be
6 precluded from admission because they are irrelevant, lack proper foundation and constitute
7 unqualified and inadmissible opinion.

8 First, Ms. Sergent’s assertion presumes that all water released from a reservoir is stored
9 water. This is a gross generalization that is not supported by DWR’s analysis. When the Petitioners
10 draw their reservoirs lower, they have the ability to capture more runoff, and Ms. Sergent’s
11 testimony readily admits that the Petitioners will be capturing more water if the Project is
12 implemented. What DWR has failed to address in its analysis is whether such additional capture of
13 runoff, in a given year and time, should be bypassed to meet a more senior downstream demand.
14 The SJTA agrees that downstream riparian right holders do not have the right to the release of
15 stored water, as Ms. Sergent states. However, riparian right holders do have the right to require
16 Petitioners bypass natural flow to meet their senior riparian rights. Ms. Sergent’s testimony and
17 analysis fails to address whether the impoundment of additional natural flow will cause injury to
18 downstream riparian right holders. Specifically, the conclusion of no injury is erroneously based on
19 the assumption that all water in the reservoir was lawfully stored and should not have otherwise
20 been bypassed for senior demand. This issue must be addressed if Ms. Sergent’s opinion regarding
21 the effect of the Project on other legal users of water is to have any relevance.

22 Furthermore, the SJTA disagrees with Ms. Sergent’s assertion that downstream pre-1914
23 water right holders do not have the ability to divert previously stored water. Pre-1914 water right
24 holders are not prohibited from diverting previously stored water. To the extent water from the
25 Projects is abandoned or cannot be continuously controlled by the Projects, pre-1914 water right
26 holders may validly divert previously stored water.

27 Ms. Sergent’s testimony also fails to address the issue of impacts from increased storage,
28 commonly resolved by refill criteria. As DWR acknowledges in its 2016 Water Transfer White

1 Paper, refilling of reservoir storage space that is made available by a release of water in excess of
2 what would be released without the approval of the petition adversely affects downstream users if
3 the increased diversion to storage is done at a time when other downstream legal users of water
4 could have diverted the water stored in the reservoir. According to DWR's White Paper, refill
5 should only occur after downstream senior needs are met and Petitioners bypass water equal to or
6 above the previous consumptive use. Despite Ms. Sergent's assertion that the Petitioners will be
7 able to increase deliveries and storage beyond current existing operations, she fails to account for
8 DWR's own principle that requires any party seeking to increase consumptive use through a change
9 petition to bypass water to avoid harming downstream users. Because the Petitioners must
10 demonstrate that implementation of the Project will not cause injury to other legal users of water
11 (Water Code 1702), this issue of how increased storage impacts other legal users of water must be
12 addressed before any relevant opinion regarding impacts to other water users can be asserted.
13 Because Ms. Sergent fails to address this point, her testimony on this issue of injury cannot be
14 considered relevant to the change petition and must be precluded.

15 Ms. Sergent also fails to acknowledge that there is a long-standing legal dispute as to
16 whether water released from SWP/CVP facilities to meet water quality objectives is protected from
17 diversion by other users or abandoned by the Projects and available for diversion. Specifically, as
18 the Board is aware, D-1641 requires the Projects to meet certain salinity requirements in the Delta.
19 (SWRCB-21, p. 183 [Table 3].) For years there has been an ongoing dispute as to whether this
20 released water that reaches the Delta is protected from diversion by water users within the Delta, or
21 whether that water is abandoned by the Projects and available for diversion. For instance,
22 approximately one year ago, on June 16, 2015, the State Water Contractors (SWC) filed a complaint
23 with the Board against diverters in the South and Central Delta alleging the unlawful diversion of
24 stored water. SWC alleged that these diversions amount to 100,000 to 300,000 acre-feet in the
25 summer and fall of dry and critical years, and require DWR and USBR to make additional releases
26 of stored water in order to satisfy the D-1641 requirements. The basis of SWC's complaint is that
27 the water released by the Projects to satisfy D-1641 requirements is protected from diversion by
28 other users, including diverters in the Delta.

1 However, the assumption that water released to meet water quality objectives is protected
2 from diversion is challenged by several facts. First, the Projects never petitioned the Board
3 pursuant to Water Code section 1707 to change the use of their water rights to instream flow use in
4 order to protect the released water. As a result, there is no express protection of this water from
5 rediversion. Second, the Projects do not redivert all of the water released to meet water quality
6 objectives, nor do the Projects exercise control over all of the water released. Finally, the actual
7 water quality objectives are in place to protect agriculture diversions in the south and central Delta.
8 Specifically, the water quality objectives require the Projects release water to ensure water is not too
9 salty to grow salt intolerant crops, like beans. Thus, it would seem odd to have this objective in
10 place, while also prohibiting the diversion of water in the south and central delta for agriculture, the
11 very beneficial use the objective is in place to protect.

12 To date, the Board has not acted on the SWC’s complaint, and the issue remains unresolved.
13 In fact, recent submissions from several parties in the curtailment enforcement matters¹ demonstrate
14 that there is a continuing dispute as to this issue. The Central and South Delta Water Agencies
15 alluded to this issue in arguing that general curtailment efforts cannot be applied to the Delta due to
16 unique factual and legal circumstances.² In opposition to some of these points, Westlands Water
17 District (WWD) asserted that “[w]ater that is released from CVP storage and travels through the
18 Sacramento-San Joaquin Delta . . . to meet water quality standards and/or for export is not
19 ‘abandoned’ flow that may be diverted.”³ DWR asserted a position similar to WWD.⁴

22 ¹ In the matter of the Draft Cease and Desist Order issued to The West Side Irrigation District, Enforcement Action
23 ENF01949; and In the Matter of the Administrative Civil Liability Complaint issued to Byron-Bethany Irrigation
24 District, Enforcement Action ENF01951.

24 ² Central Delta Water Agency and South Delta Water Agency Legal Issues Brief, available at
25 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/bbid_wsid_cdwaprehl_b012516.pdf

25 ³ Westlands Water District: Opposition to Motion for Summary Judgment, or in the Alternative, Summary Judgment,
26 page 4, available at,
26 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/wisdbbid/wsidbbis_wwdopposition2motion4sumjudg022216.PDF

27 ⁴ California Department of Water Resources’ Reply Brief, p. 5 [“Downstream water right holders have no right to divert
28 SWP or [CVP] storage releases made either for re-diversion at Project facilities in the Delta or to meet Delta
standards.”], available at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/wisdbbid/wsidbbid_dwrreplybrief022216.pdf

1 This issue has not been judicially or administratively decided. Indeed, the two cases cited by
2 WWD in the curtailment enforcement matters do not resolve the issue of whether water released to
3 meet Delta salinity objectives under D-1641 is protected from diversion or abandoned and available
4 to Delta water users; neither case deals with water quality objectives, and both cases predate D-
5 1641. (*Los Angeles v. Glendale* (1943) 23 Cal.2d 68 [holding that the pueblo rights of the City
6 attached to waters released from storage and was not abandoned when the City sold the water to
7 farmers, allowing the City to recover the irrigation water that flowed to the subterranean basin];
8 *Stevens v. Oakdale Irrigation Dist.* (1939) 13 Cal.2d 343 [holding that water rights may be acquired
9 by lower appropriators to foreign flow that has been abandoned by the producer, but such rights are
10 subject to the contingency that the supply may be intermittent or may be terminated at the will of
11 the producer].)

12 Ms. Sergent's assertion that no other legal water users will be harmed by the Waterfix
13 project assumes that this legal issue has been resolved in Petitioners' favor. As this assumption is
14 incorrect, any testimony from Ms. Sergent regarding the impact of the Project on other legal users
15 of water lacks proper foundation and is not relevant to the change petition. As such, it must be
16 precluded from admission.

17 Furthermore, Ms. Sergent's analysis is incomplete insofar as it assumes the continuing
18 applicability of D-1641, and fails to acknowledge that the Board is currently in the process of
19 developing updates to the Bay-Delta Plan. The Draft Substitute Environmental Document in
20 Support of Potential Changes to the Water Quality Control Plan for the Bay Delta (Draft SED)⁵
21 indicates a preference for new water quality objectives based on unimpaired flow. Despite the fact
22 that the Draft SED has been in public circulation for more than three years, and despite the fact that
23 DWR and USBR both submitted extensive comments on the document, the Petitioners made no
24 attempt to analyze the effects of their proposed project under an unimpaired flow regime, adhering
25 instead to an analysis guided by D-1641 requirements which may be superseded before the
26 proposed Project even becomes operational. As Ms. Sergent's testimony regarding potential impacts

27 _____
28 ⁵ Draft SED available at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2012_sed/

1 to other water users fails to account for any anticipated changes to the flows required by D-1641,
2 her testimony on this issue is incomplete and irrelevant, and therefore must be precluded from
3 admission into the record. Petitioners must demonstrate that the proposed Project will not cause
4 harm to other legal users of water under an unimpaired flow regime as well.

5 Ms. Sergent’s analysis also fails to account for the requirement that any order approving the
6 change petition “include appropriate Delta flow criteria.” (Water Code, § 85086[c][2].) The SJTA
7 previously moved to dismiss the change petition on the basis that it failed to set forth a legally
8 sufficient proposal of appropriate Delta flow criteria as required by Water Code section 85086,
9 noting that without such a proposal there is no method or basis for determining during Part 1 of the
10 hearing whether the proposed project will cause injury to other legal users of water. ⁶ In the
11 alternative to its request that the Board dismiss the petition, the SJTA requested that the Board
12 compel Petitioners to supplement their petition with the requisite information before the hearing. In
13 response, the Board stated, “SJTA is correct that . . . Delta flow criteria could affect water flows or
14 quality in a manner that causes impacts to other legal users of water.”⁷ However, rather than
15 dismissing the Petition, or requiring Petitioners to supplement their Petition (as would have been
16 appropriate under Water Code section 1701.3), the Board denied the SJTA’s application and stated,
17 **“we expect the petitioners to describe, as part of their case in chief, what Delta flow criteria**
18 **they believe would be appropriate.”**⁸ CEQA and NEPA also require that any analysis of a project
19 must take into account the regulatory schematic known or likely to be implemented.

20 Petitioners have now submitted thousands of pages of documents as part of their case in
21 chief. In apparent defiance of the Board’s directive, Petitioners have not described, in their case in
22 chief, the Delta flow criteria that they believe would be appropriate under Water Code section
23

24 ⁶ SJTA’s Application to Dismiss the Joint Petition of the Department of Water Resources and U.S. Bureau of
25 Reclamation Changes in Water Rights for the California Waterfix Project., available at
26 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160420_sjta_app.pdf

27 ⁷ Revised Hearing Schedule, Revised Notice of Intent to Appear, and Motion to Disqualify Hearing Officers –
28 California Waterfix Water Right Change Petition Hearing, dated April 25, 2016, p. 3; available at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160425_cwf_ruling.pdf

⁸ Revised Hearing Schedule, Revised Notice of Intent to Appear, and Motion to Disqualify Hearing Officers –
California Waterfix Water Right Change Petition Hearing, dated April 25, 2016, p. 3

1 85086, and instead appear to be relying on prior descriptions which the Board previously found to
2 be inadequate. The SJTA respectfully submits that the Petitioners have repeatedly taken advantage
3 of the Board's leniency on this issue, and have now gone so far as to defy the Board's directive.
4 This issue cannot be delayed any longer and the SJTA hereby renews its motion to dismiss the
5 petition for failing to set forth a proposal for appropriate Delta flow criteria under Water Code
6 section 85086.

7 Finally, the issue of whether the proposed Project operations will cause injury to other legal
8 users of water is a legal issue. To the extent Ms. Sergent seeks to provide a legal opinion as to
9 whether proposed Project operations will cause injury to other legal users of water, the SJTA asserts
10 that she is unqualified to do so, and that it is an improper legal opinion that intrudes into the Board's
11 authority to decide that issue. (cf. California Evid. Code § 801; *Kotla v. Regents of University of*
12 *California* (2004) 115 Cal.App.4th 283, 291 [in a wrongful termination case, holding that it was
13 error to allow an expert to testify that defendant's firing of plaintiff was retaliatory, as that issue was
14 for the jury to decide].) Accordingly, any such testimony constitutes unqualified and inadmissible
15 opinion and should be precluded.

16 Accordingly, the SJTA requests that the Board preclude Ms. Sergent from providing any
17 evidence or testimony as to the impact, or lack thereof, of the Project on other legal users of water,
18 as such testimony lacks proper foundation, is irrelevant in the ways set forth above, and constitutes
19 unqualified and inadmissible opinion. In the event Petitioners seek to admit Ms. Sergent's proposed
20 written testimony in DWR-53, the SJTA requests Section VI be precluded from admission on the
21 basis that it lacks proper foundation, is irrelevant and constitutes unqualified and inadmissible
22 opinion.

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1 **2. The Board should preclude all testimony from John Leahigh regarding Petitioners’**
2 **compliance with Water Rights Decision 1641, including all testimony based upon**
3 **DWR-401, plus any opinions as to past or anticipated hydrologic conditions, because**
4 **such testimony is irrelevant, lacks proper foundation and constitute unqualified expert**
5 **opinion**

6 Petitioners have presented proposed written testimony from John Leahigh (DWR-61), Chief
7 of the State Water Project Water Operations Office, to explain current operations of the SWP/CVP,
8 and anticipated operations with the California Waterfix. The SJTA objects to Mr. Leahigh’s
9 proposed written testimony, and requests that he be precluded from offering (1) any testimony as to
10 Petitioners’ past or anticipated compliance with D-1641, including any testimony based upon
11 DWR-401 and (2) any opinions as to past or anticipated hydrologic conditions on the basis that such
12 testimony is irrelevant, lacks proper foundation and constitutes unqualified expert opinion. In the
13 event Petitioners submit Mr. Leahigh’s proposed written testimony in DWR-61 for admission into
14 the record, SJTA requests that Sections V, VI, VII and VIII be precluded from admission for the
15 same reasons.

16 Mr. Leahigh contends that the Petitioners have largely complied with the requirements of D-
17 1641, and has prepared a table reflecting the number of exceedances from 1995 through 2015
18 (DWR-61, 8:20-24). However, this table (DWR-401) improperly overestimates the ability of DWR
19 and USBR to comply with the requirements of D-1641 by claiming compliance in situations where
20 D-1641 requirements were relaxed by orders granting Temporary Urgency Change Petitions. As
21 Leahigh states, “[t]he tabulation of SWP/CVP compliance records did not include exceedances of
22 standards if approval was granted under orders by the State Water Board approving joint TUCPs
23 filed by DWR and Reclamation to modify the SWP/CVP’s obligation to meet the requirements”
24 (DWR-61, 13:4-7). Moreover, aggregating all of the D-1641 requirements in order to track
25 exceedance occurrences, as Mr. Leahigh has done, obscures DWR and USBR’s consistent inability
26 to meet critical south Delta requirements. A review of the last three years is clear proof of
27 Petitioners’ inability to satisfy their requirements under D-1641. In every year, USBR sought relief
28 from the Water Quality Control Plan for releases from New Melones to meet D-1641. Every year,

1 this relief resulted in less inflow into the Delta. This raises the question of whether Petitioners will
2 make up the shortfall from the Sacramento Valley releases, or continue to ignore meeting the
3 objective. As Mr. Leahigh’s testimony does not demonstrate Petitioners’ ability to meet the
4 unaltered requirements of D-1641, it is irrelevant to the change petition and must be precluded.

5 Rather than acknowledging DWR and USBR’s inability to meet D-1641 requirements
6 during times of drought, e.g., the past four years, Mr. Leahigh dispenses with this problem by
7 suggesting that the Board view the hydrologic and temperature conditions of the past four years as
8 “**statistical outliers** from what would be within the expected range of conditions” (DWR-61, 13:20-
9 22 [emphasis supplied]). Droughts are not “statistical outliers” in the State of California. (*United*
10 *States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 98 [noting that the SWP
11 and CVP were “conceived and formed” in part to provide “relief from devastating floods and
12 droughts”]; *RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175
13 Cal.App.4th 768, 782 [“drought [is] a persistent threat in California”]). This is especially true with
14 climate change. Although Leahigh claims that the graphs in DWR-406 through DWR-410 support
15 his conclusion that the past several years are statistical outliers, his analysis is more anecdotal than
16 mathematical, as evidenced by the fact that he does not cite any statistical analysis to support his
17 conclusion. Leahigh’s dismissiveness of the possibility of future severe drought is antithetical to the
18 notion of responsible forward planning, it discounts climate change, and it should call into question
19 all of his predictions regarding DWR’s ability to comply with water quality objectives, such as,
20 “[m]y opinion is that regulatory compliance with the CWF will be at least as good [as], if not better
21 [than], . . . today given that CWF will add infrastructure flexibility to system operations” (DWR-61,
22 7:25-27), and “it is my opinion that the SWP/CVP will continue to meet existing Delta water quality
23 and fishery objectives and any additional regulatory requirements for the CWF at a similar success
24 rate as demonstrated historically.” (DWR-61, 17:5-7). As Mr. Leahigh has not demonstrated that he
25 is qualified to provide an opinion as to whether the past four years of drought should be considered
26 statistical outliers, he should be precluded from offering any testimony or opinion based upon such
27 a conclusion, including whether Petitioners will be able comply with D-1641 in the future if the
28 proposed Project is implemented.

1 Although Mr. Leahigh's opinions as to Petitioners' future ability to meet D-1641 objectives
2 are objectionable for the reasons stated above (and although such testimony should be precluded
3 from admission for those reasons alone), SJTA also objects to any such opinions on the basis that
4 they are not supported by modeling. Accordingly, SJTA objects to such testimony on the basis that
5 it is conclusory and lacks proper foundation. Petitioners must demonstrate to the Board that they are
6 capable of meeting their obligations under D-1641 through modeling and analysis, not through the
7 mere opinion of Mr. Leahigh.

8 Furthermore, as with Ms. Sergent's testimony on the issue of water rights, Mr. Leahigh's
9 testimony regarding operations fails to account for the Board's current and ongoing process of
10 updating the Bay-Delta Plan with a preference for water quality objectives tied to unimpaired flow.
11 Instead, Leahigh explains proposed Waterfix operations assuming continued applicability of D-
12 1641. As a result, his testimony and analysis as to operations is irrelevant and misleading, and
13 therefore must be precluded from introduction into the record.

14 For these reasons, the SJTA requests that the Board preclude Mr. Leahigh from offering (1)
15 any testimony as to Petitioners' past or anticipated compliance with D-1641, including any
16 testimony based upon DWR-401 and (2) any opinions as to past or anticipated hydrologic
17 conditions, as such evidence is irrelevant to the instant petition, lacks proper foundation, and
18 constitutes unqualified expert opinion. In the event Petitioners submit Mr. Leahigh's proposed
19 written testimony in DWR-61 for admission into the record, SJTA requests that Sections V, VI, VII
20 and VIII be precluded from admission.

21 **3. The Board should preclude any and all testimony from Parviz Nader-Tehrani**
22 **regarding Petitioners' compliance with D-1641, the adverse effects of the Project on**
23 **other legal water users, and all testimony based upon DWR-513 because such**
24 **testimony is irrelevant, lacks proper foundation and constitutes unqualified opinion**

25 Petitioners submitted written testimony from Parviz Nader-Tehrani, a Civil Engineer
26 employed by DWR, to explain the modeling performed to evaluate changes in the water quality and
27 water levels associated with the Project, and any possible effects on legal users of water. The STJA
28 requests that Nader-Tehrani be precluded from offering any testimony as to Petitioners' anticipated

1 compliance with D-1641, and any opinion as to the effects of the Project on other legal users of
2 water, as well as any testimony based upon DWR-513. In the event Petitioners submit Mr. Nader-
3 Tehrani's proposed written testimony in DWR-66 for admission into the record, SJTA requests that
4 Sections IV, V, VI and VII be precluded from admission.

5 Nader-Tehrani's testimony summarizes the Delta Simulation Model (DSM2) analysis
6 contained in DWR-513. The No Action Alternative (NAA), which reflects the current system, was
7 compared to four different operational scenarios, identified as Boundary 1, H3, H4 and Boundary 2
8 (the "Operational Scenarios"). The SJTA objects to Mr. Nader-Tehrani's testimony and the
9 modeling for the following reasons.

10 First, the testimony is based on model simulated water quality in the Delta, measured for
11 electrical conductivity (EC) and chloride concentration (CI), represented as **monthly averages** for
12 the NAA and all Operational Scenarios (DWR-66; 3:1-6; DWR-513; 1-5.) This means that water
13 quality for each month is represented by an average of all types of water years. The use of monthly
14 averages does not show impacts in particular water-year types, such as dry years or successive dry
15 years. Instead, it disguises the impact of the Project by averaging dry years with wet and normal
16 years. Accordingly, the modeling does not show the effect of the Project on EC or CI in dry years as
17 opposed to wet years for any of the Operational Scenarios. This deficiency prevents any assessment
18 of the Project's actual impact on EC or CI. Accordingly, the SJTA requests that the Board preclude
19 any testimony from Mr. Nader-Tehrani that is based upon DWR-513, as the modeling and analysis
20 contained in that exhibit fail to provide any relevant evidence as to the impact of the Project on
21 water quality, and as Nader-Tehrani's proposed testimony lacks the proper foundation. The SJTA
22 also requests that the Board preclude DWR-513 from admission. (See Section 5 below.)

23 Second, the SJTA objects to Nader-Tehrani's use of these monthly averages to conclude that
24 "water quality is shown to meet the water quality objectives assigned to DWR and Reclamation
25 under D-1641." (DWR-66; 3:2-4, 8-11.) Most of the water quality objectives for EC and CI in D-
26 1641 are dependent on the water year type. However, the modeling provided by DWR does not
27 examine the effect of the Project on EC and CI during specific water year types, and instead
28 averages all water years together. This limited analysis prohibits any conclusion that the water

1 quality objectives in D-1641 (which are specific to water year types) can be met. Accordingly, to
2 the extent Petitioners offer testimony from Nader-Tehrani regarding their ability to meet the D-1641
3 water quality objectives based upon this analysis, such statements should be precluded from
4 admission as they are based upon irrelevant analysis.

5 Third, the SJTA objects to Nader-Tehrani's conclusion that the expected changes in water
6 levels resulting from implementation of the Project will not have "negative effects [on] legal users
7 of water." (DWR-66; 10:14-15.) Nader-Tehrani preformed a modeling analysis to assess the
8 Project's effect on water levels, but offered no additional analysis as to how the decreased water
9 levels might affect the reliability or delivery of water to legal water users. Instead, the extent of his
10 analysis appears to be that water levels will change, but those changes will not negatively impact
11 other users. He does not define "negative effects", nor does he explain how the changes in water
12 levels will not impact other water users. Furthermore, the issue of whether the Project will cause
13 injury to other legal users of water is a legal question, and Mr. Nader-Tehrani should be precluded
14 from offering such legal conclusions as he is unqualified to do so, and as the decision should be
15 made by the Board in this proceeding.

16 For these reasons, the STJA requests that Nader-Tehrani be precluded from offering any
17 testimony as to Petitioners' anticipated compliance with D-1641, any opinion as to the effects of the
18 Project on other legal users of water, as well as any testimony based upon DWR-513. In the event
19 Petitioners submit Mr. Nader-Tehrani's proposed written testimony in DWR-66 for admission into
20 the record, SJTA requests that Sections IV, V, VI and VII be precluded from admission on the basis
21 that they are irrelevant, lack proper foundation, and constitute unqualified and inadmissible opinion.

22 **4. The Board should preclude any and all testimony from Armin Munévar regarding**
23 **Petitioners' boundary analysis, all testimony based upon DWR 514, and all testimony**
24 **based upon modeling analysis that has not been peer reviewed; such testimony is**
25 **ambiguous, irrelevant and lacks proper foundation**

26 Petitioners have submitted written testimony from Armin Munévar, a Civil Engineer
27 employed by CH2M, to explain the Project's potential changes in water supply. The SJTA requests
28 that Mr. Munévar be precluded from offering any testimony regarding Petitioners' "boundary"

1 analysis, all testimony based upon DWR-514, and all testimony based upon modeling analysis that
2 has not been peer reviewed.

3 First, the Petitioners do not know the specific operating criteria that will be set forth in the
4 Waterfix Biological Opinion because that document has not yet been issued (DWR-51, 10:6-10).
5 Rather than wait for the Biological Opinion, Petitioners have presented the Board with several
6 different operating possibilities, which they refer to as a “boundary approach” (DWR-51, 10).
7 While it is clear that Petitioners have attempted to put the cart before the horse with this approach,
8 their explanation of the boundary analysis is entirely unclear. Mr. Munévar’s explanation of the
9 boundary analysis is contradictory and insufficient to advise the parties as to its purpose. Mr.
10 Munévar initially explains that Boundary 1 and Boundary 2 represent “the outer range of regulatory
11 and **operational conditions within which the CWF could conceivably operate in the future.**”
12 (DWR-71, 2:21-23 [emphasis supplied].) In a later sentence, Mr. Munévar contends that “[t]hese
13 boundary scenarios **should not be considered as the proposed operational range of the CWF,**
14 but reflect bookends to illustrate the effects on other legal users of water.” (DWR-71, 15:8-10
15 [emphasis supplied].) These statements leave the parties with a contradictory and insufficient
16 explanation as to the manner in which the Petitioners intend to operate the Project. Without such an
17 understanding, neither the Board, nor other water users, will be able to determine whether the
18 proposed operations will cause injury to other legal water users. Accordingly, Mr. Munévar’s
19 testimony on this issue should be precluded on the basis that it is ambiguous.

20 Second, Mr. Munévar states that the CalSim II modeling program “adjusts the operations of
21 the New Melones Reservoir to meet D-1641 at San Joaquin River at Vernalis.” (DWR-71, 5:14-15.)
22 This is problematic for several reasons. One, as the Board is aware, USBR has a long history of
23 failing to meet the Petitioners’ D-1641 obligations at Vernalis. Therefore, assuming compliance at
24 Vernalis is unrealistic. Given that Petitioners operate the CVP and SWP as a whole in an effort to
25 meet D-1641 obligations, noncompliance at Vernalis causes a domino-effect on operations
26 elsewhere in the system. Munévar’s assumption of compliance at Vernalis ignores this inevitable
27 effect and taints the remainder of Petitioners’ analysis of operations at other reservoirs. More
28 importantly, Petitioners do not provide any analysis of the Project’s impact on storage at New

1 Melones. (DWR-514, p. 15-18.) Instead, Petitioners only provide simulated End of Month
2 September Storage (EOMSS) for their facilities at Shasta, Oroville, Folsom and Trinity. (DWR-514,
3 p. 15-18.) If operations at New Melones are being considered as part of the analysis, as Munévar
4 acknowledges, then the impact on New Melones reservoir should be reported to the Board.
5 Presumably, Petitioners have not provided any analysis for New Melones because their underlying
6 assumption that D-1641 can be met at Vernalis is unattainable and causes a complete drawdown of
7 the reservoir. The SJTA objects to any testimony from Munévar that is based upon Figures 12, 13,
8 14 and 15 in DWR 514, which show simulated EOMSS at Shasta, Oroville, Folsom and Trinity. In
9 the absence of any comparable figure or testimony as to EOMSS at New Melones, any testimony
10 regarding Figures 12, 13, 14 and 15 is irrelevant. SJTA also objects to the introduction of Figures
11 12, 13, 14 and 15 in DWR 514, in the absence of any comparable figure showing EOMSS at New
12 Melones. (See Section 6 below.)

13 Third, Munévar states that CalSim II averages flows on a monthly basis, but that potential
14 North Delta Diversions (NDD) are “sensitive to the daily variability of flows” (DWR-71, 6:3-4.) As
15 a result, “north Delta diversion potential was likely overstated using a monthly time step.” (DWR-
16 71, 6:11-12.) In an effort to “better represent the sub-monthly flow variability,” Munévar used
17 historical daily patterns to transform the monthly volumes into daily flows. (DWR-71, 6:15-17.)
18 Although Petitioners note that CalSim II was subjected to peer review in 2003, there is no indication
19 that this method of calculating daily patterns was ever peer-reviewed. Accordingly, the SJTA
20 objects to the introduction of any modelling incorporating the “monthly-to-daily flow mapping
21 technique.” (DWR-71, 6:14.) Without further evidence that this modeling method was peer
22 reviewed, any testimony based upon such analysis lacks proper foundation and should be precluded.

23 For these reasons, the STJA requests Mr. Munévar be precluded from offering any
24 testimony regarding Petitioners’ boundary analysis on the basis that such testimony is ambiguous,
25 all testimony based upon DWR-514 on the basis that it is irrelevant and lacks proper foundation,
26 and all testimony based upon modeling analysis that has not been peer reviewed on the basis that
27 such testimony lacks proper foundation.

28 ///

1 **4. DWR-401 should be precluded from admission as irrelevant**

2 As indicated in Section 2 above, DWR-401 improperly overestimates the ability of DWR
3 and USBR to comply with the requirements of D-1641 by claiming compliance in situations where
4 D-1641 requirements were relaxed by orders granting Temporary Urgency Change Petitions. This
5 impropriety renders DWR-401 irrelevant to the change petition, as Petitioners must comply with the
6 unrelaxed requirements of D-1641. Accordingly, the SJTA objects to the introduction of DWR-401
7 on the basis that it is irrelevant.

8 **5. DWR 513 should be precluded from admission as irrelevant**

9 For the reasons stated above in Section 3 regarding the use of monthly averages in DWR-
10 513, the SJTA requests that DWR-513 be precluded from admission because the modeling and
11 analysis contained therein fail to provide any relevant evidence as to the impact of the Project on
12 water quality.

13 **6. DWR 514 (Figures 12, 13, 14 and 15) should be precluded from admission as irrelevant**

14 As indicated above, Figures 12, 13, 14 and 15 in DWR-514 show simulated EOMSS at
15 Shasta, Oroville, Folsom and Trinity. There is no comparable Figure showing EOMSS at new
16 Melones, despite the fact that Petitioners modeling “adjusts the operations of the New Melones
17 Reservoir to meet D-1641 at San Joaquin River at Vernalis.” (DWR-71, 5:14-15.) In the absence of
18 any comparable figure showing EOMSS at New Melones under proposed Project operations,
19 Figures 12, 13, 14 and 15 are irrelevant. Accordingly, the SJTA also objects to the introduction of
20 Figures 12, 13, 14 and 15 in DWR 514.

21 **CONCLUSION**

22 The SJTA respectfully requests that the SWRCB rule on each of the preceding objections
23 prior to admitting the subject testimony, exhibits and other evidence into the record, and prior to
24 ruling on Petitioners’ change petition. For the reasons stated above, the identified testimony and
25 evidence should be precluded from admission.

26 Dated: July 12, 2016

O’LAUGHLIN & PARIS LLP

27 By: 
28 TIM O’LAUGHLIN, Attorney for
San Joaquin Tributaries Authority

1 Re: *Before the California State Water Resources Control Board*
2 *Public Hearing to Determine Requested Changes in WaterRights of the*
3 *Department of Water Resources and U.S. Bureau of Reclamation for the*
4 *California WaterFix Project*

5 **PROOF OF SERVICE BY EMAIL/MAIL**

(Government Code §11440.20)

6 I, Linda L. Wood, declare that:

7 I am employed in the County of Sacramento, State of California. I am over the age of eighteen years
8 and not a party to the within cause. My business address is 2617 K Street, Suite 100, Sacramento, CA 95816.
9 On this date, in the following manner, I served the foregoing document(s) identified as:

10 ***THE SAN JOAQUIN TRIBUTARIES AUTHORITY'S PROCEDURAL AND EVIDENTIARY***
11 ***OBJECTIONS TO THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF***
12 ***RECLAMATION'S CASE IN CHIEF IN SUPPORT OF CHANGE PETITION FOR THE***
13 ***CALIFORNIA WATERFIX PROJECT***

14 **▶▶▶ UNITED STATES MAIL** [CCP §1013]: I enclosed the documents in a sealed envelope addressed to the
15 following persons and placed the envelope for collection and mailing, following our ordinary business
16 practices. I am readily familiar with our practice for collection and processing correspondence for
17 mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in
18 the ordinary course of business with the United States Postal Service, in a sealed envelope with postage
19 thereon fully prepaid at Sacramento, California addressed as below:

20 **FACSIMILE:** Based on prior consent, I caused the documents to be sent to the following persons
21 via telecopier/facsimile machine a true copy thereof to the parties indicated below:

22 **OVERNIGHT DELIVERY** [CCP §1013(c)]: I enclosed the documents in a sealed envelope provided
23 by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope
24 for collection at a regularly utilized drop box of the overnight carrier.

25 **▶▶▶ E-MAIL** [CCP §1010.6]: Based on pending consent of the parties, and/or court order or an agreement
26 of the parties to accept service by e-mail, I caused the documents to be sent to the following persons
27 at the following e-mail address, and did not receive, within a reasonable time after the transmission,
28 any electronic message or other indication that the transmission was unsuccessful:

PERSONAL DELIVERY [CCP §415.10] I arranged to have the documents personally delivered to the
office of the persons identified below on _____:

25 ***SEE ATTACHED SERVICE LIST***
26 ***(Revised July 11, 2016)***

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and
2 correct, and that this declaration was executed on July 12, 2016, at Sacramento, California.

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Linda L. Wood, Legal Assistant

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LIST OF PARTICIPANTS
California WaterFix Petition Hearing

REVISED SERVICE LIST
(Dated July 11, 2016)

Be sure to copy all documents and correspondence addressed to the State Water Resources Control Board Members or staff regarding this hearing to **CWFhearing@waterboards.ca.gov**.

Table 1- Service List of Parties to Exchange Information
(Parties Participating in Direct Testimony, Cross-Examination or Rebuttal)

Parties Participating in Part I (May also be Parties in Part II)

THE FOLLOWING PARTIES MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The parties listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
California Department of Water Resources	James (Tripp) Mizell		james.mizell@water.ca.gov
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Carmichael Water District, The	Aaron Ferguson	Somach Simmons & Dunn	aferguson@somachlaw.com
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Sacramento Suburban Water District	Alan Lilly & Ryan Bezerra	Bartkiewicz, Kronick & Shanahan	abl@bkslawfirm.com; rsb@bkslawfirm.com
San Juan Water District	Alan Lilly & Ryan Bezerra	Bartkiewicz, Kronick & Shanahan	abl@bkslawfirm.com; rsb@bkslawfirm.com
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South Valley Water Association, et al.	Alex M Peltzer	Peltzer & Richardson, LC	apeltzer@prlawcorp.com
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California Delta Chambers & Visitor's Bureau	Bill Wells		info@californiadelta.org
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Anderson - Cottonwood Irrigation District	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Plumas Mutual Water Company (PMWC)	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
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South Feather Water and Power Agency	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Western Canal Water District (WCWD)	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
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San Luis & Delta-Mendota Water Authority	Jon Rubin, Daniel J. O'Hanlon & Rebecca R. Akroyd		Jon.Rubin@SLDMWA.org; dohanlon@kmtg.com; rakroyd@kmtg.com
Stockton East Water District	Karna E. Harrigfeld		kharrigfeld@herumcrabtree.com

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Save the California Delta Alliance; Janet & Michael McCleary; Frank Morgan; and Captain Morgan's Delta Adventures, LLC	Michael Brodsky	Law Offices of Michael A. Brodsky	michael@brodskylaw.net
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Tehama-Colusa Canal Authority & water service contractors in its service area	Steven Saxton, Meredith Nikkel & J. Mark Atlas	Downey Brand	ssaxton@downeybrand.com mnikkel@downeybrand.com matlas@jmatlaslaw.com

San Joaquin Tributaries Authority, The (SJTA), Merced Irrigation District, Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, and City and County of San Francisco	Tim O' Laughlin & Valerie C. Kincaid	O'Laughlin & Paris, LLP	towater@olaughlinparis.com; vkincaid@olaughlinparis.com
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Planning & Conservation League	Jonas Minton		jminton@pcl.org
Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife	Kate Poole	Natural Resources Defense Council	kpoole@nrdc.org; awaren@nrdc.org; bobker@bay.org; rzwilling@defenders.org; dobegi@nrdc.org
Friends of the River & Sierra Club of California	E. Robert Wright & Kyle Jones		bwright@friendsoftheriver.org; kyle.jones@sierraclub.org

THE FOLLOWING PARTY MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The party listed below has not agreed to electronic service BY THE PETITIONERS and must be served a hard copy. The party listed below agreed to

Party	Authorized Representative/ Attorney	Mailing Address of Authorized Representative/ Attorney	Email Address of Authorized Representative/ Attorney
Clifton Court, L.P.	Suzanne Womack & Sheldon Moore	3619 Land Park Drive Sacramento, CA 95818	jsagwomack@gmail.com

Parties Participating in Part II Only (Must also be Served in Part I)

THE FOLLOWING PARTIES MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
County of Sacramento, The	Aaron Ferguson	Somach Simmons & Dunn	aferguson@somachlaw.com
Environmental Council of Sacramento (ECOS)	Brenda Rose		office@ecosacramento.net
Trout Unlimited	Brian Johnson		bjohnson@tu.org
California Department of Fish and Wildlife	Carl Wilcox		carl.wilcox@wildlife.ca.gov
Environmental Water Caucus	Barbara Barrigan-Parilla and Tim Strohane and Conner Everts		barbara@restorethedelta.org; tim@restorethedelta.org; connere@gmail.com
SAVE OUR SANDHILL CRANES	Osha Meserve & Mike Savino		osha@semlawyers.com; wirthsoscranes@yahoo.com
Friends of the San Francisco Estuary	Mitch Avalon		friendsofsfestuary@gmail.com
Friends of Stone Lakes National Wildlife Refuge	Osha Meserve		osha@semlawyers.com; rmburness@comcast.net
American Rivers, Inc.	Steve Rothert		srothert@americanrivers.org

**Table 2 - Interested Persons
(Persons Intending to Make Policy Statements Only)**

PARTIES IN TABLE 1 ARE NOT REQUIRED TO SERVE THE FOLLOWING INTERESTED PERSONS WITH WRITTEN TESTIMONY, EXHIBITS, AND OTHER DOCUMENTS

Interested Persons Participating in Part I (May also be Interested Persons in Part II)

Interested Person	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
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Coachella Valley Water District	Robert C Cheng		rcheng@cvwd.org
Desert Water Agency	Mark Krause		mkrause@dwa.org
Kern County Water Agency	Curtis Creel		ccreel@kcwa.com, ameliam@kcwa.com
Metropolitan Water District of Southern California	Rebecca Sheehan		rsheehan@mwdh2o.com
Mojave Water Agency	Kirby Brill		kbrill@mojavewater.org
North Delta C.A.R.E.S. (Members making policy statements only)	Anna Swenson		deltaactioncommittee@gmail.com
North State Water Alliance	David J. Guy	Northern California Water Association	dguy@norcalwater.org
Partnership for Sound Science in Environmental Policy	Craig S.J. Johns		cjohns@calrestrats.com
San Bernardino Valley Municipal Water District	Douglas Headrick		douglash@sbfmwd.com
Butte County Department of Water and Resource Conservation	Paul Gosselin		pgosselin@buttecounty.net
San Geronio Pass Water Agency	Jeff Davis		jdavis@sgpwa.com
Santa Clara Valley Water District	Erick Soderlund		esoderlund@valleywater.org
Terri Crain	Terri Crain		tcrain@scvchamber.com

Tulare Lake Basin Water Storage District	Mark Gilkey		mgilkey@tlbwsd.com
U.S. EPA Region 9	Tomas Torres		torres.tomas@epa.gov
Zone 7 Water Agency	J. Duerig		jduerig@zone7water.com
City of Chico, The	Erik Gustafson		Erik.gustafson@chicoca.gov
Rural County Representatives of California	Kathy Mannion		kmannion@rcrcnet.org
SEMILLAS (Stockton Educational Movement in Language Literacy and Scholarship)	Moteczuma Sanchez		motecps@gmail.com

Interested Persons Participating in Part II Only

Interested Person	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
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Assemblymember Susan Eggman (and staff)	Gustavo Medina		gustavo.medina@asm.ca.gov
Braceros del Delta	Luis Magaña		Lmagana@afsc.org
Cafe Coop	Esperanza Vielma		evielma@cafecoop.org
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Earth Law Center	Linda Sheehan		lsheehan@earthlaw.org
Frank L Ruhstaller	Frank L Ruhstaller		larryruhstaller@gmail.com
Golden Gate Salmon Assoc	John McManus		john@goldengatesalmon.org
Greater Stockton Chamber of Commerce	Douglas W. Wilhoit, Jr.		doug@stocktonchamber.org
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