

BARTKIEWICZ, KRONICK & SHANAHAN

PAUL M. BARTKIEWICZ
RICHARD P. SHANAHAN
ALAN B. LILLY
RYAN S. BEZERRA
JOSHUA M. HOROWITZ
KATRINA C. GONZALES
ANDREW J. RAMOS
PATRICK K. FITZGERALD

A PROFESSIONAL CORPORATION
1011 TWENTY-SECOND STREET
SACRAMENTO, CALIFORNIA 95816-4907
TEL. (916) 446-4254
FAX (916) 446-4018
EMAIL bks@bkslawfirm.com

Of Counsel

STEPHEN A. KRONICK
JENNIFER T. BUCKMAN

September 26, 2016

Hearing Chair Tam Doduc
Hearing Co-Chair Felicia Marcus
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

VIA ELECTRONIC MAIL
CWFhearing@waterboards.ca.gov

Re: California WaterFix Hearing – Request for Additional Cross-Examination
To Address Surprise Testimony Presented On Friendly Cross-Examination

Dear Hearing Chair Doduc and Hearing Co-Chair Marcus:

We respectfully request that we be allowed to conduct an additional 45 minutes of cross-examination of the water-right panel presented by the Department of Water Resources (DWR) and the Bureau of Reclamation (Reclamation) to fully examine surprise testimony that Reclamation presented on Thursday, September 22, 2016, under coordinated friendly cross-examination by non-protestants San Luis & Delta-Mendota Water Authority (SLDMWA) and Westlands Water District (Westlands). This surprise testimony generally consisted of Reclamation’s witness Ray Sahlberg expressing previously undisclosed opinions concerning certain water-right permit terms and contracts between Reclamation and the Cities of Folsom and Roseville. We represent those protestant cities in this hearing. We respectfully request that our additional cross-examination occur immediately following the completion of the parties’ cross-examination of the water-right panel.

Background

The SWRCB’s regulations state: “It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits.” (Cal. Code Regs., tit., 23, § 648.4(a).) The SWRCB’s original notice of this hearing states: “Each party proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing. Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded.” (October 30, 2015 Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference To Consider The Above Petition, p. 33.) After applying for, and receiving, multiple extensions of time to submit their written testimony, DWR and Reclamation submitted their exhibits and testimony on May 31, 2016.

Reclamation's written testimony included Mr. Sahlberg's written testimony as exhibit DOI-4. In that written testimony, Mr. Sahlberg: (1) referenced the CVP's water-right permits, but did not discuss their terms in detail; (2) very generally discussed Reclamation's Central Valley Project (CVP) water-service contracts; (3) referred to, but expressed no opinions about, several settlement and operating agreements on the American River; and (4) did not discuss at all Warren Act contracts under which Reclamation agrees to convey non-CVP water through CVP facilities. (Exhibit DOI-4, pp. 4-5, 7-9.) One of the American River settlement/operating agreements that Mr. Sahlberg's written testimony referenced is a contract with the City of Folsom (see exhibits DOI-23 through DOI-25), but Mr. Sahlberg's written testimony contained no discussion of the contract's specific terms.

On September 22, in response to friendly cross-examination by SLDMWA and Westlands, Mr. Sahlberg expressed several specific opinions concerning terms of the City of Roseville's CVP water-service contract, that City's Warren Act contract for the conveyance of water under Placer County Water Agency's water rights through Reclamation facilities, the City of Folsom's settlement contract and the CVP's water-right permits for Folsom Dam and Reservoir. In response to later cross-examination questions by others, Mr. Sahlberg admitted that, after protestants' submission of their Part IB evidence, he had met with SLDMWA's and Westlands' attorneys, had informed them of how he would respond to certain questions about Reclamation's contracts with the Cities of Folsom and Roseville and had received from those attorneys additional information that he had not previously considered in preparing the written testimony that the SWRCB required Reclamation to submit by May 31, 2016.

Request for Additional Cross-Examination

Consistent with the SWRCB's policy against surprise testimony stated in the regulations, the notices and rulings governing this hearing have established orderly procedures under which the parties' direct testimony must be presented in writing and on a schedule that allows other parties to prepare cross-examination that is as efficient and coordinated as possible. Surprise testimony that parties present in response to friendly cross-examination that they coordinate with other parties upsets the orderly procedures that the SWRCB has established. A reasonable way to address the surprise testimony that Mr. Sahlberg gave in response to friendly cross-examination questions is for the SWRCB to authorize additional cross-examination to address the specific subjects that Mr. Sahlberg addressed in that new testimony. Accordingly, we respectfully request that you authorize us to conduct an additional 45 minutes of cross-examination that immediately follows the completion of the normal order of parties' cross-examination and that will be limited to the following topics:

- The City of Folsom's settlement contract with the United States (exhibits DOI 23 through DOI-25);
- The City of Roseville's CVP water-service contract with the United States (exhibits Roseville-6 through Roseville-9);

- The City of Roseville's Warren Act contract with the United States (exhibit Roseville-11); and
- The State Water Rights Board's Decision 893 and the terms of the CVP's Permits Nos. 11315 and 11316.

In conducting this cross-examination, it may be necessary to use exhibits in addition to the documents noted immediately above, but the scope of the cross-examination would be limited to the scope of those documents. We request that DWR's water-right witnesses also remain on the panel during the additional cross-examination, given that Mr. Sahlberg has relied extensively on those DWR witnesses' testimony in expressing his opinions.

Kind regards,

A handwritten signature in blue ink, appearing to read "Ryan S. Bezerra". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ryan S. Bezerra

RSB:tmo
L092616rsb SWRCB Cross
Cc: CWF service list

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 document(s):

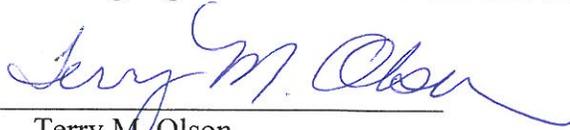
California WaterFix Hearing – Request for Additional Cross-Examination To Address Surprise Testimony Presented On Friendly Cross-Examination

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition hearing, dated September 20, 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:

I certify that the foregoing is true and correct and that this document was executed on September 26, 2016.

Signature: _____



Name: Terry M. Olson

Title: Legal Assistant

Party/Affiliation: Cities of Folsom, Roseville, Sacramento Suburban Water District, San Juan Water District and Yuba County Water Agency

Address: 1011 22nd Street
Sacramento, CA 95816