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7 Party to the WaterFix Hearing  
8 Principal, California Water Research

9  
10 **BEFORE THE**  
11 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

19 MOTION OPPOSING PETITIONERS'  
20 SUBMISSION OF SURPRISE EXHIBITS

21 Deirdre Des Jardins, principal at California Water Research (“California Water  
22 Research”), hereby moves to oppose any surprise submission of exhibits not previously noticed  
23 by the Department of Water Resources (“DWR”) and the U.S. Bureau of Reclamation  
24 (“USBR”), based on points and authorities argued below. The surprise submissions are almost  
25 four months after the May 31, 2016 deadline for submission of Petitioners’ exhibits in the April  
26 25, 2016 ruling by the Hearing Officers, and over three months after the June 22, 2016 deadline  
27 for submission of staff exhibits set in the June 10, 2016 ruling by the Hearing Officers. The  
28 surprise exhibits also come at the end of Part 1A of the hearing, denying protestants due process.

If the submission of surprise exhibits is allowed, California Water Research hereby  
requests changes to the hearing schedule, as detailed below.

1 Title 23 Cal. Code Regs. § 648.4, Identification of Witnesses; Presubmission and  
2 Presentation of Testimony and Exhibits, states:

3 (a) It is the policy of the State and Regional Boards to discourage the introduction of  
4 surprise testimony and exhibits.

5 (...)

6 (c) The hearing notice may require that direct testimony be submitted in writing prior to  
7 the hearing. Copies of written testimony and exhibits shall be submitted to the Board  
8 and to other parties designated by the Board in accordance with provisions of the  
9 hearing notice or other written instructions provided by the Board. The hearing notice  
10 may require multiple copies of written testimony and other exhibits for use by the  
11 Board and Board staff. Copies of general vicinity maps or large, nontechnical  
12 photographs generally will not be required to be submitted prior to the hearing.

13 The October 30, 2015 Hearing Notice set a deadline of March 1, 2016 for submission of  
14 testimony and exhibits.<sup>1</sup> The March 1, 2016 deadline was extended for a total of 90 days in  
15 response to requests by DWR and USBR.<sup>2</sup> The Hearing Officers' April 25, 2016 ruling then set  
16 the following deadlines for submission of Petitioners' exhibits and exhibit lists:

17 The hearing schedule is revised as follows: 12:00 noon, May 31, 2016  
18 Deadline for receipt and service of petitioners' case in chief, including witnesses'  
19 proposed testimony, witness qualifications, exhibits, list of exhibits, and a statement of  
20 service for Part 1A of the hearing. (p. 4)

21 Petitioners submitted exhibits and exhibit lists on May 31, 2016, based on this ruling.

22 The June 10, 2016 Hearing ruling then gave Petitioners an additional 22 days to revise their  
23 exhibit lists to allow submission of staff exhibits into evidence:

24 If petitioners propose to offer staff exhibits into evidence as part of their case-in-chief,  
25 they must submit revised exhibit identification indexes by June 22, 2016. (p. 5)

26 Petitioners responded on June 22, 2016, by adding some of the staff exhibits to their list  
27 of exhibits, but did not add the modeling study packages, posted on the website by the Hearing  
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<sup>1</sup> In the February 11, 2016 ruling, the Hearing Officers bifurcated Part 1 of the Hearing into Part 1A and Part 1B so that the March 1, 2016 deadline only applied to the Petitioners.

<sup>2</sup> Petitioners submitted a request on February 25, 2016 to delay the hearing schedule by 30 days. The Hearing Officers' March 4, 2016 ruling approved the request to delay the hearing by 30 days and changed the deadline for submittal of Petitioners' written testimony and exhibits to March 30, 2016. A request to delay the hearing by an additional 60 days was submitted on March 28, 2016, and approved in the Hearing Officer's April 25, 2016 ruling.

1 Team staff, to the list. DWR’s July 20, 2016 “Master Response To Similar Objections Made  
2 By Protestants Collectively” clearly stated that Petitioners did not intend to submit the modeling  
3 as part of their case in chief:

4 Petitioners do not believe it is necessary to include the complete model packages for  
5 CaiSim II and DSM2 in their testimony as the testimony includes the relevant input and  
6 output information used in their analysis. However, the model packages have been made  
7 available to all parties, upon request. In February, March, and May 2016, DWR and  
8 Reclamation made available the CalSim II and DSM2 modeling packages used in  
9 analyzing CWF and Alternative 4A.

10 (p. 17, footnote 14.)

11 Thus it is clear that DWR and USBR had ample opportunity to submit the modeling  
12 study packages as exhibits, but chose not to do so as part of their legal strategy. This legal  
13 strategy then became an issue in the hearing when the information supporting Petitioners’  
14 submitted analysis was insufficient, and Petitioners’ witnesses needed to make references to the  
15 modeling, which had not been submitted as an exhibit.

16 California Water Research made an oral objection to Petitioners’ extensive references to  
17 the modeling, which had not been submitted as an exhibit, on August 25, 2016. California  
18 Water Research then filed a motion on September 21, 2016, entitled, “Motion To Continue  
19 Objection To Hearsay Testimony, To Exclude Evidence And Strike Written Testimony, To Rule  
20 On Prior Objections, And To Allow Cross-Examination Of All Testimony.” That motion is  
21 hereby incorporated.

22 On September 27, 2016, six calendar days after the September 21, 2016 motion, the  
23 Hearing Officer announced that previously announced plans to call Petitioners’ witnesses back  
24 for two days of additional questions were cancelled, suddenly ending Part 1A of the Hearing.  
25 Protestants had no advance notice that the hearing schedule was being changed.

26 DWR and USBR then proposed to submit not only the noticed exhibits, but the modeling  
27 study packages as surprise exhibits. The Hearing Officer requested that protestants submit  
28 revised exhibit lists by noon on September 28, 2016, including the surprise exhibits.

1 This failure to announce the change in the hearing schedule in advance, and the sudden  
2 submission of surprise exhibits, provided protestants no opportunity to even argue that the  
3 submission of surprise exhibits was against Title 23 Cal. Code Regs. § 648.4, section (e), which  
4 provides:

5 Where any of the provisions of this section have not been complied with, the presiding  
6 officer may refuse to admit the proposed testimony or the proposed exhibit into evidence,  
7 and *shall refuse to do so* where there is a showing of prejudice to any party or the Board.  
8 This rule may be modified where a party demonstrates that compliance would create  
9 severe hardship. (emphasis added.)

9 Based on points and authorities below, California Water Research argues that this  
10 procedural change does cause significant prejudice to California Water Research as a party, and  
11 likely to many other protestants with limited resources. California Water Research hereby  
12 moves that all other protestants have until October 7, 2016 to object to any procedural change to  
13 allow admission of surprise exhibits. In support of this motion, California Water Research  
14 respectfully points out that this extension is necessary for a fair hearing under California Code of  
15 Civil Procedure § 1094.5(b).

16 As far as prejudice to California Water Research as a party, California Water Research  
17 argues that the Hearing Officers previously made decisions that were clearly based on the  
18 assertion by Petitioners that the modeling was not submitted as an exhibit. Pacific Coast  
19 Federation of Fishermen's Associations / Institute for Fisheries Research ("PCFFA/IFR")  
20 submitted objections on June 3, 2016, stating in part:

21 Petitioners' massive data dump and obfuscation of the models, assumptions and  
22 output differences they have employed sabotages protestants' preparation of their  
23 evidentiary objections by the June 15 deadline. Accordingly, protestants' requested 60-  
24 day extension should be granted. (p. 2.)

24 In a June 9, 2016 letter, "Request for Extension and Missing Modeling Information,"  
25 California Water Research joined in the request of PCFFA/IFR for a 60 days extension of time to  
26 submit objections. Other parties made similar requests. In the June 10, 2016 Hearing ruling,  
27 Hearing Officers denied protestants' requests for a 60 day extension of time to submit objections,  
28

1 and a delay of the start of the hearing to examine the complex modeling evidence. The ruling  
2 stated that it was based on Petitioners' statements that the modeling was not submitted as an  
3 exhibit:

4 The petitioners submitted a letter on June 3, 2016, opposing other parties' requests to  
5 extend the deadlines for the hearing. The petitioners state that time extensions are not  
6 needed because they submitted "concise testimony (133 pages for a total of 8 lead  
7 witnesses)" and a majority of submitted testimony and exhibits have been publicly  
8 available since February 2016.

9 (...)

10 For the reasons stated in petitioners' opposition letter, additional time beyond the 27-day  
11 extension to review petitioners' testimony and exhibits is not warranted. Many parties  
12 stated that they need more time to review the modeling data provided by the petitioners  
13 on May 25, 2016. Any procedural or evidentiary objections at this stage of the hearing,  
14 however, should concern petitioners' testimony or exhibits, and *petitioners have not*  
15 *submitted the May 25 modeling data as an exhibit*. For these reasons, the requests to  
16 extend all hearing deadlines by two months, and to delay the beginning of the hearing,  
17 are denied. (p. 2, emphasis added.)

18 California Water Research's June 9, 2016 letter also requested information needed to  
19 authenticate the modeling for its proposed use in the hearing. For a complex simulation,  
20 information is needed to authenticate and validate the modeling data, the code itself, and the  
21 output. The request stated in part,

22 "The Department of Water Resources and US Bureau of Reclamation appear to have  
23 assumed that disclosure of the raw modelling data is sufficient for review by  
24 stakeholders. But more complete information is required for any informed review by a  
25 technical expert." (p. 2)

26 Because the modeling was not submitted as an exhibit, these issues were never considered.

27 For the above reasons, California Water Research asserts that the admission of the modeling  
28 as a surprise exhibit at the end of Part 1A, is prejudicial to California Water Research as a party,  
and moves that the Hearing Officers not accept the modeling as a surprise exhibit on this basis.  
If Petitioners are allowed to submit the modeling as a surprise exhibit, California Water Research  
hereby requests that the Hearing Officers make the following changes to the Hearing schedule, to

1 ensure that protestants' due process rights under the XIV amendment to the U.S. Constitution,  
2 and Article I, § 7 of the California Constitution are protected in the Hearing.

3 These rights include the right to fully examine and rebut evidence, (*Int. Com. Comm. v.*  
4 *Louis. & Nash. R.R.*, (1913) 227 U.S. 88, 93, *Massachusetts etc. Ins. Co. v. Industrial Acc. Com.*,  
5 (1946) 74 Cal.App.2d 911, 914.) and to do cross-examination on all evidence (*Manufactured*  
6 *Home Communities v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 712.) In  
7 addition, these changes are necessary for a fair hearing under California Code of Civil Procedure  
8 § 1094.5(b).

9 The following are the requested changes to the hearing schedule, should petitioners be  
10 allowed to submit surprise exhibits:

- 11 (1) For non-complex surprise exhibits, give protestants until October 7, 2016 to object to  
12 the surprise exhibits, including procedural objections.
- 13 (2) If the modeling is allowed to be submitted as a surprise exhibit, allow protestants to  
14 fully brief the issues on human readability, authentication, and foundation for the  
15 modeling.
- 16 (3) If the modeling or other complex or voluminous information is allowed to be  
17 submitted as a surprise exhibit, allow protestants until October 15, 2016 to submit  
18 objections.
- 19 (4) If the modeling is allowed to be submitted as a surprise exhibit, rule on the  
20 admissibility of the modeling on prima facie considerations, based on objections and  
21 briefs.
- 22 (5) If the modeling is ruled admissible, postpone the October 20, 2016 start of the hearing  
23 to Nov 30, 2016 to allow protestants 60 days examine the complex modeling  
24 evidence. Give protestants an extension until Nov 30, 2016 to submit additions to  
25 their cases in chief based on the surprise submission of complex evidence.  
26

1 (6) Recall all appropriate panels of Petitioners' witnesses to allow protestants to do cross-  
2 examination on the surprise exhibits. For modeling, the modeling and water rights  
3 panels would be appropriate.  
4

5 While these requests would result in some changes to the Hearing schedule, it would result in  
6 a delay of significantly less than the 90 day extension provided to the Department of Water  
7 Resources and the U.S. Bureau of Reclamation. These agencies have significantly more  
8 resources than the protestants.<sup>3</sup> Providing an extension of 90 days for DWR and USBR to  
9 develop new, complex computer modeling, and giving no extension to protestants with limited  
10 resources to examine it, is prejudicial. I respectfully request that the Hearing Officers fully  
11 consider these issues.  
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13 Respectfully submitted,  
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17 Deirdre Des Jardins  
18 Principal, California Water Research  
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22 **STATEMENT OF SERVICE**  
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25 <sup>3</sup> According to the Governor's 2015-2016 budget, the Department of Water Resources has a 2015-2016  
26 budget of \$4.4 billion, and 3547 employees. Information from [the Governor's 2015-2016 budget website](http://www.ebudget.ca.gov/2015-16/StateAgencyBudgets/3000/3860/department.html)  
27 <http://www.ebudget.ca.gov/2015-16/StateAgencyBudgets/3000/3860/department.html>. Accessed on  
28 September 19, 2016.

