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November 23, 2016

VIA electronic mail to CWFhearing@waterboards.ca.gov and the November 15, 2016 service list of hearing participants.

Hearing Chair: Tam Doduc
Hearing Officer: Felicia Marcus
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Sacramento Valley Water Users' Proposal

Dear Ms. Doduc and Ms. Marcus:

On behalf of protestants Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources (collectively, "PCFFA"), we submit the following comments on the recommendations by the Sacramento Valley Water Users for hearing procedures for the rebuttal phase of Part 1.

1. Hearing Efficiency and Due Process

As this Board confirmed in its February 11, 2016 Hearing Ruling, petitioners Department of Water Resources and the U.S. Bureau of Reclamation failed to present a complete application for their Change Petition at the outset of this proceeding:

The lack of information concerning project operations and potential effects is due in part to the fact that, at the petitioners' request, the State Water Board skipped the protest resolution process that would normally precede a hearing on a water right change petition. The petition process under Water Code sections 1701 et seq. includes various procedures designed to supply supporting information and narrow issues prior to any Board hearing or decision. (...) This type of information exchange would have served to fill information gaps, narrow the focus of hearing issues, and increase the efficiency of the hearing.

February 11, 2016 Hearing Board Ruling, p. 6.

Rather than dismiss the Petition for noncompliance with the governing law as PCFFA and other protestants requested, this Board attempted to accommodate petitioners' claimed "urgent" need for expedited Board action on the petition – a claim that we now know to be baseless – by splitting the presentation of the case in chief into two parts:

Suspending the due date for other parties to submit written testimony and exhibits until after petitioners present their cases in chief will address the need for an adequate project description.

February 11, 2016 Hearing Board Ruling, p. 7.

PCFFA and many other protestants have repeatedly pointed out that petitioners did not provide sufficient information in their case in chief to allow this Board and protestants to assess whether the proposed changes would cause injury to legal users of water. Allowing petitioners to belatedly cure their inadequate application and supporting evidence at this late date, in the guise of "rebuttal," would deprive protestants of due process. It is well established law that parties in an adjudicatory proceeding

must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding.

Int. Com. Comm. v. Louis. & Nash. R.R., 227 U.S. 88, 93 (1913); *accord Massachusetts etc. Ins. Co. v. Industrial Acc. Com.* (1946) 74 Cal.App.2d 911, 914. Allowing petitioners to submit new evidence after protestants have concluded their presentations would violate this fundamental tenet of due process.

Accordingly, the Hearing Officers must ensure that protestants have the opportunity to fully examine and rebut all evidence provided by petitioners in support of the petition. Therefore petitioners' rebuttal must be submitted well before, rather than concurrently with, protestants' rebuttal, in order to allow protestants adequate opportunity to respond.

2. Rebuttal Phase

The Sacramento Valley Water Users have requested that rebuttal evidence be submitted simultaneously by both petitioners and protestants. This would be unfair to protestants. As noted, if petitioners provide additional information on project impacts, protestants are entitled to respond. Therefore the order of rebuttal should be the same as the order of the cases in chief: the petitioners should submit rebuttal testimony first, and then protestants should submit their rebuttal.

Relatedly and equally important, rebuttal may not be used to expand a party's case in chief. Therefore if petitioners attempt to submit significant additional evidence, protestants must be afforded an opportunity to move to strike it. And, if such new evidence is allowed nonetheless, the Board must allow sufficient time for protestants to analyze and respond to the new information.

3. Closing Briefs

The Sacramento Valley Water Users have proposed that closing briefs be submitted at the end of Part II of the Hearing. We urge the Board to reject that proposal. There are a number of issues that properly should be decided by the end of Part I, and whose resolution may very well terminate this proceeding, just as a nonsuit motion would in a civil trial. It is important that the Hearing Officers consider closing arguments and make timely rulings on these issues while the parties' and this Board's memory of the testimony and exhibits is still fresh. Following receipt of protestants' rebuttal evidence and argument at the conclusion of Part 1 – and before Part 2 might otherwise commence – this Board must render decisions on the following issues:

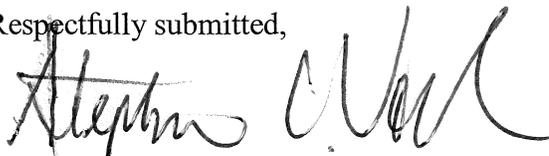
- Rulings on pending objections that the petition is for a new water right and thus impermissible
- Rulings on pending motions to dismiss
- Rulings on pending objections to evidence

The Board should accept closing briefs – first by petitioners, followed by protestants – that address these and any other issues within the scope of Part 1 at the conclusion of Part 1.

In the event this Board allows this proceeding to progress to Part 2, all Part 1 parties should also have the opportunity to submit supplemental closing briefs at the conclusion of Part 2.

Thank you for considering our views on these important matters.

Respectfully submitted,



Stephan C. Volker
Counsel to Protestants Pacific Coast Federation of
Fishermen's Associations and Institute for Fisheries
Resources

SCV:taf

c: November 15, 2016 Service List via email

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:

Protestants Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources comments on the recommendations by the Sacramento Valley Water Users for hearing procedures for the rebuttal phase for Part 1

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated November 15, 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 November 23, 2016.

Signature: _____



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