

1 Trent W. Orr, State Bar No. 77656  
A. Yana Garcia, State Bar No. 282959  
2 EARTHJUSTICE  
50 California Street, Suite 500  
3 San Francisco, CA 94111  
torr@earthjustice.org  
4 ygarcia@earthjustice.org  
Tel: (415) 217-2000  
5 Fax: (415) 217-2040

6 *Attorneys for Protestant Restore the Delta*

7  
8 **BEFORE THE**  
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

**RESTORE THE DELTA'S RESPONSE TO  
SACRAMENTO VALLEY GROUP'S AND  
JOINING PARTIES' OBJECTIONS TO  
PROTESTANTS' WRITTEN TESTIMONY  
AND EXHIBITS**

1       **I.    INTRODUCTION**

2           Protestant Restore the Delta (RTD) filed its case in chief on September 1, 2016. In  
3 accordance with the State Water Resources Control Board’s (Board) Pre-hearing Conference Ruling,  
4 issued on February 11, 2016, RTD has focused much of its witnesses’ testimony on describing  
5 various environmental justice issues the Delta region faces. RTD’s case in chief also includes  
6 testimony that responds directly to the Board’s specific inquiries for this hearing, set forth in its  
7 October 30, 2015 Notice of Petition and Hearing and subsequent orders. Each of RTD’s witness’s  
8 testimony includes an explanation of that witness’s competence to offer the testimony stated therein  
9 and contains verified facts based on the witness’s personal knowledge. Despite RTD’s testimony  
10 addressing the very issues this Board has identified as appropriate for Part 1, Sacramento Valley  
11 Group (SVG)<sup>1</sup> objects to portions of RTD’s written testimony on the basis that it is either not  
12 relevant to the issues in Part 1 of this proceeding or on the basis the testimony lacks foundation and  
13 consists of improper legal opinion.

14           The Board explicitly determined that Part 1 of this proceeding would include addressing  
15 “human uses that extend beyond the strict definition of legal users of water, including...  
16 environmental justice concerns.” (See California WaterFix Project Pre-hearing Conference Ruling  
17 (Feb. 11, 2016) at p. 10.) The Board also clarified that testimony should focus on issues pertaining  
18 to (1) whether the changes proposed in the Petition in effect initiate a new water right; and (2)  
19 whether the proposed changes would cause injury to any municipal, industrial or agricultural uses of  
20 water, including associated legal users of water. (See California WaterFix Hearing – Ruling on  
21 Written Testimony Outside the Scope of Part 1 and other Procedural Matters (October 7, 2016) at  
22 p. 2.) In accordance with the Board’s instructions, including its recent instruction to strike portions  
23 of the revised testimony of Tim Stroshane, issued on November 23, 2016, RTD has revised its  
24  
25

---

26 <sup>1</sup> SVG consists of numerous parties listed in its September 21, 2016 Objections to Protestants’  
27 Witness Testimony and Exhibits. SVG was also joined in its Objections by the Cities of Folsom and  
28 Roseville, Sacramento Suburban Water District, San Juan Water District, and the Yuba County  
Water Agency. (See Joinder in Sacramento Valley Group Objections to Written Testimony and  
Exhibits Submitted by Restore the Delta (Sept. 21, 2016).) The responses herein apply equally to the  
objections made by all SVG groups and their joining parties.

1 witness' testimony, and has withdrawn the testimony of Gary Mulcahy, Roger Mammon, and Xiuly  
2 Lo and submissions related to these witnesses' testimony as outside the scope of Part 1.

3 For the reasons stated herein, SVG's objections RTD's remaining testimony are unfounded  
4 and should be overruled.

## 5 **II. LEGAL STANDARDS**

6 This hearing is governed by Chapter 4.5 of the Administrative Procedure Act (Gov. Code, §  
7 11400 et seq.); Board regulations (Cal. Code Regs., tit. 23, §§ 648-648.8); sections 801 to 805 of the  
8 Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648(b).)  
9 The Board is not required to conduct adjudicative hearings according to the rules of evidence  
10 applicable in court proceedings. (Gov. Code, § 11513(c).) Instead, "[a]ny relevant evidence shall be  
11 admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the  
12 conduct of serious affairs, regardless of the existence of any common law or statutory rule which  
13 might make improper the admission of evidence over objection in civil actions." (*Id.*) "Hearsay  
14 evidence may be used for the purpose of supplementing or explaining other evidence...." (Gov.  
15 Code § 11513(d).) The Board follows these relaxed standards because the Hearing Officers'  
16 expertise in water issues justifies its ability to make both legal and factual determinations.

17 As discussed below, RTD's testimony and exhibits fall squarely within the scope of evidence  
18 to be admitted in this proceeding, in accordance with the above standards.

## 19 **III. ARGUMENT**

20 In addition to the testimony of Gary Mulcahy, Xiuly Lo, and Roger Mammon, SVG objects  
21 to following testimony and exhibits submitted by RTD, which are no longer at issue following  
22 RTD's evidentiary revisions in response to the Board's rulings and instructions regarding the scope  
23 of Part 1 B: RTD-10 at pp. 2-5 (¶¶ 5-11), 21-24 (¶¶ 66-75), 48 (¶ 145).

24 The remaining objections asserted by SVG concern the following evidence that is still  
25 included in RTD's testimony and exhibits, notwithstanding its revisions in response to the Board's  
26 rulings: RTD-10 at pp. 9-11 (¶¶ 29-34), 19-20 (¶¶ 61-65), 49-51 (¶¶ 149-151); and RTD-131 (C-  
27 WIN Water Availability Analysis, 2012).

1           **A.     The Testimony of Tim Stroshane (RTD-10 Pp. 49-51), Which Sets Forth RTD’s**  
2           **Recommendations for Permit Conditions, Is Relevant to the Issues Before the**  
3           **Board in Part 1.**

3           In its October 30, 2015 hearing notice, the Board identified the following issues for  
4 consideration in Part 1 of this hearing: (1) whether the changes proposed in the Petition in effect  
5 initiate a new water right; and (2) whether the proposed changes cause injury to any municipal,  
6 industrial or agricultural uses of water, including associated legal users of water. (California  
7 WaterFix Project Pre-hearing Conference Ruling (Feb. 11, 2016) at p. 10; California WaterFix  
8 Hearing – Ruling on Written Testimony Outside the Scope of Part 1 and other Procedural Matters  
9 (Oct. 7, 2016) at p. 2.) With respect to the Board’s inquiry into whether the proposed changes  
10 would cause injury to any municipal, industrial, or agricultural uses of water, the Board specifically  
11 requested testimony and evidence regarding whether the proposed changes in points of diversion  
12 alter water flows in a manner that causes injury to these uses of water and, if so, what specific  
13 conditions the Board should include in any approval of the Petition to avoid injury to such uses.  
14 (See *id.*) Despite the Board’s clear invitation of evidence relating to specific conditions it should  
15 include in any approval of the Petition to avoid injury to municipal, industrial, or agricultural users  
16 of water, SVG objects to RTD’s recommendations in Mr. Stroshane’s testimony at RTD-10 pp. 49-  
17 51. (SVG Objections at 4.) The only basis SVG offers for its objection is that the “evidence is not  
18 relevant to the [Board’s] consideration under Water Code Section 1702 and the Part 1 issues  
19 identified by the [Board] for Part 1. (SVG Objections at p. 3.) SVG suggests that this testimony  
20 instead concerns “environmental and recreational uses, flow requirements, the economic feasibility  
21 of WaterFix and various statutory requirements that have no bearing on the issues set out by the  
22 Board in Part 1.” (See *id.*) The recommendations fall squarely within the Board’s specified  
23 evidentiary parameters.

24           In Mr. Stroshane’s testimony, RTD offers recommendations largely focused on ensuring  
25 consistent protections for the regional water rights of Delta water users and setting reasonable  
26 construction deadlines for Petition Facilities. (See e.g. RTD-10 at pp. 50-51 [¶ 156].) The facts  
27 provided by Mr. Stroshane in the paragraphs preceding RTD’s recommendations, set forth in  
28

1 paragraph 156, to which SVG also objects, summarize the context in which these and RTD's  
2 additional recommendations as made.

3 RTD is entitled to offer these recommendations both as a Protestant to the Petition and in  
4 keeping with the Board's statements regarding the scope of the issues in Part 1. Thus, SVG's  
5 objections that these recommendations are irrelevant to the issues before the Board are meritless.  
6 SVG's objection to RTD-10 at pp. 49-51 should be overruled.

7 **B. SVG Mischaracterizes as Legal Opinion the Testimony of Tim Stroshane at**  
8 **RTD-10 Pp. 9-11 and 19-20, Which Consists of Facts Relevant to the Question**  
9 **Whether the Petition in Effect Initiates a New Water Right.**

10 SVG objects to statements made by Mr. Stroshane regarding the absence of any description  
11 of Petition Facilities in existing beneficial use authorizations or water rights permits, found in RTD-  
12 10, at pp. 9-11 and 19-21, on the basis that these convey inadmissible legal opinions. These  
13 objections are baseless attempts to foreclose arguments made in RTD's Protest. This testimony  
14 relates directly to the question of whether the Petition initiates a new water right. Mr. Stroshane's  
15 reference to existing water rights authorizations in permits issued via the State Water Project or  
16 Central Valley Project is key to RTD's position that the Petition would in fact initiate a new water  
17 right. This testimony is not only offered in response to the Board's rulings regarding the scope of  
18 issues in Part 1 but also in direct response to arguments presented by DWR to support its position  
19 that the Petition would not initiate a new water right or injure legal users of water.

20 Mr. Stroshane does not purport to be a lawyer or to offer legal conclusions. However, this is  
21 a legal proceeding, in which the laws and regulations regarding change petitions, water rights, and  
22 beneficial use are directly at issue and are highly relevant. Precluding Mr. Stroshane, or any other  
23 witness, from grounding testimony in the appropriate legal framework would be senseless and highly  
24 prejudicial, as it would impede any party's ability to present a persuasive argument regarding the  
25 central issues before the Board.

26 SVG's position that Mr. Stroshane should be precluded from offering this testimony is  
27 inconsistent with the Board's rulings and would thwart protestants' ability to present relevant  
28 evidence regarding the central issues here. For these reasons, SVG's objections to RTD-10 at pp. 9-  
11 and 19-20 should be overruled.



1 **STATEMENT OF SERVICE**


2 **CALIFORNIA WATERFIX PETITION HEARING**  
3 **Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

4 I hereby certify that I have this day submitted to the State Water Resources Control Board  
5 and caused a true and correct copy of the following document(s):

6 **RESTORE THE DELTA’S RESPONSE**  
7 **TO SACRAMENTO VALLEY GROUP’S AND JOINING PARTIES’ OBJECTIONS**  
8 **TO PROTESTANTS’ WRITTEN TESTIMONY AND EXHIBITS**

9 to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service**  
10 **List** for the California WaterFix Petition Hearing, dated November 15, 2016, posted by the State  
11 Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water\\_issues/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)  
12 [programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

13 I certify that the foregoing is true and correct and that this document was executed on  
14 December 2, 2016.

15 Signature:  \_\_\_\_\_

16 Name: John W. Wall

17 Title: Litigation Assistant

18 Party/Affiliation: Protestant, Restore the Delta

19 Address: Earthjustice  
20 50 California Street, Suite 500  
21 San Francisco, CA 94103