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15 BEFORE

16 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

17 CALIFORNIA WATER FIX HEARING

18 Hearing in the Matter of California  
19 Department of Water Resources' and United  
20 States Bureau of Reclamation's Petition for  
21 Change in Points of Diversion for the Central  
22 Valley Project and the State Water Project

SACRAMENTO VALLEY WATER USERS'  
COMMENTS ON DRAFT ORDER OF  
WITNESS PRESENTATION AND MOTION  
TO REVISE PETITIONERS' PROPOSED  
WITNESS PANELS

23 **INTRODUCTION**

24 The petitioners, the Department of Water Resources (“DWR”) and the United States  
25 Department of the Interior (“DOI”), proposed to present their project operators and their  
26 CalSim II modelers on separate panels during their Part 2 case-in-chief. Specifically,  
27 Petitioners have proposed that their project operators would testify on their Panel 1 and their  
28 CalSim II modelers would testify on their Panel 2. The Hearing Officers' January 4, 2018  
ruling reflects Petitioners' proposal in the draft order of presentation of witnesses.

The experience during Part 1 of this hearing demonstrates that dividing the Petitioners' project operators and CalSim II modelers across witness panels leads to inefficient cross-examination that prejudices other parties by allowing Petitioners' witnesses to defer to one another across panels and potentially to even defer to witnesses whose cross-examination was completed earlier. In addition, Petitioners' written Part 2 testimony demonstrates the

1 heightened need for simultaneous cross-examination of their operators and CalSim II modelers  
 2 and the potential prejudice to other parties of not having such cross-examination. The  
 3 Sacramento Valley Water Users ("SVWU") therefore request that the Hearing Officers modify  
 4 Petitioners' witness panels listed in the January 4 ruling. Specifically, the SVWU move for an  
 5 order requiring Petitioners to present their project operators and their CalSim II modelers on the  
 6 same witness panel so that they are available for simultaneous cross-examination. The SVWU  
 7 have attached a proposed reorganization of Petitioners' proposed panels and respectfully  
 8 request that the Hearing Officers adopt that proposal.

9 **STATEMENT OF FACTS**

10 Petitioners have submitted Part 2 testimony for, among others, the following witnesses  
 11 on the following subjects on the following panels:

<u>Panel</u>	<u>Witness</u>	<u>Subject</u>
1	Aaron Miller, DWR	"Operations"
1	Kristin White, DOI	"Modeling and Operations"
2	Erik Reyes, DWR	"CALSIM II modeling"
2	Nancy Parker, DOI	"Modeling"

17 (See DWR's Supplemental Notice of Intent to Appear, served Nov. 30, 2017;  
 18 Petitioners' Grouping Proposal, dated Dec. 12, 2017.)

19 Petitioners' written Part 2 testimony indicates that these witnesses' testimony have  
 20 significant interrelationships. Approximately six of the 12 pages of Mr. Miller's written  
 21 testimony discuss how the Petitioners would "operationalize" various modeling assumptions,  
 22 including "pulse protection criteria," "CWF Old and Middle River flow" and an "additional  
 23 spring outflow target." (Exhibit DWR-1011, pp. 5-12.) Mr. Reyes' testimony describes the  
 24 new CalSim II hydrologic modeling that Petitioners are presenting based on the Final  
 25 Environmental Impact Report/Environmental Impact Statement ("FEIR/EIS") that DWR has  
 26 certified and "additional information" including the biological opinions and "2081(b) Incidental  
 27  
 28

1 Take Permit" that have been issued for California WaterFix.<sup>1</sup> (Exhibit DWR-1016.) Mr.  
2 Reyes also has submitted an extensive exhibit summarizing various modeling assumptions,  
3 which include "Delta Outflow Index (Flow and Salinity)," "Post-Pulse Operations for North  
4 Delta Diversion Bypass Flows" and "Old and Middle River Flow Criteria under H3, H4 and  
5 H3+" assumptions whose "operationalization" Mr. Miller presumably seeks to describe. (See  
6 Exhibit DWR-1069.) While Mr. Miller seeks to describe how the Petitioners would implement  
7 modeling assumptions that Mr. Reyes describes, Petitioners propose to present Mr. Miller as a  
8 witness on Panel 1 **before** Mr. Reyes testifies on Panel 2.

9 Judging by their brief written testimony, Ms. White and Ms. Parker would testify  
10 primarily to support Mr. Miller and Mr. Reyes, on Panel 1 and Panel 2, respectively. (See  
11 Exhibits DOI-39 and DOI-40.) In her brief written testimony, Ms. White – who Petitioners  
12 propose to present as a Panel 1 "operations" witness – demonstrates the interrelationship  
13 between Petitioners' modeling testimony and their operations testimony, stating:

14  
15 [S]ince 2013, I have served as an operations liaison for internal divisions and  
16 external agencies to provide input and review on evaluating operational effects,  
17 operational descriptions and appropriate methods to model current and future  
18 operation of the CVP . . . I have reviewed and am familiar with the CalSim II  
19 models and operational assumptions used in this hearing process. **I am able to  
20 answer technical questions regarding the use of CalSim II to model and  
21 analyze CVP operations and how components from the modeling may be  
22 operationalized within the CVP.**

23 (Exhibit DOI-39 (emphasis added).)

24 In addition, Petitioners have proposed a very large Panel 2 of 13 witnesses, whose  
25 testimony would cover subjects ranging from CalSim II, DSM, selenium and temperature  
26 modeling to both in-Delta and upstream fishery issues to water quality effects both in and  
27 upstream of the Delta to facilities construction. Cross-examination of the Petitioners' proposed  
28 Panel 2 likely would consume weeks, with each cross-examiner potentially requiring many  
hours of time in order to adequately cover all of the topics presented by that proposed panel.

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<sup>1</sup>To date, no federal agency has adopted a record of decision approving the FEIR/EIS under the National Environmental Policy Act.

1 Counsel for SVWU parties have informed DWR's counsel that the SVWU object to  
2 Petitioners' proposed separation of their operations and CalSim II modeling witnesses across  
3 Part 2 panels. Counsel for SVWU parties and DWR's counsel have communicated  
4 telephonically and via e-mail in an attempt to resolve the SVWU's objections, but have not  
5 been successful.

### 6 **ARGUMENT**

7 The Hearing Officers have broad authority to manage presentation of evidence in this  
8 hearing. Section 648.5, subdivision (a), of the SWRCB's regulations states:

9  
10 Adjudicative proceedings shall be conducted in a manner as the Board deems  
11 most suitable to the particular case with a view toward securing relevant  
information expeditiously without unnecessary delay and expense to the parties  
and to the Board.

12 The Hearing Officers especially should ensure that cross-examination affords  
13 protestants an effective, yet efficient, opportunity to test the Petitioners' written testimony. Part  
14 1 cross-examination demonstrated the problems created when interlocking testimony by  
15 Petitioners' CalSim II modeling and operations witnesses, and therefore cross-examination of  
16 those witnesses, is spread across various witness panels. Petitioners' operators testified that  
17 their models do not capture day-to-day operations by the Petitioners, but that those models are  
18 the best available. (See August 10, 2016 Reporter's Transcript ("RT"), pp. 186-188.)  
19 Petitioners' modelers testified that their CalSim II results demonstrate that, in their opinion,  
20 implementing California WaterFix would have insignificant effects on other water users, but  
21 also that those model results "should not necessarily be understood to reflect actually what  
22 would occur in the future under a given scenario" where those results depict "systems wide  
23 storage levels are at or near dead pool." (Exhibit DWR-71, pp. 12:15-18, 20:10-19.) On cross-  
24 examination, DWR's primary CalSim II modeler and other witnesses presented by Petitioners  
25 testified that Petitioners' operators would have additional flexibility that cannot be modeled to  
26 avoid problems in those scenarios. (August 23, 2016 RT, 229:9-233:11.) Petitioners' operators  
27 questioned whether model results showing that south-of-Delta Central Valley Project  
28 agricultural water-service contractors would actually receive less water with California

1 WaterFix than without it accurately depicted what would happen in the future. (April 27, 2017  
2 RT, pp. 48:6-53:8.) In addition, Petitioners' water-right witnesses referred to their operators'  
3 and modelers' testimony to testify that Petitioners' modeling results do not indicate that  
4 implementing California WaterFix would injure other legal users of water because Petitioners'  
5 operators would operate to avoid such a result. (Sept. 22, 2016 RT, pp. 215:6-218:9.)

6 Petitioners' proposed Part 2 witness panels – which are reflected in the January 4  
7 ruling's draft order of presentation – would create a significant risk of such problems  
8 reoccurring in Part 2. For example, Petitioners propose that Mr. Miller – whose testimony  
9 primarily concerns how Petitioners would "operationalize" certain modeling assumptions –  
10 would testify on a different panel from Mr. Reyes, whose modeling would be  
11 "operationalized." In fact, Petitioners propose that Mr. Miller would testify about  
12 "operationalizing" modeling **even before** Mr. Reyes would be subject to cross-examination  
13 about what is actually in the new modeling that reflects the "CWF H3+" scenario that  
14 Petitioners are presenting for the first time in Part 2. As experience in Part 1 proves, this sort of  
15 arrangement of witnesses presents a substantial problem for other parties in cross-examining  
16 Petitioners' witnesses, who may defer to one another across panels to answer cross-examination  
17 and actually may seek to defer to witnesses whose cross-examination already has been  
18 completed. The SVWU parties therefore respectfully request that the Hearing Officers revise  
19 Petitioners' witness panels so that Mr. Miller, Ms. White, Mr. Reyes and Ms. Parker all testify  
20 on the same panel. The SVWU parties have attached a proposed reorganization of Petitioners'  
21 witness panels.

22 Based on discussions with DWR counsel, the SVWU counsel understand that DWR  
23 may be concerned that consolidating Petitioners' operators and CalSim II modelers on a panel  
24 may force Petitioners to present their modelers and biologists on separate panels. Petitioners  
25 apparently are concerned that their modelers' and biologists' testimony interlocks sufficiently  
26 that those witnesses may need to refer to one another during cross-examination. There are a  
27 number of reasons, however, why this concern should not result in Petitioners' CalSim II  
28 modelers and operators testifying on separate Part 2 panels.

1 First, experience from Part 1 already proves that there are problems when Petitioners'  
2 CalSim II modelers and operators testify on separate panels.

3 Second, Petitioners' proposed Panel 2 already is at best unwieldy, comprising 13  
4 witnesses. In order to allow protestants a fair opportunity to cross-examine that panel, total  
5 cross-examination of that panel would consume weeks. Petitioners accordingly should be  
6 encouraged – or ordered – to break up that panel.

7 Third, if necessary, Petitioners could present their CalSim II modelers both with their  
8 operators and then with their biologists under a protective order issued by the Hearing Officers  
9 under which those modelers would be subject to cross-examination on the second panel only to  
10 the extent that another witness needs to rely on those modelers in cross-examination.

11 After reviewing the Part 2 written testimony of Petitioners' witnesses and considering  
12 DWR's concerns about the relationship between those witnesses' testimony, the SVWU  
13 developed the attached proposal to reorganize Petitioners' proposed panels. The reorganized  
14 panels would reflect the following logic:

15 Panel 1: Project description and construction witnesses;

16 Panel 2: Modelers and CVP/SWP operations witnesses;

17 Panel 3: Environmental witnesses largely interpreting modeling results; and

18 Panel 4: Other environmental witnesses.

19 The SVWU's proposal would result in none of Petitioners' witness panels being larger  
20 than seven witnesses, with that seven-witness panel – proposed Panel 2 – consisting solely of  
21 modelers and operators. This proposal also is consistent with Petitioners' presentation of their  
22 "project description" witness Gwen Buchholz and their "facilities construction" witness John  
23 Bednarski on the same Part 1 panel. (See Aug. 5, 2016 RT, p. iv.) If Petitioners were to feel  
24 compelled to return their CalSim II modelers to testify on the SVWU's proposed Panel 3, the  
25 Hearing Officers could apply the potential protective order discussed above to ensure that there  
26 would not be repetitive cross-examination of those modelers.

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**CONCLUSION**

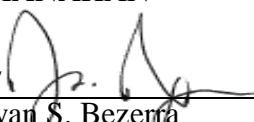
For these reasons, the SVWU respectfully request that the Hearing Officers issue an order reorganizing Petitioners' Part 2 case-in-chief witness panels as proposed by the SVWU.

Dated: January 11, 2018

Respectfully submitted,

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**Sacramento Valley Water Users' Proposal for  
Petitioners' Part 2 Witness Panels, Compared with Petitioners' Proposal**

<b><u>Petitioners' Proposal</u></b>		<b><u>SVWU Proposal</u></b>	
<u>Witness</u>	<u>Subject</u>	<u>Witness</u>	<u>Subject</u>
<i>Panel One</i>		<i>Panel One</i>	
Buchholz	Project description/public interest	Buchholz	Project description/public interest
Miller	Operations	Bednarski	Facilities construction
White	Operations	Pirabarooban	Facilities construction
<i>Panel Two</i>		<i>Panel Two</i>	
Greenwood	Delta fisheries/public trust	Miller	Operations
Wilder	Upstream fisheries/public trust	White	Operations
Earle	Terrestrial species	Smith	DSM2 modeling
Smith	DSM2 modeling	Reyes	CALSIM II modeling
Reyes	CALSIM II modeling	Parker	CALSIM II modeling
Parker	CALSIM II modeling	Ohlendorf	Selenium modeling
Bryan	WQ modeling	Smith	DSM2 modeling
Preece	WQ modeling		
Ohlendorf	Selenium modeling		
Guerin	Delta temperature modeling		
Hsu	Upstream temperature modeling		
Bednarski	Facilities construction		
Pirabarooban	Facilities construction		
<i>Panel Three</i>		<i>Panel Three</i>	
Rischbieter	Recreation	Greenwood	Delta fisheries/public trust
Bednarski	Facilities construction	Wilder	Upstream fisheries/public trust
		Bryan	WQ modeling
		Preece	WQ modeling
		Guerin	Delta temperature modeling
		Hsu	Upstream temperature modeling
		<i>Panel Four</i>	
		Rischbieter	Recreation
		Earle	Terrestrial species