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

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

CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MOTION TO
QUASH AND FOR PROTECTIVE
ORDER FROM RESTORE THE
DELTA'S SUBPOENA DUCES
TECUM

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17 The California Department of Water Resources (DWR) objects to the February 14,
18 2018 Subpoena Duces Tecum (Subpoena) filed by Earthjustice on behalf of Restore the
19 Delta (RTD) pursuant to Water Code section 1080, Government Code sections 11450.10-
20 11450.50, Code of Civil Procedure sections 1985 and 1987, and California Code of
21 Regulations, title 23, section 649.6(a) in the matter of DWR's and U.S. Bureau of
22 Reclamation's (Reclamation) Request for a Change in Point of Diversion for California
23 WaterFix (CWF hearing).

24 DWR requests that the Hearing Officers quash the Subpoena and issue a protective
25 order. DWR makes this request pursuant to Title 23 of the California Code of Regulations
26 section 648(b) under Government Code section 11450.30 that the request is unreasonable
27 or oppressive; Code of Civil Procedure section 2017.020 that the burden, expense or
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1 intrusiveness clearly outweigh the likelihood that the information sought will lead to
2 admissible evidence; Code of Civil Procedure section 2019.030(a)(1) that the subpoena is
3 unreasonably cumulative or duplicative, or is obtainable from some other source that is
4 more convenient, less burdensome, or less expensive.

5 In light of the Hearing Officer's February 21, 2018 Ruling on Outstanding Motions,
6 RTD's Subpoena is unreasonable and oppressive in seeking documents, communications
7 and electronic data regarding matters unconnected to and unlikely to inform the Hearing
8 Officers about the issues before the Hearing Officers in the current water rights hearing for
9 the California WaterFix (CWF). Additionally, the Subpoena is unreasonable for seeking
10 documents, communications, and electronic data on an infeasible timeframe.

11 **I. STATEMENT OF FACTS**

12 DWR incorporates by reference all its previous filings on the appropriate scope of
13 Part 2 and preliminary nature of the CWF staged construction approach served on the
14 parties to the CWF Hearing.

15 On October 30, 2015, the State Water Board issued the Notice of Hearing in which it
16 set forth the issues to be considered by the Hearing Officers. The hearing issues are
17 restated in multiple rulings on October 7, 2016 and August 31, 2017. The issues to be
18 considered in two parts of the hearing, and are:

19 Part 1

- 20 A) Will the changes proposed in the Petition in effect initiate a new water right?
21 B) Will the proposed changes cause injury to any municipal, industrial or agricultural
22 uses of water, including associated legal users of water?

23 Part 2

- 24 C) Will the changes proposed in the petition unreasonably affect fish and wildlife or
25 recreational uses of water, or other public trust resources?
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1 D) Are the proposed changes requested in the petition in the public interest? What
2 specific conditions, if any, should be included in any approval of the Petition to
3 ensure that the changes are in the public interest?

4 E) Should the Final Environmental Impact Report be entered into the administrative
5 record for the Petition?

6 Part 1 of this hearing initiated on July 26, 2016 and concluded on July 11, 2017.

7 On February 14, 2018, RTD served the Subpoena upon DWR. The Subpoena is
8 filed in connection with the ongoing change in point of diversion hearing for the CWF
9 pursuant to Water Code sections 1700 et seq. Generally, RTD's Subpoena seeks
10 documents related to topics that the Hearing Officers have already ruled will be addressed
11 in Part 3 if it occurs.

12 In response to Protestants' motions to stay Part 2 based on claims that Petitioners
13 were pursuing a different project than described in the water rights change petition, the
14 Hearing Officers on February 21, 2018 issued a ruling denying the motions to stay and
15 postponing consideration of a staged implementation of CWF until a later, yet to be
16 scheduled Part 3. (February 21, 2018 Ruling on Outstanding Motions p. 5). In denying the
17 motions to stay, the Hearing Officers explained that "[b]ecause the parties will have the
18 opportunity to present testimony and evidence regarding staged implementation if and
19 when we convene Part 3, cross-examination and rebuttal on **issues related to staged**
20 **implementation will not be allowed during Part 2.** Postponing discussion of those issues
21 until it becomes necessary and there is more detailed supporting documentation to inform
22 the parties' presentations will make the most efficient use of the State Water Board's and
23 the parties' time and resources in light of present uncertainty." (February 21, 2018 Ruling
24 on Outstanding Motions p. 5) (emphasis added).

25 Part 2 of this hearing began on February 22, 2018. As established in the February
26 21, 2018 Ruling, Part 3, should it be necessary, will commence on a schedule yet to be
27 determined by the Hearing Officers.

1 Pursuant to California Code of Civil Procedure section 2016.040, DWR attempted a
2 meet and confer call with RTD on March 1, 2018. No return call was received. DWR made
3 a second attempt to meet and confer with RTD on March 2, 2018. This too was
4 unsuccessful. Given the time constraints of this subpoena and an inability to reach RTD,
5 DWR files this motion.

6 **II. ARGUMENT**

7 The Hearing Officers should grant DWR's motion to quash and for a protective order
8 because RTD's Subpoena is unreasonable. Adjudicative proceedings are generally
9 governed by Title 23 of the California Code of Regulations section 648 et seq., and
10 subpoenas in the CWF Hearing are governed by Title 23 of the California Code of
11 Regulations section 649.6.

12 DWR files this motion for protective order under Title 23 of the California Code of
13 Regulations section 648(b), Government Code section 11450.30, Code of Civil Procedure
14 section 2017.020, and Code of Civil Procedure section 2019.030(a)(1).

15 **A. RTD's Subpoena is unreasonable for seeking documents,** 16 **communications and electronic data on matters beyond the scope of** 17 **this CWF Hearing Part 2 (CCP 2017.020)**

18 As explained above, the CWF Hearing Part 2 is limited to the issues set forth by the
19 Hearing Officers in their rulings and notices. Because the Hearing Officers have already
20 ruled that Part 2 will not include evidence or testimony related to a staged implementation
21 of CWF, the documents sought in RTD's Subpoena are beyond the scope of these issues
22 and are therefore unreasonable and unnecessary.

23 Moreover, on February 27, 2018 Hearing Officer Doduc took time to emphasize the
24 intent of the February 21, 2018 ruling regarding the appropriate scope of Part 2. In
25 summary, the discussion confirmed that the February 21, 2018 ruling moved discussions of
26 a staged construction approach to a Part 3, should the Petitioners make a decision to utilize
27 such a staged construction approach. (February 27, 2018 rough transcript, p. 70-72.)

1 The only documents RTD's Subpoena seek relate to a potential staged
2 implementation of the CWF project. Specifically, RTD seeks documents from May 1, 2017
3 to the present referencing or related to:

- 4 1) a 6000 cfs single tunnel alternative for the WaterFix Project, or separation of the
5 WaterFix Project into two distinct stages of construction and/or operation;
- 6 2) operation of a 6000 cfs single tunnel alternative for the WaterFix Project, or
7 separation of the WaterFix Project into two distinct stages of construction and/or
8 operation;
- 9 3) evaluation of environmental effects of a 6000 cfs single tunnel alternative for the
10 WaterFix Project, or separation of the WaterFix Project into two distinct stages of
11 construction and/or operation;
- 12 4) cost of a 6000 cfs single tunnel alternative for the WaterFix Project, or separation
13 of the WaterFix Project into two distinct stages of construction and/or operation.

14 RTD's subpoena also seeks communications between:

- 15 5) DWR and the State Water Resources Control Board referencing or relating to a
16 6000 cfs single tunnel alternative for the WaterFix Project, or separation of the
17 WaterFix Project into two distinct stages of construction and/or operation;
- 18 6) DWR and Metropolitan Water District of Southern California referencing or
19 relating to a 6000 cfs single tunnel alternative for the WaterFix Project, or
20 separation of the WaterFix Project into two distinct stages of construction and/or
21 operation;
- 22 7) DWR and State Water Contractors, Inc. referencing or relating to a 6000 cfs
23 single tunnel alternative for the WaterFix Project, or separation of the WaterFix
24 Project into two distinct stages of construction and/or operation;
- 25 8) DWR and the U.S. Bureau of Reclamation referencing or relating to a 6000 cfs
26 single tunnel alternative for the WaterFix Project, or separation of the WaterFix
27 Project into two distinct stages of construction and/or operation;

- 1 9) DWR and Santa Clara Valley Water District referencing or relating to a 6000 cfs
2 single tunnel alternative for the WaterFix Project, or separation of the WaterFix
3 Project into two distinct stages of construction and/or operation; and,
4 10) DWR and Kern County Water Agency referencing or relating to a 6000 cfs single
5 tunnel alternative for the WaterFix Project, or separation of the WaterFix Project
6 into two distinct stages of construction and/or operation.

7 RTD also filed a PRA request for documents related to identical issues. (February 9, 2018
8 California Public Records Act Request, attached as exhibit 1).

9 RTD, in the affidavit submitted by Ms. Geis in support of the Subpoena, states the
10 basis of this Subpoena. She declares that, “[t]he requested documents are relevant and
11 necessary: RTD cannot properly participate in Part 2 of the WaterFix hearing nor continue
12 in its role as an active protestant without the requested documents.” (Affidavit of Stacey P.
13 Geis in Support of Subpoena Duces Tecum, para. 8). RTD supports its Subpoena with
14 erroneous assertion that DWR has modified the project. (Affidavit of Stacey P. Geis in
15 Support of Subpoena Duces Tecum, paras. 4, 6, 8).

16 Contrary to Ms. Geis’s assertions, while DWR is only considering the option of
17 staged construction and has not decided to modify the project. DWR continues to pursue
18 the full project. Petitioners are the only two parties with the authority to modify the petition.
19 The petitioned project has not been modified by virtue of the fact that neither DWR nor
20 Reclamation have filed an amendment to the petition. Further, DWR has repeatedly
21 confirmed that DWR will pursue the project as planned, and, as explained in its February 9,
22 2018 Response to Questions from the Hearing Officers, DWR Director Nemeth attested
23 that DWR is not modifying the project or the change requested in its Petition. (DWR
24 February 9, 2018 Response to Questions from the Hearing Officers p. 5)

25 Thus, all of the documents RTD seeks in the Subpoena relate to a 6000 cfs single
26 tunnel alternative for the CWF Project, or separation of the CWF Project into two distinct
27 stages of construction and/or operation, which are not at issue in Part 2. Therefore, RDT
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1 does not need the documents to participate in Part 2. On that basis the subpoena is
2 unreasonable and the Hearing Officers should issue a ruling quashing the Subpoena.

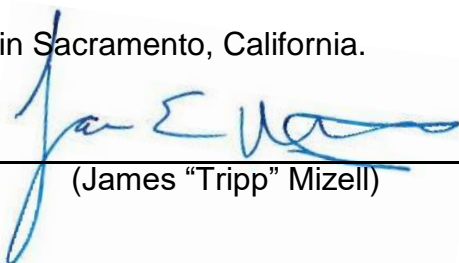
3 **B. RTD's Subpoena is unreasonable for seeking documents,**
4 **communications and electronic data on an infeasible timeframe**
5 **(Gov. Code 11450.30)**

6 RTD's Subpoena is also unreasonable because of the short timeframe demanded
7 for the production of documents. RTD made its exceptionally over-broad and largely
8 irrelevant demand upon DWR with a 16-day production timeframe. Such a timeframe is
9 entirely insufficient should its demands be found reasonable. If documents,
10 communications and electronic data are required to be produced, DWR estimates that a
11 reasonable timeframe for production is 120 days. DWR requests that should the Hearing
12 Officers find any merit in RTD's Subpoena that they issue a protective order modifying the
13 timeframe for production to 120 days from the date of the order.

14 **III. CONCLUSION**

15 For the reasons stated above DWR requests that the Hearing Officers quash RTD's
16 Subpoena and issue a protective order relieving DWR of any obligation to comply with the
17 Subpoena until it is determined that Part 3 will proceed. DWR will refrain from acting on the
18 subpoena until it receives instructions from the Hearing Officers as to this motion.

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20 Executed on this 2nd day of March, 2018, in Sacramento, California.

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22 _____
23 (James "Tripp" Mizell)