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14 [Additional counsel listed as signatories]

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'  
MOTION FOR ORDER OVERRULING  
OBJECTIONS BY THE DEPARTMENT OF  
THE INTERIOR TO SUBPOENA DUCES  
TECUM AND COMPELLING  
PRODUCTION OF SUBPOENAED  
DOCUMENTS

23 **INTRODUCTION**

24 Petitioner United States Department of the Interior (“DOI”) jointly filed with petitioner  
25 Department of Water Resources (“DWR”) the water-right petition that is at issue in this  
26 hearing. Even though DOI initiated this proceeding, thus availing itself to the State Water  
27 Resources Control Board (“SWRCB”), DOI asserts that it is immune from the SWRCB’s  
28 subpoena authority and therefore has no obligation to produce relevant documents and  
information in response to the subpoena duces tecum served by members of the Sacramento  
Valley Water Users group (“SVWU”). The documents produced by DOI's co-petitioner, the  
Department of Water Resources (“DWR”), in response to the subpoena demonstrate that DOI  
possesses critically relevant documents that it is refusing to produce, including operable  
CalSim modeling files that reflect the new spring Delta outflow criteria contained in the  
biological opinions (“BiOps”) recently issued for California WaterFix. Pursuant to

1 Government Code section 11450.30, subdivision (b), and California Code of Regulations title  
2 23, section 649.6, subdivision (b), the SVWU therefore move for an order overruling DOI's  
3 objections and compelling DOI to produce documents responsive to the SVWU's subpoenaed  
4 documents.

### 5 **BACKGROUND**

6 Pursuant to the SWRCB's regulations governing DOI's and DWR's pending water-right  
7 change petitions and this hearing, the SVWU served subpoenas duces tecum demanding the  
8 production, by July 7, 2017, of documents and modeling files referenced in the BiOps recently  
9 issued for California WaterFix by the United States Fish & Wildlife Service ("USFWS") and  
10 the National Marine Fisheries Agency ("NMFS"). Copies of the subpoenas are Exhibits A and  
11 B to this Motion. DWR has produced subpoenaed documents by posting them to the  
12 SWRCB's FTP site for this proceeding. However, DWR has said it cannot produce some  
13 subpoenaed files regarding modeling conducted by USFWS and NMFS for the BiOps, claiming  
14 that those files are in the possession of DOI and not DWR. A copy of DWR counsel's relevant  
15 e-mail is Exhibit C to this Motion.<sup>1</sup>

16 The documents that DWR has produced demonstrate that DOI not only has in its  
17 possession documents that are responsive to the subpoena, but also that some of those  
18 documents will be critically relevant for the SWRCB and the parties to explore and address the  
19 issues raised by DOI's own petition. In particular, DWR has produced PDF versions of  
20 PowerPoint presentations that depict some limited CalSim modeling results from modeling that  
21 DOI's agency USFWS apparently conducted to assess the hydrologic effects of the new spring  
22 Delta outflow criteria that are contained in the BiOps. One of those PowerPoints is attached to  
23 this Motion as Exhibit D to this Motion. DWR has stated that it does not have the operable  
24 modeling files by which those results were generated. (See Exhibit C to this Motion.) In  
25 addition, the documents that DWR has produced reference additional documents that  
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27 <sup>1</sup> The original form of the e-mails that are exhibits to this motion contained certain  
28 correspondents' cellular telephone numbers. Those numbers have been redacted in the attached  
exhibits.

1 apparently are in DOI's possession. For example, DWR produced a "resolution log" that  
2 identifies documents apparently produced during DWR's and DOI's consultation for California  
3 WaterFix under the federal Endangered Species Act, including documents numbered "BO#98"  
4 and "BO#99."<sup>2</sup> DWR, however, does not appear to have produced documents "BO#98" and  
5 "BO#99." The SVWU believe these documents, and other similarly responsive documents, are  
6 also in DOI's possession.

7 DOI, however, has refused to produce any subpoenaed files, or even to formally object  
8 the subpoena, based on the theory that DOI is immune from subpoenas issued under the  
9 SWRCB's authority in this proceeding. A copy of a July 7, 2017 email from DOI's counsel to  
10 counsel for SVWU parties stating this theory is Exhibit F to this Motion.

### 11 ARGUMENT

12 The SWRCB's presiding officer has the authority resolve an objection to a subpoena  
13 duces tecum served in a hearing and to order appropriate relief. (Gov't Code, § 11450.30,  
14 subd. (b); Cal. Code Regs., tit. 23, § 649.6, subd. (b).) The SWRCB's October 30, 2015 notice  
15 of this hearing states, at page 33, that the SWRCB would use its standard procedures in this  
16 hearing and indicates that these procedures include the availability of subpoenas. The SWRCB  
17 should overrule DOI's apparent objection to the SVWU subpoena and issue an order  
18 compelling DOI to produce documents responsive to that subpoena, including the operable  
19 CalSim modeling by which DOI generated the modeling results depicted in the documents that  
20 DWR has produced.

21 Notwithstanding that it jointly initiated this proceeding by filing a water-right petition to  
22 change the Central Valley Project's water-right permits, DOI has refused to produce, among  
23 other things, files regarding modeling conducted to support the BiOps, which are necessary for  
24 California WaterFix's approval. The subpoenaed information is necessary for the SVWU and  
25 other hearing parties who seek to understand how California WaterFix, as now defined by the  
26 BiOps, may affect their water supplies and the environment. DWR has represented that there is

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28 <sup>2</sup> A copy of the relevant pages of that resolution log are Exhibit E to this Motion. The  
relevant items on the log are Items 98 and 99.

1 no source for this information other than DOI. Requiring DOI to produce this information now  
2 would promote this hearing's efficiency, because it would allow the parties' technical experts to  
3 review it for use in Part 2 of the hearing and in a possible extension of Part 1 following Part 2.  
4 If DOI were to instead produce the modeling files at some later point, it might require the  
5 SVWU and other parties to seek extension of hearing deadlines in order to have enough time to  
6 review, and respond to, complex technical information.

7 DOI's apparent position is that the SWRCB has no authority to compel DOI to produce  
8 any evidence relevant to DOI's proposed changes to its water-right permits other than what DOI  
9 voluntarily chooses to produce. Under the United States Supreme Court's decision in  
10 *California v. United States* (1978) 438 U.S. 645, 671-676, the SWRCB has authority to impose  
11 conditions on DOI's water-right permits unless those conditions would be inconsistent with  
12 clear congressional directives. DOI's current position would prevent the SWRCB from  
13 obtaining evidence from DOI – other than what DOI chooses to produce – to assist the SWRCB  
14 in developing those conditions. That cannot be the law. DOI is subject to both California's  
15 substantive and procedural water law. (Cf. *United States v. Idaho* (1993) 508 U.S. 1, 8 (under  
16 the McCarran Amendment, the United States generally is subject "state adjective law, as well  
17 as to state substantive law of water rights," but not to fees); *United States v. Orr Water Ditch*  
18 *Co.* (9<sup>th</sup> Cir. 2004) 391 F.3d 1077, 1078, 1081 (state procedural water law applies to change  
19 petition under decree).) The SWRCB should overrule DOI's objection to the SVWU subpoena  
20 and require DOI to produce responsive documents and files, including operable CalSim  
21 modeling files by which the results depicted in Exhibit D to this Motion were generated.

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**CONCLUSION**

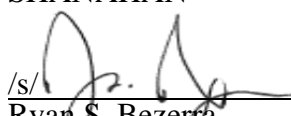
For these reasons, the SVWU respectfully request that the SWRCB overrule DOI's tacit objection to the SVWU's subpoena duces tecum and order DOI to produce all documents responsive to the subpoena.

Dated: August 4, 2017

Respectfully submitted,

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SHANAHAN

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PLACER COUNTY WATER AGENCY

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/s/ Dustin Cooper  
Dustin Cooper

\_\_\_\_\_  
/s/ Daniel Kelly  
Daniel Kelly

SACRAMENTO COUNTY WATER  
AGENCY

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STOEL RIVES

\_\_\_\_\_  
/s/ Wesley A. Miliband  
/s/ Wesley A. Miliband

**Attachment A—Sacramento Valley Water Users**

**Protestants represented by Downey Brand LLP**

Carter Mutual Water Company  
El Dorado Irrigation District  
El Dorado Water & Power Authority  
Howald Farms, Inc.  
Maxwell Irrigation District  
Natomas Central Mutual Water Company  
Meridian Farms Water Company  
Oji Brothers Farm, Inc.  
Oji Family Partnership  
Pelger Mutual Water Company  
Pleasant-Grove Verona Mutual Water Co.  
Princeton Codora-Glenn Irrigation District  
Provident Irrigation District  
Reclamation District 108  
Sacramento Municipal Utility District  
Henry D. Richter, et al.  
River Garden Farms Company  
South Sutter Water District  
Sutter Extension Water District  
Sutter Mutual Water Company  
Tisdale Irrigation and Drainage Company  
Windswept Land and Livestock Company

**Protestants represented by Somach Simmons & Dunn**

Glenn-Colusa Irrigation District  
Biggs-West Gridley Water District  
Sacramento County Water Agency  
Placer County Water Agency  
Carmichael Water District

**Protestants represented by Bartkiewicz, Kronick & Shanahan**

City of Folsom  
City of Roseville  
San Juan Water District  
Sacramento Suburban Water District  
Yuba County Water Agency

**Protestants represented by Minasian, Meith, Soares, Sexton & Cooper, LLP**

Anderson-Cottonwood Irrigation District

Butte Water District

Nevada Irrigation District

Paradise Irrigation District

Plumas Mutual Water Company

Reclamation District No. 1004

Richvale Irrigation District

South Feather Water & Power Agency

Western Canal Water District

**Protestants represented by Stoel Rives**

City of Sacramento