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7 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

8 **STATE OF CALIFORNIA**

9

10 HEARING IN THE MATTER OF)	PETITION FOR RECONSIDERATION
11 CALIFORNIA DEPARTMENT OF)	OF THE RULING VACATING SAN
12 WATER RESOURCES AND UNITED)	JOAQUIN RIVER EXCHANGE
13 STATES BUREAU OF)	CONTRACTORS WATER
14 RECLAMATION'S REQUEST FOR)	AUTHORITY'S NOTICE
15 A CHANGE IN POINT OF DIVERSION))	REQUESTING ATTENDANCE OF
16 FOR CALIFORNIA WATER FIX)	WITNESSES AND OPPORTUNITY TO
)	PRODUCE EVIDENCE

16 The San Joaquin River Exchange Contractors (SJREC) hereby petition the Board
17 for reconsideration of its December 8, 2016 Ruling that the SJREC may not introduce in
18 Part 1, by Notice to Appear or by Subpoena, the testimony of the head of DWR's Levee
19 and Environmental Engineering Branch or other most knowledgeable persons employed
20 by DWR, regarding evidence of the reasonable measures necessary and economic
21 contributions required to reasonably assure 3,000 cfs cross-Delta flow deliveries in July
22 through September to the Delta pumps. The Ruling of December 8, 2016 is attached as
23 Attachment 1.

24 This Petition is made on the following grounds and bases:

25 1. The SWRCB's conduct of an adjudicatory proceeding requires that
26 constitutional due process be provided to both applicants and protestants. It is respectfully
27 submitted that the denying SJREC's right to present evidence, whether produced by
28 subpoena or pursuant to cooperative means, violates principles of due process; the

1 granting of reasonable opportunity to present evidence is essential for due process
2 compliance (See Attachment 2 - Legal Authorities). The rescission of authority to present
3 the testimony would violate those fundamental constitutional rights.

4 2. DWR's further objection to the testimony which gave rise to this reversal by
5 the Board and denial of the opportunity to produce evidence was based upon DWR's
6 argument that:

7 “(1) DWR did not address long-term levee maintenance and
8 repair in its direct testimony, (2) a witness from DWR is
9 needed to explain the level of funding needed to ensure that
10 through-Delta conveyance can be maintained, and (3) the
11 potential for levee failure to disrupt through-Delta conveyance
12 is (not) relevant to the issue of harm to legal users of water.”
13 (Ruling, Page 2.)

14 The SWRCB states on page 3 of its Ruling:

15 “. . . we have determined that it would be unreasonable to
16 require DWR to provide witnesses to testify as requested by
17 SJRECWA because SJRECWA does not seek to elicit
18 testimony that is relevant to the key hearing issues for Part 1
19 of the hearing. The key hearing issues for Part 1 are whether
20 the water right changes proposed by DWR and the U.S.
21 Bureau of Reclamation (petitioners) constitute the initiation of
22 a new right or will cause injury to legal users of water or
23 otherwise impact human uses.”

24 The Board ruling, based in part on a draft of preliminary questions drafted by SJRECWA
25 for the witnesses, continues by stating:

26 “. . . it has become clear that the issues that SJRECWA seeks
27 to explore do not concern the potential impacts of the
28 proposed changes. Instead, SJRECWA seeks to present
testimony concerning the need for funding for levee
maintenance and repair in order to maintain the petitioners'
existing ability to convey water through the Delta. This is an
issue that will exist regardless of whether the WaterFix change
petition is approved.”

3. The Board's reversal through its Ruling ignores the facts in this instance, the
requirements of due process in an adjudicative hearing, and impermissibly narrows its
proceedings:

A. The authority sought by the DWR and Bureau is to provide for
facilities and uses which would divert around the Delta a majority of the usable water

1 South of the Delta at certain times. The proponents' plan submitted and testified that
2 3,000 cfs would continue to reach the Delta pumps by flowing across the Delta and would
3 be of a quality that the water would be pumped into the State and Federal aqueducts and
4 usable by municipal and agricultural users. That described condition can exist only if
5 Delta levee integrity is maintained, or after levee failure, if critical levees are quickly
6 rebuilt. DRMS I at pages 12-28 estimates a cost of \$100 Million per island for three
7 island failures, also found at page 10 of the Executive Summary. Is the Board really
8 theorizing and presuming that DWR and the Federal government are going to continue to
9 provide funding to aid local interests in protecting levees from failure or rapidly
10 reconstructing those levees if they fail, when \$15 to \$30 Billion is already invested in
11 Tunnels? There is no evidence presented to substantiate such a presumption by DWR and
12 the Bureau who have the burden of reasonably describing how their new and old
13 diversions and plan will be implemented and organized.

14 B. No one twisted DWR's arm to present modeling as part of its
15 description of the WaterFix Tunnel operations, which modeling assumes that critical
16 levees would continue to exist and that cross-Delta flows of 3,000 cfs would be available
17 for pumping in the period of July through September of each year. This is the proposal of
18 DWR and an integral part of its proposal and representation that "no harm will arise."
19 The SWRCB ruling improperly narrows the ability to present evidence showing that such
20 a "proposal" is only feasible if conditions are imposed requiring large amounts of money
21 to be marshaled and devoted to preventative levee work, and, upon failure events, if
22 prompt funding of and organization of efforts to provide repair and replacement is
23 organized and feasible. (DRMS II SJRECWA exhibits filed with the Board.)

24 It is true that the DWR has not presented any evidence of how this part of
25 the Tunnel plan will reliably exist. That is why there is a Phase 1B for protestants or
26 commenters to present the absence of such information and plans and the ease with which
27 those arrangements could be included in the DWR and Bureau plan for the Tunnels as a
28 condition of approval. If the DWR modelers and witnesses had testified that upon a flood,

1 earthquake or simple failure of critical levees, the 3,000 cfs would be routed through the
2 Tunnels, no monies would be contributed to the local Reclamation Districts to repair and
3 reconstruct critical levees, and cross-Delta flows would thereafter be available only during
4 floods, a glaring omission in the description of the Tunnel Project could have been
5 eliminated and the Board ruling might have been correct and the Board's statement in its
6 reversal of the Ruling would be true. However, no such description was included, and all
7 modeling assumes a miraculous preservation without funding for critical levees.

8 C. The Board errs when it curtails testimony of the impacts to legal
9 users of water based on carving out a critical part of DWR's proposed operations. The
10 Board makes the following statement on page 3 of its Ruling and reversal in regard to the
11 subject of what measures will be undertaken to repair upon failure or to prevent critical
12 levee failure:

13 "This is an issue that will exist regardless of whether the
14 WaterFix change petition is approved. Other than the fact that
15 petitioners propose to continue to convey water through the
16 Delta, SJRECWA has not sought to explore any connection
17 between the WaterFix change petition and the need for
18 funding for levee maintenance and repair. Accordingly,
19 requiring DWR to provide a witness to testify on this issue
20 would not be reasonable or an efficient use of time."

21 DWR proposed this operating scheme to satisfy the "ho harm" test. It
22 makes no difference if the levees are fragile and expensive to protect. DWR could have
23 clearly stated that the first time three or more levees failed, efforts to preserve cross-Delta
24 flows would end, and quantify those effects in their modeling. If the Delta pump water
25 users are to be served in a different fashion or to be abandoned, DWR needs to explain
26 that.

27 1. It is the burden of the plan proponent for the new diversion
28 facilities to present evidence that its plan is feasible and will operate as is outlined in its
modeling. The two (2) path proposal (Tunnel and cross-Delta flow) cannot assume that
examination of the potential harm arising from the Tunnel path is the only subject of
inquiry and that someone else will take care of the second path.

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2. If the ruling of the SWRCB by the reference,

“Other than the fact that petitioners proposed to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair...”

is to infer that SJRECWA should have consumed the time of the hearing officers and parties in Part 1A asking questions of DWR witnesses, which witnesses made no offer of proof or testimony on direct as to the likelihood or means to be undertaken physically or financially to cause that the levees would remain intact, and that the 3,000 cfs of pumped water continue to be available or the necessity of proper funding or organization by the DWR and United States, the Board should state that clearly and explicitly in the Ruling. The fact is that DWR presented no such evidence (even though it is DWR’s burden to show the features of its “project” are feasible), and any such questions by SJRECWA would have been objected to by DWR as exceeding the scope of direct and not allowed or answered with “I have no knowledge.”

3. The California Legislature directed the DWR to perform the Delta Risk Management Studies Part I and Part II by State law (Assembly Bill 1200.) The Legislature has directed that tens of millions of Dollars be spent planning how to maintain a dual path method of water delivery and the costs. Is this Board really willing to state to the public and a reviewing Court that DWR and the United States had no duty to explain how, when the first wave of levee failures occurs, the 3,000 cfs would continue to be delivered, or alternatively, discontinued and routed through the Tunnels?

4. In adjudicative proceedings, sometimes the judge has a duty to save a party from its own instincts. Here, DWR needs saving. DWR appears to think it is a good idea to “hide the ball” in regard to whether parties that invest \$15 to \$30 Billion in Tunnels will be willing to continue or increase support of State and Federal financial contributions to maintaining levees or fixing the levees upon failure and preserving the 3,000 cfs dual path flow capability across the Delta. The SWRCB concludes on page 3: “This is an issue that will exist regardless of whether the WaterFix change petition is

1 approved.” Yet, it is with the same logic that water users who may, because Tunnels have
2 been completed and are in operation, if State and Federal contributions to local cost
3 sharing programs for levee repair and reconstruction are not a condition of SWRCB
4 permission to install the Tunnels and operate them, will ask why those levee expenditures
5 should continue or commence. If State and Federal funding contributions are necessary to
6 support local interests in fixing levees necessary to deliver 3,000 cfs to the State and
7 Federal pumps in July through September, and those funding measures are not to be
8 conditions of the Tunnel proposal and levees that fail are to be abandoned, DWR and the
9 Bureau can easily end this inquiry by stating what their plan proposes. Will the 3,000 cfs
10 flow stop? Will the levee damage and failures be repaired utilizing only the local
11 landowners’ funding capabilities which the testimony SJRECWA offers will show are
12 extremely limited? Should the Tunnels be larger, anticipating this change to a one path
13 alternative?

14 D. The attached Notice of Deposition pursuant to Water Code Section
15 1100 is designed to remind the Board of its legal duty to provide a fair proceeding so that
16 a full and correctly conditioned plan is approved or rejected. Review at the Court
17 authorities outlined in Attachment 2. DWR, and apparently some of the State Contractors,
18 are about to create legal defects in a plan and proceeding for which the public is entitled to
19 be given a fair hearing. The Tunnels can obviously provide resiliency to threatened Delta
20 physical conditions, which is a good thing. However, the desire to route water around the
21 Delta to avoid the claimed “thefts” of water, impositions of the Endangered Species Act
22 conditions, and the constant uncertainty is causing a “hide the ball” approach to these
23 issues of the Tunnel plan proponents, which is destructive of the very plan they advocate.
24 By providing a fair and open proceeding as to what the plan really proposes, the Board
25 can assure the proposal gets the attention it is entitled to and complies with the law.

26 **PRAYER**

27 The Board should allow the testimony proposed by the SJREC in Part 1B, or as
28 Rebuttal testimony if that is more efficient for the Board scheduling, whether by direct

1 testimony pursuant to Notice and Subpoena, or by Deposition. If the Deposition proceeds
2 because no reconsideration is granted, be assured a Court will only be left to wonder and
3 examine whether the proceeding which could have been conducted fairly and openly is not
4 constitutionally deficient and subject to being redone in the future.

5 Date: 12/23/16

Respectfully Submitted,

MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP

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8 By: 
9 PAUL R. MINASIAN, ESQ.

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State Water Resources Control Board

December 8, 2016

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING VACATING SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY’S NOTICE REQUESTING ATTENDANCE OF WITNESSES

On August 31, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) served written notice on the Department of Water Resources (DWR), requesting the appearance of certain DWR witnesses during Part 1B of this hearing. On October 27, 2016, DWR filed a motion for protective order, seeking to vacate or limit the scope of SJRECWA’s notice. Based on our review of DWR’s motion and SJRECWA’s reply, it does not appear that SJRECWA seeks to compel DWR’s witnesses to testify concerning any issues that are relevant to the key hearing issues for Part 1 of this hearing. Accordingly, SJRECWA’s notice requesting the appearance of DWR’s witnesses is hereby vacated in its entirety.

Procedural Background

The Notice of Intent to Appear (NOI) that SJRECWA originally filed in this proceeding listed four expert witnesses, including Christopher H. Neudeck. The subject of Mr. Neudeck’s proposed testimony was the need for agreements and funding for the maintenance, repair, and improvement of Delta levees and channels “for conveyance and control of water across and through the Delta to CVP and SWP pumps” On August 31, 2016, SJRECWA notified the State Water Resources Control Board (State Water Board) and the other parties that Mr. Neudeck was no longer available, and SJRECWA proposed to call DWR employees or consultants to testify instead of Mr. Neudeck.

In order to effectuate the substitution of DWR witnesses for Mr. Neudeck, SJRECWA served a notice on DWR pursuant to Government Code section 11450.50, requesting the appearance of: (1) David Mraz, Chief of the Delta Levees and Environmental Engineering Branch within DWR, (2) other DWR employees or consultants most knowledgeable concerning the modeling assumption that preferential pumping of up to 3,000 cubic feet per second (cfs) at the South Delta intakes would occur during July through September “as well as the financial contributions . . . that would provide reasonable assurance that this dual pathway for water to reach CVP and SWP pumps would exist . . . ,” and (3) individuals with knowledge of why the California WaterFix

Project does not provide a means for DWR, the U.S. Bureau of Reclamation, and local reclamation districts to implement various levee improvement projects and levee protection programs to ensure that water can continue to be conveyed through the Delta.

Originally, DWR opposed SJRECWA's request on the grounds that SJRECWA was impermissibly seeking to expand the scope of SJRECWA's NOI. In a ruling dated October 7, 2016, this objection was overruled because the scope of the proposed testimony from DWR witnesses was within the scope of Mr. Neudeck's proposed testimony. We also affirmed that SJRECWA had followed the proper procedures to compel a party to appear in an adjudicative proceeding before the State Water Board, and directed DWR to coordinate with SJRECWA to arrange for the appearance of the appropriate witness at the appropriate time.

Following the October 7 ruling, representatives for DWR and SJRECWA met and discussed SJRECWA's request, but were unable to reach agreement. As part of these discussions, SJRECWA provided DWR with a list of possible questions for a prospective DWR witness. DWR submitted a copy of the draft questions as an exhibit to its motion for protective order. The questions concern: (1) the modeling assumption that up to 3,000 cfs would continue to be pumped from the South Delta intakes during July through September, (2) the content of two Delta Risk Management Study (DRMS) reports that addressed the risk of levee failure, and (3) the need to fund levee improvements and repairs in order to maintain the ability to convey up to 3,000 cfs through the Delta.

Discussion

SJRECWA's written notice requesting the appearance of DWR witnesses had the same legal effect as a subpoena. (See Gov. Code, §§ 11450.10, 11450.50 [providing that a subpoena is not required in the case of the production of a party if written notice requesting attendance of the witness is served on the party's attorney in accordance with section 1987 of the Code of Civil Procedure].) A person served with a subpoena, or, as in this case, a written notice requesting attendance of a witness, may object to the terms of the subpoena or notice by a motion for a protective order, including a motion to quash. (Gov. Code, § 11450.30, subd. (a).) The hearing officer has discretion to resolve any objection subject to any appropriate terms and conditions. In addition, the hearing officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands. (*Id.*, § 11450.30, subd. (b).)

In its motion for protective order, DWR argues that SJRECWA's notice requesting the appearance of DWR witnesses is unreasonable and oppressive because: (1) SJRECWA could have asked its prospective questions during cross-examination of DWR's expert witnesses in Part 1A of the hearing, (2) the DRMS reports can be submitted as exhibits, and do not require testimony about their content, and (3) questions concerning long-term efforts to fund levee maintenance and repair are outside the scope of the hearing. In its reply, SJRECWA argues that DWR's motion should be denied because: (1) DWR did not address long-term levee maintenance and repair in its direct testimony, (2) a witness from DWR is needed to explain the level of funding needed to ensure that through-Delta conveyance can be maintained, and (3) the potential for levee failure to disrupt through-Delta conveyance is relevant to the issue of harm to legal users of water.

Having reviewed SJRECWA's prospective questions for DWR's witnesses and reply to DWR's motion for protective order, we have determined that it would be unreasonable to require DWR to provide witnesses to testify as requested by SJRECWA because SJRECWA does not seek to elicit testimony that is relevant to the key hearing issues for Part 1 of the hearing. The key hearing issues for Part 1 are whether the water right changes proposed by DWR and the U.S. Bureau of Reclamation (petitioners) constitute the initiation of a new right or will cause injury to legal users of water or otherwise impact human uses. Based on the limited description of proposed testimony contained in SJRECWA's NOI and written notice to DWR, it was unclear whether SJRECWA sought to present relevant testimony from Mr. Neudeck or DWR witnesses. Based on the more detailed prospective questions provided to DWR, however, it has become clear that the issues that SJRECWA seeks to explore do not concern the potential impacts of the proposed changes. Instead, SJRECWA seeks to present testimony concerning the need for funding for levee maintenance and repair in order to maintain the petitioners' existing ability to convey water through the Delta. This is an issue that will exist regardless of whether the WaterFix change petition is approved. Other than the fact that petitioners propose to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair. Accordingly, requiring DWR to provide a witness to testify on this issue would not be reasonable or an efficient use of time.

For the foregoing reasons, SJRECWA's written notice requesting attendance of DWR witnesses is vacated. Because the notice is vacated in its entirety, a protective order limiting the scope of SJRECWA's proposed questions is not necessary.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY:

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY:

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer

1 property, including water, can be affected by the action. *United States v. James Daniel*
2 *Good Real Property* (1993) 510 U.S. 43-45, 53, 61; *Connecticut v. Doehr* (1991) 501 U.S.
3 1, 107-08.

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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, December 27, 2016, submitted to the State Water Resource Control Board and caused a true and correct copy of the following document(s):

SJREC's PETITION FOR RECONSIDERATION OF THE RULING VACATING SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY'S NOTICE REQUESTING ATTENDANCE OF WITNESSES AND OPPORTUNITY TO PRODUCE EVIDENCE;

DRAFT NOTICE OF DEPOSITION TO ALL PARTIES TO THE WATERFIX PROCEEDINGS

to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition Hearing, dated December 27, 2016, posted by the State Water Resources Control Board at:

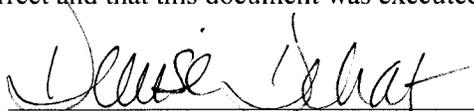
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

Service also perfected by placing for collection and deposit in the United States mail a copy/copies of the documents(s) at: MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP, in Oroville, Butte County, California in a sealed envelope, with postage fully prepaid, addressed to:

JAMES MIZELL
DEPARTMENT OF WATER RESOURCES
Office of the Chief Counsel
1416 Ninth Street, Room 1104
Sacramento, CA 95814

I am familiar with the practice of MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on December 27, 2016, the same day on which it/they were placed at MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP for deposit.

I certify that the foregoing is true and correct and that this document was executed on December 27, 2016.



Denise M. Dehart, Secretary to Paul R. Minasian
On behalf of SAN JOAQUIN RIVER EXCHANGE
CONTRACTORS WATER AUTHORITY
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