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8 members

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

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

18 OPENING STATEMENT

19 **I. SUMMARY OF PROTEST**

20 Pursuant to Water Code § 1702, the California Department of Water Resources
21 (Department) and the United States Bureau of Reclamation (Bureau) (collectively,
22 Petitioners) have the burden of proving that the requested change in point of
23 diversion/re-diversion (Requested Change) will not operate to the injury of any legal
24 user of the water involved. Petitioners have failed to present sufficient evidence to
25 carry this burden.

26 The injury the Requested Change threatens to cause South Valley Water
27 Association Protestants (SVWA Protestants) arises from changes to real-time
28 operations necessitated by implementation of the California WaterFix (CWF).
Although Petitioners have the burden of proving that such changes will not operate to
the injury of SVWA Protestants, Petitioners have failed to present any evidence that
would support a finding to this effect. Not only is Petitioners' modeling incapable of

1 accurately simulating real-time operations, but Petitioners have declined to provide an
2 adequate operations plan that would permit an analysis of the impacts resulting from
3 real-time operational changes incident to the CWF's implementation.

4 Accordingly, because Petitioners have failed to show that the Requested
5 Change will not operate to the injury of SVWA Protestants, permission for the
6 Requested Change must not be granted. Alternatively, if the Board does grant
7 permission for the Requested Change, it must impose terms and conditions to ensure
8 that the Requested Change will not operate to the injury of SVWA Protestants.

9 **II. ARGUMENT**

10 **A. Permission to Make the Requested Change Must Not Be Granted**
11 **Because Petitioners Have Failed to Meet Their Burden of**
12 **Demonstrating that the Requested Change Will Not Operate to the**
13 **Injury of Other Legal Water Users.**

14 **1. Permission to Make the Requested Change Must Not Be**
15 **Granted Unless Petitioners Have Demonstrated that the**
16 **Requested Change Will Not Operate to the Injury of Other**
17 **Legal Water Users**

18 Petitioners have the burden of proof in this proceeding. Pursuant to Water
19 Code § 1702, before the Board may grant permission for a change in point of
20 diversion, the petitioner "shall establish" that the requested change "will not operate
21 to the injury of any legal user of the water involved." See also Water Code § 1701.1(d)
22 ("A petition for change ... shall ... [i]nclude sufficient information to demonstrate a
23 reasonable likelihood that the proposed change will not injure any other legal user of
24 water."). Water Code § 1701.1(d). Accordingly, the Board cannot grant permission to
25 make the Requested Change unless Petitioners have successfully demonstrated that
26 the Requested Change "will not operate to the injury of any legal user of the water
27 involved."

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1 **2. SVWA Protestants Are Legal Users of the Water Involved**

2 All of the SVWA Protestants' Members, other than Pixley Irrigation District,¹
3 hold permanent Repayment Contracts with the United States entitling them to a supply
4 of water from the San Joaquin River through Millerton Reservoir and the Friant-Kern
5 Canal, a component of the CVP. The Association Members' Repayment Contracts
6 are listed in the SVWA Protestants' Protest, along with the number of the contract
7 between the member and the United States Department of the Interior, Bureau of
8 Reclamation, and the quantities of Class 1 Water and Class 2 Water to which the
9 member is entitled. These contracts, entered into pursuant to Section 9(d) of the
10 Federal Reclamation Act of 1939, establish a permanent, contractual right to the
11 stated water quantities.

12 Although the SVWA Protestants' contractual rights directly relate to water on
13 the San Joaquin River, the availability of those supplies is contingent on the United
14 States' ability to provide a substitute supply to the Exchange Contractors, the original
15 holders of water rights on the San Joaquin River. This substitute supply is obtained
16 primarily from the Sacramento River, its tributaries, and the Sacramento-San Joaquin
17 Delta under permits the Bureau acquired for the express purpose of satisfying the
18 substitute supply requirements of the Exchange Contract. Because these permits
19 make it possible for the CVP to deliver a reliable water supply to Friant Division
20 contractors, and because the purpose of this proceeding is to modify these permits,
21 SVWA Protestants are legal users of the water involved.

22 Depending on how the currently-proposed project is operated, the diversions
23 at the proposed tunnels could compete with or interfere with diversions by the United
24 States that are necessary to meet the substitute supply under the Exchange Contract.

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26 ¹ Pixley Irrigation District does not hold a permanent Repayment Contract, but does
27 hold a contract with the United States for a Cross Valley Canal water supply, which
28 entitles the District to certain benefits from the Friant Division facilities, including
access to Section 215 water supplies and ability to receive transfer water from Friant
Division Repayment Contractors.

1 If the Exchange Contract is not fully satisfied from the Sacramento River, its
2 tributaries, or Delta sources, the flows of the San Joaquin River may be required to be
3 delivered to the Exchange Contractors, which necessarily reduces the supplies to the
4 Friant Division contractors, including the Protestants.

5 The testimony of Daniel Vink, Executive Director of the South Valley Water
6 Association, explains the nature of SVWA Protestants' rights, and their relationship to
7 the Exchange Contract in further detail, and demonstrates that SVWA Protestants are
8 legal users of the water involved.

9 **3. Petitioners Have Failed to Demonstrate that the Requested**
10 **Change Will Not Operate to the Injury of SVWA Protestants**

11 Petitioners have failed to meet their burden of showing that the Requested
12 Change "will not operate to the injury of any legal user of the water involved" because
13 Petitioners have failed to show that the Requested Change will not interfere with the
14 United States' ability to satisfy the Exchange Contract requirements from the
15 Sacramento River, its tributaries, or Delta sources.

16 The potential for injury to SVWA Protestants is rooted in real-time operational
17 decisions regarding the use of Delta supplies. However, Petitioners have declined to
18 present an operations plan that would allow SVWA Protestants to analyze how the
19 Requested Change will affect these real-time operational decisions. Compounding
20 matters further, the modeling Petitioners submitted for this proceeding is, by their own
21 admission, incapable of accurately simulating real-time operations, rendering it
22 useless for determining whether the Requested Change will operate to the injury of
23 SVWA Protestants. Indeed, because Petitioner's modeling cannot meaningfully
24 simulate real-time operations, it simply assumes that the conditions that would cause
25 injury to SVWA Protestants cannot occur, even though those conditions have occurred
26 in two out of the last three years.

27 In light of these deficiencies, Petitioners cannot meet their burden of showing
28 that the requested change will not injure SVWA Protestants.

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a. Petitioners have failed to provide a well-defined operations plan.

Petitioners have failed to demonstrate that the Requested Change will not injure SVWA Protestants because Petitioners have failed to provide an operations plan that would allow SVWA Protestants to assess the Requested Change's effects on real-time operations. Because real-time operations are integral to the CVP's ability to deliver water to CVP contractors, the United States normally sets forth its proposed operations in the Operations Criteria and Plan (OCAP). This gives potentially affected contractors—the legal users of CVP water—written notice and an opportunity to review, comment, and be heard with respect to proposed operational parameters and their potential impact on CVP contractors. Here, in contrast, Petitioners have failed to present a meaningful operations plan that explains how the SWP and CVP will be operated after the proposed new facilities and points of diversion and re-diversion are constructed and operational.

Oral testimony during Petitioners' case-in-chief revealed that crucial decisions regarding how the CVP/SWP will be operated under the CWF have yet to be made. For instance, Petitioners have yet to determine which agency will have priority to additional yield. Additionally, although Petitioners acknowledge that CWF's implementation will trigger a review of the Coordinated Operations Agreement (COA), they have not determined whether, and to what extent, COA obligations will need to be modified. While this may explain Petitioners' failure to provide a well-defined operations plan, it does not excuse Petitioners from complying with Water Code § 1702's express mandate that Petitioners "shall establish" that the requested change "will not operate to the injury of any legal user of the water involved."

That Petitioners claim not to propose changes to operations is unavailing. Regardless of whether Petitioners are proposing operational changes, CWF's implementation will necessitate operational changes to accommodate new facilities and, if the modeling is correct, additional system supply. Indeed, one of the principal

1 purposes of the CWF is to increase operational flexibility—which can only be realized
2 through changes in operations. It makes no difference that Petitioners have not
3 affirmatively proposed such changes in this proceeding; they will necessarily occur as
4 a direct result of the changes Petitioners have proposed.

5 **b. Petitioners' modeling is incapable of accurately**
6 **simulating real-time operational decisions.**

7 In the absence of a well-defined operations plan, the only way Petitioners can
8 demonstrate that the Requested Change will not injure SVWA Protestants is through
9 modeling. However, Petitioners have steadfastly maintained that CalSim II is not
10 capable of accurately simulating real-time operations. This is extremely problematic,
11 as the potential for injury to the SVWA Protestants arises from real-time operational
12 decisions.

13 Friant Division contractors hold a priority right among CVP contractors to San
14 Joaquin River water, which is stored at Millerton reservoir. However, when the Bureau
15 decides to use Delta supplies for purposes other than satisfying Exchange Contractor
16 demands, the Exchange Contractors may exercise their reserved rights to San
17 Joaquin River water and receive delivery of San Joaquin River flows under those
18 reserved rights. When this occurs, water that would otherwise go to Friant Division
19 contractors is used to satisfy Exchange Contractor demands instead.

20 In 2014 and 2015 the Bureau made real-time operational decisions to use
21 available Delta water for purposes other than satisfying Exchange Contractor
22 demands. As a result, in both years Delta supplies were insufficient to satisfy
23 Exchange Contractor demands and the Bureau made releases from Millerton
24 reservoir to cover the shortfall, causing significant adverse impacts to Friant Division
25 contractors.

26 Although such real-time operational decisions can, and do, have significant
27 adverse consequences for Friant Division contractors, they cannot be simulated in
28 CalSim II. If decisions of this sort are more likely with the CWF in place, then

1 Petitioner's requested change will operate to the injury of the SVWA Protestants, and
2 all Friant Division contractors. However, CalSim II cannot be used to assess whether
3 the Bureau is more likely to use Delta supplies for purposes other than satisfying
4 Exchange Contractor demands with the CWF in place because this is precisely the
5 sort of real-time operational decision that CalSim II cannot simulate. As a result,
6 Petitioners' modeling is not probative of whether the requested change will operate to
7 the injury of SVWA Protestants.

8 **c. Petitioners' modeling of Exchange Contractor**
9 **deliveries is fundamentally flawed.**

10 Because CalSim II cannot accurately simulate real-time operational decisions,
11 it relies instead on "generalized rules [and] a coarse representation of project
12 operations." One of these rules makes meeting Exchange Contractor demands from
13 the Delta "the first priority" of CVP operations. Consequently, CalSim II makes "every
14 attempt to meet the Exchange Contract from the Delta and out of CVP storage in
15 Folsom and Shasta," even if that means depleting storage beyond what would be
16 permitted during actual operations. This means that the model's operating rules
17 preclude any outcome where Exchange Contractor demands are satisfied from a
18 source other than the Delta, even though this has occurred in the past and will likely
19 happen again in the future. It is very unlikely that the system operators will violate,
20 among other things, Folsom and Shasta operational parameters. As Mr. Milligan
21 explained, the circumstances that led to the Bureau's decision to serve the Exchange
22 Contractors with water from the San Joaquin River, rather than the Delta, "lie outside
23 the simulation of the model and should be thought through."

24 Significantly, although CalSim II could have been applied so as to address this
25 flaw, it was not. As Mr. Milligan explained, applying different assumptions to CalSim
26 II would allow one to assess the effect on Friant Division contractors of satisfying
27 Exchange Contractor demands from sources other than the Delta. However,
28 Petitioners chose not to apply those assumptions. As a result, no evidence has been

1 submitted to show the Requested Change's effect on SVWA Protestants.
2 Nevertheless, as explained in the written testimony of Dan Vink, those effects can be
3 disastrous for Friant Division contractors and SVWA Protestants.

4 **B. If the Petition is Approved, It Must Be Approved Subject to Terms**
5 **and Conditions that Ensure the Requested Change Will Not**
6 **Operate to the Injury of SVWA Protestants.**

7 To ensure the Project will not operate to Protestants' injury, any approval must
8 contain the following terms and conditions:

9 **1. Core Rights and Priorities Not Altered**

10 To avoid causing injury to Protestants, any approval of the Petition must be
11 made subject to, and expressly deemed not to alter:

12 a. All existing vested rights, including pre-1914 and riparian rights and
13 permitted and licensed rights as reflected in existing records, permits and water rights
14 decisions, including D-935 and D-990.

15 b. All existing priorities, including those established by existing permits,
16 vested pre-1914 appropriative rights and riparian rights, or other lawful means.

17 c. All existing contractual obligations, including specifically, obligations of
18 the United States contained in Article 3n of the Friant Division Contracts.

19 d. All interpretations of state and federal law as established by prior federal
20 and state court decisions, including the Westlands decisions.

21 The preservation of these core rights and priorities, through specific permit
22 conditions, is necessary due to the fact that a specific plan of operations has not been
23 established (as the Petitioners themselves have admitted). Such terms would not be
24 necessary if an operations plan had been made a part of the Petitioner.

25 **2. No Effect on "CVP Integration"**

26 To avoid causing injury to Protestants' intra-CVP priority to waters of the San
27 Joaquin River and to Protestants' contractual rights under Article 3(n), any approval
28 of the Petition must include a term or condition that the Petition's approval shall not

1 constitute or have the effect of integrating the operations of the CVP, or change any
2 of the relationships or priorities as amongst the divisions and units of the CVP.
3 Additionally, any approval of the Petition must *not* include any finding that the
4 operations of the CVP are, have been, or will, as a result of the approval, be integrated.

5 Again, this term is necessitated by the failure of the Petitioners to present a
6 binding operations plan.

7 3. No Effect on Solidifying Current COA Implementation

8 Article 16 of the COA requires a review pursuant to the procedures specified in
9 Article 14 upon "the construction of a new facility (not presently existing) by either
10 party." It is my opinion that maintenance of current COA implementation practices
11 under the CWF will injure Protestants by making it more difficult for the Bureau to
12 satisfy Exchange Contractor demands from the Delta, thereby increasing the
13 likelihood of a call for releases from Millerton. Accordingly, to avoid causing injury to
14 Protestants' intra-CVP priority to waters of the San Joaquin River and to Protestants'
15 contractual rights under Article 3(n), any approval of the Petition must include a term
16 or condition that:

17 a. Approval of the Change of Point of Diversion shall not constitute an
18 agreement (whether express or implied through course of dealings, or pattern of
19 performance) to maintain the status quo operation under the COA or to maintain the
20 status quo interpretation or application of the COA as reflected in drought operations
21 during 2014 and 2015.

22 b. All arguments regarding the appropriate application of the COA, or the
23 ability of the parties to renegotiate the terms of the COA to more appropriately reflect
24 relative priorities, that existed prior to the Petition shall continue to exist following
25 approval of the Petition.

26 4. Provide an Operations Plan

27 Although Petitioner's modeling indicates that the Exchange Contractors will
28 receive full substitute supply amounts in all year types from Delta sources, this is

1 because Petitioners have artificially forced this outcome by establishing it as a
2 required outcome of the modeling. However, this commitment to force delivery of all
3 Exchange Contract substitute supply requirements from Delta sources is not reflected
4 in an operations plan. If this truly is a commitment of the Petitioners, then they should
5 be able to comply with a requirement of the Petition that any operations plan
6 developed post-Petition approval must be consistent with this commitment as
7 reflected in the modeling. Consequently, to demonstrate that the Project will not
8 operate to the injury of Protestants, Petitioners must be required, prior to implementing
9 diversions at the new point of diversion, to provide an operations plan that
10 demonstrates what the modeling simply assumes: that under the CWF the Bureau will
11 be able to meet full Exchange Contract obligations in all years from the Delta.

12 **5. No Effect on Cost Allocation Negotiations**

13 If the project that is the subject of the Petition has a positive impact on the ability
14 of the United States to provide the full substitute supply requirements of the Exchange
15 Contract from Delta Sources, then this ability should be quantifiable, and a reasonable
16 cost allocation for this benefit could be identified. If, however, there is no benefit to
17 the project yet costs associated with the project are added to Friant Division rates, or
18 cost allocations are arrived at that are far out of proportion to the benefit to the security
19 of the Exchange Contract supplies, the Friant Division contractors will be injured.
20 None of this, however, can be determined at this time because of the failure of the
21 Petitioners to put forward a specific plan of operations.

22 To avoid causing injury to Protestants, any approval of the Petition must include
23 a term or condition that the United States will not require the Friant Division contractors
24 to pay for costs that they do not agree to and that are not in proportion to the benefits
25 received by the Friant Division.

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1 **III. Conclusion**

2 SVWA will be prepared to establish the facts as described above, through
3 written and oral testimony of Daniel Vink, as well as through written and oral testimony
4 of Walter Bourez that will be presented by other Protestants under agreement
5 between those protestants and SVWA. SVWA also reserves the right to rely on written
6 and oral testimony produced by the Petitioners and other protestants.

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