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3 RESOURCES**

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8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
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10 HEARING IN THE MATTER OF  
11 CALIFORNIA DEPARTMENT OF WATER  
RESOURCES AND UNITED STATES  
12 BUREAU OF RECLAMATION REQUEST  
FOR A CHANGE IN POINT OF  
13 DIVERSION FOR CALIFORNIA WATER  
FIX  
14

**CALIFORNIA DEPARTMENT OF  
WATER RESOURCES' OPPOSITION  
TO SAN JOAQUIN RIVER  
EXCHANGE CONTRACTORS  
WATER AUTHORITY PROPOSED  
AMENDMENT TO ITS NOTICE OF  
INTENT TO APPEAR**

15 California Department of Water Resources ("DWR") opposes San Joaquin River  
16 Exchange Contractors Water Authority's ("SJREC's") proposal, which it styled as a notice  
17 of unavailability of its expert witness and application for relaxation regarding submission  
18 of written testimony. SJREC's proposal is instead a request to amend its Notice of Intent  
19 to Appear ("NOI") that broadens the scope of the proposed testimony and adds an  
20 unspecified number of witnesses. DWR requests that the Hearing Officers reject  
21 SJREC's proposal, because it is procedurally improper and substantively unfair.  
22

23 **I. STATEMENT OF FACTS**

24 On August 26, 2015, DWR and Reclamation filed a petition for a change to their  
25 water rights necessary to allow for the implementation of key components of the State's  
26 California Water Fix ("CWF") program. On October 30, 2015, the Board issued a Notice  
27 of Petition and Notice of Public Hearing and Pre-Hearing Conference to consider the  
28

1 petition. The Hearing Officers later ruled on various hearing issues in letters dated  
2 January 15, 2016, February 11, 2016, March 4, 2016, April 25, 2016, June 10, 2016,  
3 July 22, 2016, and during the Part 1A hearing, which began on July 26, 2016, and they  
4 issued the Second Revised Notice of Rescheduled Public Hearing on May 11, 2016.

5 SJREC submitted its NOI on January 4, 2016 indicating that Christopher Neudeck  
6 would be one of its four witnesses and the subject of his proposed testimony would be:

7 Need for comprehensive agreements between SWP/CVP/local  
8 Reclamation Districts, and funding for maintenance, repair and  
9 improvement of levees and channels for conveyance and control of water  
10 across and through Sacramento/San Joaquin Delta to CVP and SWP  
11 pumps to prevent unreasonable salinity impairment of water quality; flow  
12 characteristics damaging to fish life[.]

13 The hearing officers scheduled a pre-hearing conference on January 28, 2016 to  
14 discuss the scope of the hearing and any other procedural issues. (October 30, 2015  
15 Notice, at p. 15.) After the pre-hearing conference, the Hearing Officers set a staggered  
16 submittal schedule for cases-in-chief and later set September 1, 2016 as the deadline for  
17 Part 1B cases-in-chief. (Feb. 11, 2016 Ruling, at p. 2; April 25, 2016 Ruling, at p. 4.) This  
18 allowed Protestants 93 days to prepare their cases-in-chief after receiving Petitioner's  
19 written testimony and exhibits. The April 25, 2016 notice indicated that NOI amendments  
20 were allowed for Part 2 parties to conduct cross-examination in Part 1 and to present  
21 testimony on impacts to human uses in Part 1, but not for other types of revisions and  
22 that new NOIs would not be accepted.

23 On July 22, 2016, the Board ruled that the staggered submittal structure would  
24 allow petitioners to describe the proposed project in a more succinct and accessible  
25 format to the extent possible, and gave the other parties additional time to review and  
26 prepare their own submittals. They disagreed with those parties who contended that  
27 petitioners' case-in-chief is insufficient to allow parties to meaningfully participate in Part  
28

1 of the hearing. As described in the Ruling, petitioners bear the burden of establishing  
2 that the proposed changes will not injure other legal users of water and reiterated the  
3 point from their February 11, 2016 ruling that not all uncertainties can or need to be  
4 resolved before beginning the hearing.

5 On August 26, 2016, the Board's Water Fix Hearing Team e-mailed out a form for  
6 parties to use to make substitutions to their witness lists, but they indicated parties may  
7 not expand the scope of proposed testimony or the increase number of witnesses.  
8 Without indicating why Mr. Neudeck will not be available to testify, SJREC proposes to  
9 submit oral testimony from DWR employees and consultants on the issues of levee and  
10 channel maintenance in the Central and South Delta areas instead of written testimony  
11 on these subjects. SJREC implies that its proposal satisfies the subpoena requirements  
12 of Government Code section 11450.10 and California Code of Regulations, title 23,  
13 section 649.6. SJREC's NOI Part 1 Witness Amendment Sheet not only broadens the  
14 topic of Mr. Neudeck's testimony,<sup>1</sup> but it also substitutes "DWR Employees And  
15 Consultants, David Mraz, and other produced DWR witnesses" for Mr. Neudeck.  
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## 18 **II. ARGUMENT**

19 This is an administrative hearing governed by Title 23 of the California Code of  
20 Regulations, section 648-648.8, 649.6, and 760; Chapter 4.5 of the Administrative  
21 Procedure Act (commencing with 11400 of the Government Code); sections 801 to 805  
22 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs.,  
23 tit. 23, § 648, subd. (b).) The Water Code also applies and provides that depositions may  
24 be taken pursuant to the Civil Discovery Act. (Wat. Code, § 1100; Code Civ. Proc.,  
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27 <sup>1</sup> The Amended NOI indicates the subject of Mr. Neudeck's proposed testimony is, "[l]evee  
28 maintenance and repair in Central Delta/South Delta."

1 § 2016.010, et seq.) Parties may subpoena witnesses to appear at a hearing or produce  
2 documents. (Gov. Code, § 11450.10, subd. (a); Cal. Code Regs., tit. 23, § 649.6.)

3 The April 25, 2016 ruling allowed revisions to parties' participation, but "did not  
4 otherwise permit parties to revise existing NOI's or to submit new NOI's." SJREC's  
5 request is equivalent to the revision or submission of a new NOI. SJREC's amended NOI  
6 not only broadens the scope of the proposed testimony, but it also substitutes an  
7 unspecified number of DWR employees and consultants to testify in place of Mr.  
8 Neudeck. Allowing SJREC to amend its NOI will encourage other parties to change the  
9 scope of their testimony and add witnesses, which could delay the hearing significantly  
10 and be largely duplicative. For each witness or panel of witnesses added, there are  
11 potentially 74 hours of cross examination. Parties should not now, almost a year after the  
12 petition was originally filed and more than seven months after the NOIs were due, be  
13 allowed to add witnesses or broaden the scope of the proposed testimony.  
14

15 SJREC's amended NOI is similar to Save the California Delta Alliance's ("SCDA's")  
16 motions to change its level of participation and Metropolitan Water District's request that  
17 the Board already denied. In their August 24, 2016 ruling on SCDA's second motion, the  
18 Hearing Officers indicated that the scope of a party's participation in the hearing is  
19 limited by their NOI. They also ruled that the October 30, 2015 Hearing Notice  
20 sufficiently described the project's potential for changes in flows and water quality in the  
21 Sacramento-San Joaquin Delta to alert SCDA to possible injury to legal users and plan  
22 their participation in the hearing accordingly. This reasoning also applies to SJREC's  
23 proposal. SJREC claims DWR did not submit enough information on financing,  
24 organizing, or modeling for maintaining channels and levees. However, substituting  
25  
26  
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1 DWR employees and consultants for its own case-in-chief witnesses is not the proper  
2 procedure.

3 This is without justification and poses an undue burden and resulting in surprise  
4 testimony discouraged in these proceedings. (Cal. Code Regs., tit. 23, § 648.4,  
5 subd. (a).<sup>2</sup>) Additionally DWR's experts were available for cross-examination where  
6 parties used that opportunity to establish testimony on this subject for the record. If they  
7 failed to explore the areas to which they now seek information it is too late as that panel  
8 has been excused. Allowing Petitioners' witnesses to be called back in this manner is not  
9 consistent with the hearing procedures set and relied upon by the parties. As noted in  
10 the Hearing Officer's August 24, 2016 ruling, the scope and complexity of this hearing  
11 require adherence to the procedural rules in order to facilitate an orderly and efficient  
12 proceeding.  
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14 **III. CONCLUSION**

15 DWR requests that the Hearing Officers deny this untimely and unjustified  
16 proposal.  
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18 Dated: September 2, 2016

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES



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27 <sup>2</sup> "It is the policy of the State and Regional Boards to discourage the introduction of surprise  
28 testimony and exhibits." (Cal. Code Regs., tit. 23, § 648.4, subd. (a).)