

1 Spencer Kenner (SBN 148930)

2 James E. Mizell (SBN 232698)

3 Robin McGinnis (SBN 276400)

4 **CALIFORNIA Department of Water Resources**

5 Office of the Chief Counsel

6 1416 Ninth Street, Room 1104

7 Sacramento, CA 95814

8 Telephone: (916) 653-5966

9 E-mail: james.mizell@water.ca.gov

10 Attorneys for California **Department of Water Resources**

11
12 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

20 **CALIFORNIA DEPARTMENT OF WATER
21 RESOURCES' RESPONSE TO SAN
22 JOAQUIN TRIBUTARIES AUTHORITY'S
23 OBJECTIONS TO DWR'S AND BUREAU'S
24 CASE IN CHIEF**

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INTRODUCTION3

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1 Specifically, Government Code section 11513, subdivision (c), provides:

2 The hearing need not be conducted according to technical rules relating to
3 evidence and witnesses, except as hereinafter provided. Any relevant evidence
4 shall be admitted if it is the sort of evidence on which responsible persons are
5 accustomed to rely in the conduct of serious affairs, regardless of the existence
of any common law or statutory rule which might make improper the admission of
the evidence over objection in civil actions.

6 To the extent a party wishes to oppose testimony, the party is entitled to "cross-examine
7 opposing witnesses on any matter relevant to the issues even though that matter was not
8 covered in the direct examination" (Gov. Code sec. 11513(b).)

9 **II. DWR'S WRITTEN TESTIMONY AND EXHIBITS SATISFIES THE EVIDENTIARY**
10 **STANDARD SET FORTH IN GOVERNMENT CODE SECTION 11513, AND SHOULD**
11 **BE ADMITTED**

12
13 SJTA's objections to DWR's witnesses and exhibits will be addressed in turn.

14 **A. Testimony of Maureen Sergent**

15
16 Maureen Sergent submitted her qualifications as an expert witness on the State Water
17 Project (SWP) water rights. SJTA does not object to Sergent's status of expert witness, but
18 instead objects to certain opinions she expressed in her testimony. The Notice makes clear that
19 the status of SWP's water rights is central to the SWRCB's review of the change petition.
20 Specifically, the Notice (p. 11) identifies the existing SWP water rights that are at issue in the
21 hearing, the proposed change of those water rights, and whether the proposed change in effect
22 constitutes a new water right or may injure legal users of water. Sergent's testimony is directly
23 relevant to these issues. As she has summarized on page 2 of her written testimony:

24 "My testimony presents information relevant to water rights issues
25 covered in Part 1 of this hearing. In the California WaterFix (CWF) Petition for
26 Change, DWR proposes to add three new points of diversion to four SWP water
right permits that would allow for the CWF. (Exhibits SWRCB-1; SWRCB-2.) The

1 purpose of my testimony is to explain DWR's water right permits for the SWP and
2 how the CWF will be operated consistent with these permits, that the proposed
3 project does not change the diversion rate or season of use permitted under the
4 permits, and how the information provided by DWR supports a conclusion by the
State Water Board that the new points of diversion will not injure other legal
users of water or in effect initiate a new water right and to provide a general
overview of DWR water supply and settlement agreements.

5 First, I describe the DWR's SWP water rights permits covered in the
6 CWF Petition for Change, including a brief description of the permit terms and
7 existing points of diversion. I then describe the change requested and provide
8 information to demonstrate that the requested change does not represent a new
9 water right because the proposed project does not change the diversion rate or
10 season of use provided by the permits. Next, I briefly discuss how information
11 provided in other DWR testimony on SWP operations, including Water Rights
12 Decision 1641 objectives (D-1641) required by the State Water Board for the
13 combined SWP and Central Valley Project (CVP) (collectively SWP/CVP),
14 modeling information of operational criteria analyzed for this hearing, and
15 historical salinity information support a decision by the Board that operating the
16 CWF will not injure other legal users of water. Finally, I describe the SWP long-
17 term water supply contracts and several settlement agreements between DWR
and diverters on the Feather River and in the Delta. In the State Water Board
February 11, 2016, ruling on the CWF Project pre-hearing conference, the Board
requested that DWR provide information required by its regulations for Change
Petitions, Section 794(a), in a succinct and easily identifiable format. This
information is attached to my testimony as Exhibit DWR-324.3 My testimony
builds on the information of other testimony in Part 1 to provide additional
information to the State Water Board to support a decision that, within the
framework of DWR's

18 water rights, regulations, and contracts, the CWF can be constructed and
19 operated without injuring other legal users of water"

20 Her testimony thus is relevant to several issues raised in the Notice, specifically about
21 DWR's water rights, proposed changes to those water rights, and whether the change DWR is
22 seeking is a new right. SJTA objects to Sergeant's testimony about injury to legal users of water
23 (p. 3 of SJTA Objections), and lack of testimony about refill criteria (p. 4 of Objections), and
24 about the ability to divert project stored water dedicated to water quality objectives (pp. 4-5
25 Objections). These objections do not undermine the relevancy of Sergeant's testimony under
26 Section 11513 or their admissibility, but instead simply show that SJTA may disagree with her
27 testimony. Sergeant is offered as an expert on SWP water rights and, as such, is permitted to

1 provide expert opinion about the water rights issues identified in the Notice, including testimony
2 about legal users of water. She is not required to testify about issues that SJTA may wish her to
3 testify, namely refill criteria and the ability to divert stored water dedicated to water quality
4 objectives. Section 11513 affords SJTA the opportunity to cross-exam all witnesses and it may
5 offer other evidence into the record, subject to review and objections by other parties, if it wishes.

6 SJTA also argues that Sergent's testimony is "incomplete" (pp. 6-7 of Objections)
7 because it does not testify about the projects impacts under the potential changes under
8 consideration by the SWRCB for a revised Delta water quality control plan with new Delta flow
9 criteria. DWR is not obligated to submit testimony about changes to the water quality control plan
10 being considered by the SWRCB, as any testimony would be speculative. Sergent's testimony
11 properly focused on the existing water quality plan, which is the plan in place under which the
12 projects must operate. Contrary to SJTA's assertion (p. 7 of Objections), DWR is not obligated to
13 provide testimony about appropriate flow criteria to protect fish and wildlife in this part of the
14 hearing. In the Notice, the SWRCB assigned that type of testimony to Part II of the hearing.

15
16 In regard to SJTA's argument that Sergent has offered a legal opinion about potential
17 injury to legal users of water (p. 8 of SJTA Objections), citing Evidence Code section 801 and
18 *Kotal v. Regents of United States* (2004) 115 Cal.App.4th 283. As an expert on water rights,
19 Sergent is entitled to offer expert opinions in this administrative hearing about questions
20 concerning "injury" and "legal users of water," as these terms are key elements of issues
21 identified for this hearing, and involve mixed questions of fact and law.

22 *Kotal* is distinguishable, as it concerned expert testimony before a jury about the ultimate
23 finding in the case, not in administrative matter involving questions falling under the expertise of
24 the witness. The Court of Appeal was concerned that the expert testimony in *Kotal* would intrude
25 upon an issue that was the responsibility of the jury and unduly influence it. The SWRCB is an

1 expert administrative body and not subject to undue influence by expert testimony like a lay jury.
2 The ultimate determination of the issues in this hearing concerning injury rests with the SWRCB,
3 which is entitled to determine the relevancy and weight of all evidence, including the evidence
4 provided by expert witnesses like Sergent. Unlike the testimony in *Kotal*, Sergent's expert
5 opinion testimony will not invade upon the SWRCB 's independent decision-making
6 responsibility.

7 **B. Testimony of John Leahigh**

8
9 SJTA objects to John Leahigh's testimony about SWP's compliance with D-1641,
10 including testimony based on DWR-401, which concerns Bay-Delta objectives exceedance
11 metrics for objectives that are the SWP and CVP responsibility, and testimony about past and
12 anticipated hydrological conditions. SJTA does not object to Leahigh's status of expert witness,
13 but instead objects to certain opinions he expresses in his testimony.

14 The Notice (p. 11) identifies as one of the key issues in the hearing whether the proposed
15 changes to the points of diversion would alter water quality in a manner that causes legal injury.
16 Leahigh's testimony and DWR-401 is relevant to this issue, as describes the SWP's historical
17 ability, in coordination with the Bureau, to meet water quality objectives, which is relevant to the
18 issue of whether the proposed change would alter water quality to the point of injury. His
19 testimony on page 8 provides:

20 My staff routinely tracks SWP/CVP compliance record with the Bay-Delta
21 objectives. They, at my direction, have compiled tables that tabulate
22 exceedances of D-1641 standards as well as standards that were operative
23 previously under D-1485. The exceedance record for D-1485 standards and D-
24 1641 standards can be found as Exhibits DWR-401 and DWR-402 of this
25 testimony, respectively. Exhibit DWR-401 shows that
26 D- 1485 standards were exceeded 0.5 percent of the time. Exhibit DWR-402
27 shows that the exceedances of D-1641 standards occurred 1.5 percent of the
28 time through 2015 and the combined D-1485 and D-1641 standards were
exceeded 1.1 percent of the time through 2015.

1 SJTA also objects to Leahigh's testimony on the basis that it "obscures" DWR and the
2 Bureau's ability to meet South Delta salinity objectives. In fact, a section of his testimony (p. 10)
3 and exhibit DWR-412 are devoted to SWP/CVP statistical compliance with South Delta salinity
4 objectives.

5 SJTA also objects to Leahigh's testimony about the past four years of drought, and his
6 characterization of these years as statistical outliers. This testimony is relevant to the ability of
7 the SWP and CVP to meet water quality objectives during dry years. Leahigh explains the basis
8 for his statistical analysis starting on page 13, which includes testimony about the extreme
9 temperature and low precipitation that occurred in the state during the drought, all of which fall
10 within his qualifications as an expert on SWP operations. If SJTA has objections to this
11 testimony, its recourse is cross-examination, but the testimony is relevant to water quality issued
12 identified in the Notice and should not be precluded from admission.

13 14 **C. Testimony Parviz Nader-Tehrani**

15 SJTA objects to Parviz Nader-Tehrani's testimony (DWR-66) about SWP's anticipated
16 compliance with D-1641 and impacts on legal users of water under the change petition, and
17 testimony based on DWR-513 (which shows the modeling results of DSM2), on the basis that
18 such testimony is irrelevant, lacks property foundation, and constitutes an unqualified expert
19 opinion. DSM2 is a one-dimensional hydrodynamic and water quality simulation model used to
20 simulate hydrodynamics and water quality in the Sacramento-San Joaquin Delta. For reasons
21 similar to those offered in the response to the objections to Sergeant's and Leahigh's testimony,
22 SJTA's objection to this testimony is without merit, as his testimony is relevant to the issue of
23 injury identified in the Notice.

24 Nader-Tehrani testimony on page 2 states:

1 This testimony provides an overview of the computer modeling performed to
2 evaluate changes in the water quality and water levels associated with the CWF
3 and any possible effects on legal users of water. This modeling provides
4 information in support of how the CWF can be operated while continuing to meet
5 DWR and Reclamation's responsibilities under the Water Rights Decision 1641
6 objectives (D-1641). Delta Simulation Model (DSM2) is the primary state of the art
7 tool utilized in this analysis. The modeling results are shown in Exhibit DWR-5132.

8 SJTA objects to the testimony (p. 12 of SJTA's objections) on the basis that the testimony
9 relies on monthly averages rather than year type. DSM2 represents the best available planning
10 model for Delta tidal hydrodynamics and salinity, and is used to make comparisons between the
11 no action alternative and four operational scenarios. Using the time period for each modeling
12 simulation permits a valid comparison between the different operational scenarios.

13 SJTA also object to his testimony about water levels (p. 13). Again, Nader-Tehrani's
14 testimony contains a discussion of water levels in *comparison* to the no action alternative and the
15 various operational scenarios. He states on page 9:

16 Exhibit DWR-513, pp. 11-15, Figures W1 through W5 show the probability of
17 exceedance for daily minimum water levels for locations throughout the Delta.
18 For example, the 10% exceedance represents the top 10% minimum daily water
19 levels, which most likely occur during high flow periods. Similarly, the 90%
20 exceedance represents the bottom 10% minimum water levels, which most likely
21 occur during low flow periods. Results show in general that all scenarios (except
22 the NAA) result in a similar frequency distribution for water levels.

23 This testimony is relevant to the injury issue identified in the Notice, and should not be
24 precluded from admission to the record.

25 **D. Testimony of Armin Munevar**

26 SJTA objects to the testimony of Armin Munevar and DWR-514 concerning
27 CalSim II modeling results and boundary analysis on the basis that it has not been peer
28 reviewed, and is ambiguous, and lacks relevancy and foundation. SJTA does not object to
Munevar's qualifications as an expert witness, but instead objects to certain opinions about

1 boundary analysis used in the modeling. Munevar states on page 2 of his testimony:

2 This testimony provides an overview of the computer modeling performed to
3 evaluate changes in the water supply, water quality, and water levels in the Delta
4 associated with the CWF Alternative 4A, the preferred alternative from the
5 Recirculated Draft Environmental Impact Report/Supplemental Draft
6 Environmental Impact Statement (RDEIR/SDEIS). Alternative 4A is described by
7 initial operational criteria referred to as scenarios H3 and H4. Specific initial
8 operational criteria will be set at the time of Project approval. Further, the
9 operational criteria could subsequently change based on adaptive management.
10 To ensure that any operations considered within this change petition proceeding
11 have been evaluated with regard to effects on legal users of water, the modeling
12 uses a boundary analysis; specifically Boundary 1 and Boundary 2, representing
13 the outer range of regulatory and operational conditions within which the CWF
14 could conceivably operate in the future. In addition, modeling results using the
15 initial operational range of the CWF, as represented through scenarios H3 and
16 H4, are shown. These scenarios are consistent with and included in the range of
17 alternatives evaluated in the Environmental Impact Report/Environmental Impact
18 Statement (EIR/EIS). These scenarios are evaluated considering climate change
19 and sea level rise effects at about year 2025. The modeling results are compared
20 between the CWF scenarios and the No Action Alternative (NAA).

21 Munevar's testimony is relevant to evaluate impacts to water levels of storage facilities
22 and to water deliveries by the water projects to the users of these waters. He is an expert that
23 may render opinions on these matters. DWR and the Bureau have proposed an operational
24 range for the project at this point in the hearing, permitting parties to evaluate impacts for any
25 operational scenarios within that range. That does not make the testimony irrelevant or
26 ambiguous. Instead, this provides a meaningful method to evaluate a range of impacts, and
27 allows the SWRCB and parties to access the different operational scenarios.

28 Finally, SJTA argues that the CalSim II daily pattern has not been peer reviewed and
thus such testimony based on CalSim II modeling should not be admitted due to lack of
foundation. The reasons for the historical daily patterns are discussed on page 6 of Munevar's
testimony:

To better represent the sub-monthly flow variability, particularly in early winter,
this analysis uses a monthly-to-daily flow mapping technique that is applied
directly in CalSim II for the Fremont and Sacramento Weirs and the NDD intakes.

1 This analysis applies historical daily patterns based on the year's hydrology to
2 transform the monthly volumes into daily flows. In all cases, this analysis
preserves the monthly volumes when converting the monthly to daily flows.

3 Munevar's testimony explains the reason for using historical daily patterns in the analysis
4 and how that information is used. The monthly volumes used in CalSim II are preserved under
5 this analysis, so CalSim II is still being used as a peer-reviewed model. To the extent the use of
6 historical daily patterns has not been peer reviewed, this does not go to the analysis's
7 admissibility, but to the weight of the evidence.

8 **E.DWR-401**

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10 For the reasons discussed above under the testimony of John Lehigh, DWR-401 meets
11 the evidentiary standard of Government Code section 11513, and should not be precluded from
12 admission.

13 **F.DWR-513**

14
15 For the reasons discussed above under the testimony of Parviz Nader-Tehrani, DWR-
16 513 meets the evidentiary standard of Government Code section 11513, and should not be
17 precluded from admission.

18 **G. DWR-514**

19
20 For the reasons discussed above under the testimony of Armin Munevar,
21 DWR-513 meets the evidentiary standard of Government Code section 11513, and should not
22 be precluded from admission.

23 *///*

24 *///*

CONCLUSION

For the reasons stated herein, the SWRCB should rule against SJTA's objections to DWR's testimony, and find that the testimony should not be precluded from admission.

Dated: July 22, 2016

California Department of Water Resources



Robin McGinnis

Office of the Chief Counsel