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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

23 AMERICAN RIVER WATER AGENCIES'
24 OPPOSITION TO MOTION TO STRIKE
25 MODIFIED FLOW MANAGEMENT
26 STANDARD AS TERMS AND
27 CONDITIONS AND RELATED
28 SUPPORTING EVIDENCE

17
18 The American River Water Agencies (ARWA) oppose the motion by the Department of
19 Water Resources (DWR) to strike proposed terms and conditions of the modified flow
20 management standard (exhibit ARWA- 308 (MFMS)) and supporting evidence.

21 **BACKGROUND**

22 DWR's attorney made this motion orally on May 12, 2017. It reflects DWR's
23 contention that the MFMS was required to be submitted in Part 1B of this hearing. The
24 SWRCB's hearing officer previously denied, or overruled as an objection, a different motion
25 by DWR's attorney to strike the MFMS, and supporting testimony, on the grounds that it was
26 not within the scope of this hearing. Other parties, including at least the Bureau of
27 Reclamation, joined DWR's pending motion. Other than the MFMS, DWR did not identify
28 specific testimony as subject to that motion. DWR's counsel may have incorporated by

1 reference a statement by the State Water Contractors' attorney concerning DWR's prior motion
2 and the specific portions of ARWA testimony that she considered to be subject to that prior
3 motion. The pending motion is based on DWR's argument that the MFMS, and supporting
4 testimony, are not timely as rebuttal.

5 ARGUMENT

6 The SWRCB must deny DWR's motion because it is contrary to the clear rule
7 established by numerous prior procedural rulings that proposed terms and conditions may be
8 presented as Part 1 rebuttal in this hearing.

9 On August 30, 2016, in response to a letter that day from Daniel Kelly, Placer County
10 Water Agency's attorney, that sought guidance concerning the timing of the submission of
11 proposed terms and conditions, the SWRCB's hearing team sent an e-mail that stated:

12 We have conferred with the hearing officers and are writing to confirm that a
13 party participating in Part 1B of the hearing may submit a proposed protest
14 dismissal package as part of a rebuttal submittal, and that the proposal does not
15 have to be submitted by the September 1, 2016 deadline for written testimony
16 and exhibits for Part 1B cases-in-chief."

17 In a December 19, 2016 ruling, in response to a December 5, 2016 letter from Downey
18 Brand LLP concerning the phasing of the presentation of proposed terms and conditions, the
19 SWRCB's hearing officers stated the following:

20 ***Consistent with our prior direction, parties are encouraged to submit proposed
21 permit terms and conditions and supporting evidence as part of their rebuttal
22 testimony or, as appropriate, during Part 2 of the hearing.***

23 (Emphasis added.)

24 On March 3, 2017, in response to the ARWA group's February 16, 2017 letter
25 concerning the presentation of the MFMS, the SWRCB's hearing team issued an e-mail that
26 stated:

27 The hearing team welcomes suggestions to conduct the WaterFix hearing as
28 efficiently as possible. However, presentation of evidence regarding Part 1
hearing issues during Part 2 would be inconsistent with the hearing officers'
prior rulings and unfair to parties who have separated their cases-in-chief to
address the separate Part 1 and Part 2 issues. Therefore, ARWA should split
their presentation of evidence in support of their proposed permit terms and
conditions into Part 1 and 2 issues and present their evidence during the
appropriate part of the WaterFix hearing. ARWA should submit its Part 1
related information as part of its rebuttal testimony and exhibits package by

1 12:00 noon, March 23, 2017 as instructed in the hearing officers' February 21,
2017 ruling letter.

2
3 On March 13, 2017, in response to a March 8, 2017 letter from Downey Brand LLP, the
4 SWRCB sent an e-mail that stated, in part:

5 In response to concerns that information presented in Part 2 may have a bearing
6 on Part 1 issues, the hearing officers have indicated that it may be necessary to
7 revisit Part 1 issues after Part 2 of the hearing. The hearing officers will not
8 evaluate whether it is necessary to revisit Part 1 issues, however, until Part 2 has
9 been completed, and the parties should not assume that they will have a second
10 opportunity to present evidence relevant to Part 1 issues. ***Accordingly, the
11 parties should present any supporting evidence for permit terms that they
12 intend to propose to address Part 1 issues, including potential injury to legal
13 users of water, during the rebuttal phase of Part 1.***

14 (Emphasis added.)

15 Both the Sacramento Valley Water Users and the ARWA have presented evidence in
16 this proceeding that the Central Valley Project (CVP) could be operated more aggressively with
17 WaterFix in place, which could result in reduced water storage levels in CVP reservoirs. The
18 MFMS, supported by the related Part 1 portion of ARWA's rebuttal testimony, would protect
19 storage in Folsom Reservoir from those reduced water storage levels. As such, the MFMS is
20 proper rebuttal evidence and falls squarely within the presentation of terms and supporting
21 evidence contemplated by the Hearing Team's prior rulings and direction in this proceeding.
22 The SWRCB therefore must deny DWR's pending motion.

23 **CONCLUSION**

24 For the reasons stated above, the American River Water Agencies respectfully request
25 that the SWRCB deny DWR's pending motion to strike exhibit ARWA-308 and supporting
26 evidence.

27 Dated: May 15, 2017

Respectfully submitted,

28 BARTKIEWICZ, KRONICK &
SHANAHAN

SACRAMENTO COUNTY WATER
AGENCY

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Ryan S. Bezerra

By: /s/ Sarah Britton
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PLACER COUNTY WATER AGENCY

STOEL RIVES LLP

By: /s/Daniel Kelly
Daniel Kelly
Staff Counsel

By: /s/ Wes Miliband
Wes Miliband

Attorneys for the City of Sacramento

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 submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

California WaterFix Hearing – American River Water Agencies’ Opposition To Motion To
Strike Modified Flow Management Standard As Terms And Conditions and Related
Supporting Evidence

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 March 30, 2017, 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:

I certify that the foregoing is true and correct and that this document was executed on May 15, 2017.

Signature: 

Name: Terry M. Olson

Title: Legal Assistant

Party/Affiliation: Cities of Folsom, Roseville, Sacramento Suburban Water District, San Juan Water District

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