

NRDC et al Opposition to the Department of Interior's Notice of Objection to the Supplemental Notice of Intent Filed by NRDC, Bay Institute, and Defenders of Wildlife

The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute ("NRDC et al") oppose the Department of Interior's November 14, 2017 Notice of Objection by United States Department of Interior, Fish and Wildlife Service, and United States Geological Survey, of Supplemental Notice of Intent to Appear Filed by the Natural Resources Defense Council, Bay Institute, and Defenders of Wildlife ("Objection"). The Objection filed by the United States is procedurally improper and is substantively without merit.

First, the Objection is procedurally improper. The Hearing Officers' November 13, 2017 ruling in this proceeding denied the request of the San Joaquin River Exchange Contractors Water Authority to rule on their supplemental Notice of Intent to appear ("NOI"), holding that, "SJRECWA's request is procedurally improper. Unless SJRECWA serves a deposition notice on DWR and DWR files a motion for protective order, the matter is not properly before us." The same is true in this instance, where the Department of the Interior is seeking to strike or amend the supplemental NOI filed by NRDC et al. The Hearing Officers should reject the motion to strike or amend the supplemental NOI filed by NRDC et al as procedurally improper. Once NRDC et al serve and file a subpoena for witnesses of the United States to appear and testify at the hearing, the United States may file a motion to quash the subpoena.

Second, substantively the Objection is without merit because the United States has waived its sovereign immunity by filing a petition with the State Water Resources Control Board and appearing in this proceeding. The water rights petition was filed by the "California Department of Water Resources and the United States Department of Interior, Bureau of Reclamation" in this proceeding. U.S. Bureau of Reclamation and California Department of Water Resources, Petition for Change, Supplemental Information at 1 (Aug. 25, 2015). That water rights petition states that, "California WaterFix was developed in cooperation with the California Department of Fish and Wildlife (CDFW), United States Fish and Wildlife Service (USFWS) and NMFS (jointly the Fishery Agencies)." *Id.* at 5. The United States Department of the Interior filed a Supplemental NOI identifying witnesses who would participate in the hearing through direct testimony on behalf of the United States. Supplemental NOI, U.S. Department of the Interior, October 13, 2017, available online at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/noi_protests/docs/20171013_DOI_SNOI_ad.pdf. The U.S. Department of the Interior also filed a NOI for

Part 1 of the hearing and participated in that hearing. Notice of Intent to Appear, U.S. Department of the Interior, January 5, 2016, available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/noi_protests/docs/usdoi_noi.pdf.

We are aware of the Touhy regulations, which are named after the U.S. Supreme Court's 1951 decision holding that federal agencies could prevent their employees from testifying in litigation between private parties. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). However, as noted above, the United States has waived its sovereign immunity by petitioning the Board for this proceeding and participating

in this proceeding. It would constitute manifest injustice and a violation of fundamental fairness and due process should NRDC et al not be permitted to cross-examine witnesses of the United States after the United States has participated in both parts of this hearing.

On both procedural and substantive grounds, the Hearing Officers should deny the Objection. If the Hearing Officers decline to deny the Objection based on procedural grounds, we request that the Hearing Officers identify a briefing schedule for the motion, with briefing occurring after the November 30, 2017 deadline for submission of our case in chief. We do not intend to serve subpoenas on the United States before that date, and there should be no prejudice to the United States should the Hearing Officers delay any briefing on this objection until after this deadline.

Dated: November 16, 2017

Natural Resources Defense Council



Doug Obegi

On behalf of the Natural Resources Defense Council,
Defenders of Wildlife, and the Bay Institute