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7  
8 BEFORE THE  
9 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
10

11 In re State Water Resources Control Board  
Petition Requesting Changes in Water Rights  
12 of the Department of Water Resources and  
U.S. Bureau of Reclamation for the California  
13 WaterFix Project.

**MOTION BY WESTLANDS WATER  
DISTRICT TO STRIKE ENTIRETY OF  
LAND-290, AND OPPOSITION TO  
MOTIONS FOR RECONSIDERATION  
OF JULY 27, 2018 RULING**

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18 **I. INTRODUCTION**

19 In their ruling of July 27, 2018, the Hearings Officers struck portions of Exhibit LAND-290,  
20 the testimony of Thomas Stokely offered in supposed rebuttal to the testimony of Jose Gutierrez.  
21 Protestants PCFFA, IFR and LAND have moved for reconsideration of the July 27 order. Westlands  
22 Water District ("Westlands") respectfully submits that the Hearing Officers did not go far enough  
23 in their July 27 order, and should have stricken LAND-290 in its entirety. Westlands hereby moves  
24 that the Hearing Officers strike all of LAND-290, and opposes the motions for reconsideration.

25 LAND-290 should be stricken in its entirety because it does not rebut anything in Mr.  
26 Gutierrez's testimony, it is irrelevant to the Part 2 issues, and is argument better left to briefing.

27 **II. SUMMARY OF BACKGROUND INFORMATION**

28 In LAND-290, Mr. Stokely offers a rehash of issues raised and decided in other proceedings,

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1 issues that have no bearing on the change petition before the Hearing Officers. Before turning to the  
2 reasons why LAND-290 should be stricken, it is useful to provide a brief background.

3 **A. Decision 1641 Determined That Nearly All of Westlands Is Within The**  
4 **Permitted Place Of Use In CVP Water Rights Permits**

5 Mr. Stokely suggests that Westlands is using CVP water in locations where it should not be  
6 used. The State Water Board exhaustively addressed place of use issues as they relate to Westlands  
7 in the proceeding that resulted in Revised Water Right Decision 1641. In its decision, the State  
8 Water Board expanded the authorized place of use in the water rights permits for the CVP to include  
9 all lands within Westlands that had already been receiving CVP water. (Revised Water Right  
10 Decision 1641 at pp. 115-22.) It did so over the objections of Trinity County, represented by Mr.  
11 Stokely. (*Id.* at pp. 119-21.) After Decision 1641, only a relatively small portion of Westlands, the  
12 so-called expansion lands that were both outside the place of use in the CVP water rights permits  
13 and had not yet received CVP water, required any further change petition proceedings before they  
14 could receive CVP water. Thus, the State Water Board has recently resolved the issue of the  
15 authorized place of use for CVP water within Westlands, and there is no valid reason to revisit place  
16 of use here.

17 **B. The Barcellos Judgment Determined That All of Westlands May Receive CVP**  
18 **Water Under Federal Law**

19 Mr. Stokely devotes much of LAND-290 to a theory that a portion of Westlands is not  
20 authorized to receive CVP water as a matter of federal law, because that portion was not within the  
21 originally proposed service area of the San Luis Unit. This issue was litigated, and resolved, in the  
22 Barcellos litigation. Sections 10.1, 10.2 and 10.3 of the Barcellos Judgment (LAND-300) provide  
23 that all of Westlands is “within the authorized service area of the Central Valley Project, including  
24 the San Luis Unit and Delta Mendota Canal.” (LAND-300 at p. 36-37.)

25 While the Barcellos Judgment is no longer in effect, the legal conclusion adopted in the  
26 judgment that all of Westlands is within the authorized service area of the CVP is as true today as  
27 when the federal district court entered it in December 1986. There is no valid reason to revisit this  
28 legal issue here.

1           **C.     Westlands Holds Interim Contracts For CVP Supply Of Up To 1,195,000**  
2           **Acre-Feet**

3           Mr. Stokely correctly observes in LAND-290 that Westlands is currently receiving water  
4 under an interim CVP contract, something Mr. Gutierrez testified to as well. (WWD-15, at pp. 4-5.)  
5 Mr. Stokely contends Westlands' next contract may not be for the same quantity, or may not be  
6 renewed at all.

7           Westlands' contract has been renewed every two years since its long-term contract expired  
8 at the end of 2007. Each renewal of Westlands' 1963 contract, as amended, has been for a total of  
9 1,150,000 acre-feet. A copy of the current interim contract, which took effect March 1, 2018 and  
10 extends the Westlands' contract for CVP water to February 28, 2020, is attached to this  
11 memorandum as Exhibit A. As the interim contract recites, completion of environmental  
12 documentation necessary for entry of a long-term contract has been delayed for reasons beyond the  
13 control of the contracting parties. As a result of assignments of other contracts described by Mr.  
14 Gutierrez (WWD-15, at pp. 4-5), which have likewise been renewed, Westlands' total contract  
15 quantity is approximately 1,195,000 acre-feet annually. The contract quantities are supported by a  
16 needs assessment performed by Reclamation, which has determined that Westlands can put the  
17 contract quantity (and more) to beneficial use.<sup>1</sup>

18           In sum, there is nothing substantial or current in LAND-290. It resurrects issues already  
19 decided, or matters that are not real issues at all. As we explain next, LAND-290 is irrelevant to and  
20 outside the scope of any proper rebuttal in this proceeding.

21           **III.    ARGUMENT**

22           **A.     LAND-290 Is Not Rebuttal Testimony**

23           In his testimony, Mr. Stokely claims to rebut three claims or assertions made by Mr.  
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25  
26 <sup>1</sup> See e.g., Reclamation's description of information regarding past beneficial use and projected  
27 future needs that is required for CVP contract renewal, at  
28 [https://www.usbr.gov/mp/cvpia/3404c/process\\_info/cont\\_policies/3\\_cvp\\_policies/01\\_02-22-99.pdf](https://www.usbr.gov/mp/cvpia/3404c/process_info/cont_policies/3_cvp_policies/01_02-22-99.pdf). The needs assessment process and results is described in a 2005 draft EIS regarding long-term contract renewal for the San Luis Unit, at pages 2-2, 2-9 to 2-20, 2-12 and 2-13, available at [https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=1905](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=1905).

1 Gutierrez. But Mr. Stokely's testimony does not actually respond to anything Mr. Gutierrez testified  
2 to. It is not rebuttal.

3 **1. Mr. Stokely's Testimony About A Supposed Federal Cap On Lands**  
4 **Eligible For CVP Water Is Not Rebuttal**

5 First, Mr. Stokely claims to respond to the following statement in Mr. Gutierrez's written  
6 testimony, taken from WWD Ex. 15, at 2:14-16: "Westlands Water District is a California water  
7 district with its service area in western Fresno and Kings counties encompassing over 600,000 acres  
8 with the historical demand for water or about 1.4 million acre feet per year primarily for irrigation."  
9 (LAND-290, 3:6-9.) But there is no evidence in LAND-290 rebutting these statements. Mr. Stokely  
10 does not assert that Westlands in fact does not encompass 600,000 acres, or that its historical demand  
11 for water was not 1.4 million acre-feet per year.

12 Instead, Mr. Stokely's supposed rebuttal is an ill-informed and incorrect legal argument that  
13 Congress authorized delivery of CVP water to a 500,000 acre area in total, including 400,000 acres  
14 within Westlands, and that hence delivery of CVP water to lands outside that 500,00 acre area must  
15 violate federal law. (LAND-290, 3:1-6-18.) But Mr. Gutierrez's statement is about the physical size  
16 of Westlands; Mr. Gutierrez made no statement about federal statutory authorization for deliveries  
17 in Westlands, or any lack thereof.

18 **2. Mr. Stokely's Testimony About Water Quantity On Contract Renewal**  
19 **Is Not Rebuttal**

20 Next, Mr. Stokely claims to respond to Mr. Gutierrez's statement that Westlands has a  
21 contractual entitlement of 1,150,000 acre-feet of CVP water. (LAND-290, 6:19-20.) He cites Mr.  
22 Gutierrez's testimony at WWD-15, page 4, where Mr. Gutierrez describes the initial Westlands  
23 contract entered in 1963, the effect of the Barcellos Judgment, and the series of interim, 2 year  
24 contracts Westlands has entered beginning in 2008. (WWD-15, 4:17-5:1.) There is no evidence in  
25 LAND-290 rebutting these statements. In fact, Mr. Stokely agrees with Mr. Gutierrez that Westlands  
26 formerly received water under its 1963 contract and the Barcellos Judgment, and now receives CVP  
27 water under an interim contract. (LAND-290, 6:19-7:3.)

1           Instead, the supposed rebuttal is another legal argument, this time that Westlands has no  
2 right to insist that Reclamation renew Westland’s CVP contract at the quantity of 1,150,000 acre-  
3 feet. (LAND-290, 6:19-9:14.) But Mr. Gutierrez made no statements about whether Westlands has  
4 a right to renew its contract at the same quantity provided for under the 1963 contract and Barcellos  
5 Judgment. Mr. Stokely’s legal arguments about water quantity on contract renewal do not rebut  
6 anything Mr. Gutierrez testified to.

7                           **3.     Mr. Stokely’s Testimony About The CVP Being Subject To Area Of**  
8                           **Origin-Related Laws And Permit Terms Is Not Rebuttal**

9           Mr. Stokely’s third and final point of supposed rebuttal concerns area of origin-related laws  
10 and permit terms. He cites the following testimony by Mr. Gutierrez’s in WWD-15 as the statement  
11 he is responding to: “It is my understanding that Reclamation, the Water Board, and courts have  
12 consistently declined to give priority to contractors based on ‘area of origin’ principles.” (LAND-  
13 290, 9:15-19.)

14           The context of this statement makes clear that Mr. Gutierrez was referring to Reclamation’s  
15 decisions about how to allocate CVP water among its CVP contractors. The statement Mr. Stokely  
16 refers to is underlined in the following passage in WWD-15:

17           Reclamation operates the CVP as an integrated project. This means that Reclamation  
18 uses water from all CVP facilities subject to the consolidated place of use approved  
19 by Water Rights Decision 1641 to meet the United States’ contractual obligations  
20 and does not make allocation decisions based on geographical regions. It is my  
21 understanding that Reclamation, the Water Board, and courts have consistently  
22 declined to give priority to contractors based on ‘area of origin’ principles. Rather,  
23 Reclamation makes allocation decisions based on the terms of the CVP contracts and  
24 other policies. Different allocations are made to contractors in one region versus  
25 another only in circumstances where Reclamation is unable because of regulatory  
26 constraints to move CVP water from one region to another.

27 (WWD-15, 3:18-23.)

28           That Mr. Gutierrez’s understanding is correct is confirmed by the Ninth Circuit Court of  
Appeal’s decision in *Tehama-Colusa Canal Authority v. United States*, 721 F.3d 1086 (9th Cir.  
2012). In that case, CVP water service contractors located north of the Delta sued Reclamation,  
claiming they were entitled to a full contract allocation of CVP water before water service  
contractors located south of the Delta received any allocation of CVP water, based on area of origin

1 principles. (*Tehama-Colusa*, at p. 1088.) In contrast, Reclamation’s position was that “[a]rea of  
2 origin/county of origin statutes do not give any CVP user a priority over any other CVP user  
3 regarding water service provided by CVP contracts . . . [and that] this is also the position of the State  
4 Water Resources Control Board.” *Id.* at 1092. The Ninth Circuit ruled for Reclamation, holding that  
5 the plaintiffs were bound by the terms of their CVP contracts, which granted them no priority to  
6 CVP water over other CVP contractors in times of shortage. *Id.* at 1088.

7 Mr. Stokely offers no evidence in LAND-290 that Reclamation allocates CVP water among  
8 its contractors based on area of origin principles, i.e., that it gives priority in allocation to contractors  
9 in some regions over others based on the area of origin, or that the State Water Board or courts have  
10 directed that Reclamation must do so. Instead, Mr. Stokely’s supposed rebuttal is yet more legal  
11 argument, this time that Reclamation is subject to water right permit terms and federal statutes that  
12 provide protections for areas of origin. (LAND-290, 9:15-11:19.) But Mr. Gutierrez said nothing to  
13 the contrary. Mr. Gutierrez made no assertion that “USBR need not comply with area of origin  
14 requirements.” (LAND-290, 1:15-16.) Mr. Gutierrez’s testimony concerned allocation of CVP  
15 water among CVP contractors, not whether in its operation of the CVP Reclamation is subject to  
16 area of origin laws, or permit terms designed to benefit local areas. Mr. Stokely’s arguments about  
17 the application of area of origin related permit terms or programs are not rebuttal to anything in Mr.  
18 Gutierrez’s testimony.

19 In sum, the testimony in LAND-290 is not proper rebuttal testimony, because it does not  
20 respond to testimony submitted by Mr. Gutierrez. It should therefore be stricken.

21 **B. LAND-290 Is Irrelevant To The Part 2 Issues**

22 This proceeding should not be used as an occasion to dredge up whatever issues one party  
23 has with another, when those issues have nothing to do with the change petition for the WaterFix  
24 project. The Hearing Officers may and should exclude such evidence as irrelevant.

25 LAND-290 is irrelevant evidence. Mr. Stokely’s testimony has no bearing on whether the  
26 changes proposed in the petition will unreasonably affect fish and wildlife, recreational uses, or  
27 other public trust resources. It has no bearing on whether the changes proposed in the petition are in  
28 the public interest. It does not inform whether the Final Environmental Impact Report should be

1 entered into the administrative record for the petition. Nor does it bear on any issue within Part 1  
2 that is allowed for discussion in Part 2, or the Supplemental Environmental Impact Report.

3 The issues LAND-290 does address are not the subject of this proceeding. This proceeding  
4 will not determine whether federal law imposes some acreage limitation on the lands that may  
5 receive water from the San Luis Unit. This proceeding will not determine whether Westlands has a  
6 right to renew its CVP contract at the existing quantity. This proceeding will not determine whether  
7 Reclamation's allocation of CVP water among its contractors is subject to area of origin priorities.  
8 The Hearing Officers should therefore reject Mr. Stokely's attempt to raise these extraneous issues  
9 and exclude LAND-290 as irrelevant to the Part 2 issues.

10 **C. LAND-290 Is Inexpert Legal Argument That Should Be Left To Briefing**

11 In the July 27 ruling, the Hearing Officers explained that "legal or other non-expert *argument*  
12 or *interpretation* of evidence from the case-in-chief phase is not proper rebuttal when it has no  
13 independent evidentiary value and does not introduce any new evidence. Such arguments or  
14 interpretations can and should be made as part of a party's closing brief." (Emphasis in original.)  
15 The July 27 ruling recognized that at least portions of LAND-290 fit this description. Respectfully,  
16 so does the rest of LAND-290.

17 **D. The Motions For Reconsideration Should Be Denied**

18 PCFFA asks the Hearing Officer's to reconsider the July 27 order on the basis that the  
19 stricken portions supposedly rebut statements by Mr. Gutierrez. In fact, they do not, which is  
20 apparent from both the quotations in PCFFA's motion and the discussion above. LAND joins in  
21 PCFFA's argument, and in addition argues that LAND-290 should be allowed because other  
22 witnesses have offered legal conclusions too. While some other witnesses have been allowed to  
23 testify on legal issues, at least they were germane to the issues in this proceeding. Mr. Stokely's  
24 legal conclusions in LAND-290 are not.

25 **IV. CONCLUSION**

26 The Hearing Officers should strike LAND-290 in its entirety, and deny the motions for

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1 reconsideration, because LAND-290 does not rebut any statements by Mr. Gutierrez, is irrelevant,  
2 and is primarily legal argument best left to briefing.

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DATED: August 9, 2018

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation

By:   
Daniel J. O'Hanlon  
Attorneys for Westlands Water District



# EXHIBIT A



# United States Department of the Interior

BUREAU OF RECLAMATION  
Mid-Pacific Regional Office  
2800 Cottage Way  
Sacramento, CA 95825-1898

IN REPLY REFER TO:

MP-440  
WTR-4.00

MAR 30 2018

Board of Directors  
Westlands Water District  
P.O. Box 6056  
Fresno, CA 93703

Subject: Interim Renewal Contract No. 14-06-200-495A-IR6 Between the United States and Westlands Water District Providing for Project Water Service – Central Valley Project, California

Dear Board of Directors:

Enclosed is an executed original of the subject contract for your records. The Bureau of Reclamation appreciates the effort expended by Westlands Water District and its representatives relative to this contract.

If there are any questions, please contact Mr. Stanley Data, Repayment Specialist, at 916-978-5246, or e-mail [sdata@usbr.gov](mailto:sdata@usbr.gov).

Sincerely,

Richard J. Woodley  
Regional Resource Manager

Enclosure

1 UNITED STATES  
2 DEPARTMENT OF THE INTERIOR  
3 BUREAU OF RECLAMATION  
4 Central Valley Project, California

5 INTERIM RENEWAL CONTRACT BETWEEN THE UNITED STATES  
6 AND  
7 WESTLANDS WATER DISTRICT  
8 PROVIDING FOR PROJECT WATER SERVICE  
9 FROM THE SAN LUIS UNIT AND DELTA DIVISION

10 THIS CONTRACT, made this 1<sup>ST</sup> day of MARCH, 2018,

11 in pursuance generally of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory or  
12 supplementary thereto, including, but not limited to, the acts of August 26, 1937 (50 Stat. 844),  
13 as amended and supplemented, August 4, 1939 (53 Stat. 1187), as amended and supplemented,  
14 July 2, 1956 (70 Stat. 483), June 21, 1963 (77 Stat. 68), October 12, 1982 (96 Stat. 1263), as  
15 amended, and Title XXXIV of the Act of October 30, 1992 (106 Stat. 4706), all collectively  
16 hereinafter referred to as Federal Reclamation law, between the UNITED STATES OF  
17 AMERICA, hereinafter referred to as the United States, and WESTLANDS WATER  
18 DISTRICT, hereinafter referred to as the Contractor, a public agency of the State of California,  
19 duly organized, existing, and acting pursuant to the laws thereof;

20 WITNESSETH, That:

21 EXPLANATORY RECITALS

22 WHEREAS, the United States and the Contractor entered into interim renewal Contract  
23 (long-form interim renewal contract) No. 14-06-200-495A-IR1 which provided for the continued  
24 water service after Contract No. 14-06-200-495A (which addressed the "Contract Between the

25 United States and Westlands Water District Providing for Water Service", dated June 5, 1963,  
26 and the Stipulated Judgment in the lawsuit entitled *Barcellos and Wolfsen, Inc. v. Westlands*  
27 *Water District*, Civ. No. F-79-106-EDP (E.D. Cal.), as consolidated with *Westlands Water*  
28 *District v. United States of America*, Civ. No. F-81-245-EDP (E.D. Cal.), entered into on  
29 December 30, 1986) ended water service on December 31, 2007; and

30 WHEREAS, the last long-form interim renewal contract between the United  
31 States and the Contractor is Contract No. 14-06-200-495A-IR1, hereinafter referred to as IR1; and

32 WHEREAS, the United States and the Contractor have entered into successive  
33 renewals of IR1, the most recent of which is Contract No. 14-06-200-495A-IR5, hereinafter  
34 referred to as IR5, effective March 1, 2016, through February 28, 2018; and

35 WHEREAS, the United States and the Contractor have made significant progress  
36 in their negotiations of a long-term renewal contract, believe that further negotiations on the  
37 long-term renewal contract would be beneficial, and mutually commit to continue to negotiate to  
38 seek to reach agreement, but anticipate that the environmental documentation necessary for  
39 execution of any long-term renewal contract may be delayed for reasons beyond the control of  
40 the parties; and

41 WHEREAS, the Contractor has requested a subsequent interim renewal contract  
42 pursuant to IR5; and

43 WHEREAS, the United States has determined that the Contractor has to date  
44 fulfilled all of its obligations under IR5; and

45 WHEREAS, the United States is willing to renew IR5 pursuant to the terms and  
46 conditions set forth below;

47 NOW, THEREFORE, in consideration of the mutual and dependent covenants  
48 herein contained, it is hereby mutually agreed by the parties hereto as follows:

49 RENEWAL AND REVISION OF  
50 CONTRACT NO. 14-06-200-495A-IR5

51 1. Except as specifically modified by this Contract, all provisions of IR5 are  
52 renewed with the same force and effect as if they were included in full text with the exception of  
53 Article 1 of IR5 thereof, which is revised as follows:

54 (a) The first sentence in subdivision (a) of Article 1 of IR5 is replaced with  
55 the following language: "This Contract shall be effective from March 1, 2018, and shall remain  
56 in effect through February 29, 2020, and thereafter will be renewed as described in Article 2 of  
57 IR1 if a long-term renewal contract has not been executed with an effective commencement date  
58 of March 1, 2020."

59 (b) Subdivision (b) of Article 1 of IR5 is amended by deleting the date  
60 "February 28, 2018," and replacing same with the date "February 29, 2020."

61 IN WITNESS WHEREOF, the parties hereto have executed this Contract as of  
62 the day and year first above written.

63 APPROVED AS AN AGENCY  
FOR THE FEDERAL GOVERNMENT  
*Stacy R. Baker*  
CHIEF OF REGIONAL COUNCIL FOR  
RECLAMATION BY THE REGIONAL

UNITED STATES OF AMERICA

64 By: *David M. ...*  
65 Regional Director, Mid-Pacific Region  
66 Bureau of Reclamation



67 WESTLANDS WATER DISTRICT

68 By: *DW ...*  
69 President of the Board of Directors  
70

71 Attest:

72 By: *Beth ...*  
73 Secretary of the Board of Directors

**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):

Motion by Westlands Water District to Strike Entirety of LAND-290, and Opposition to Motion for Reconsideration of July 27, 2018 Ruling

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 August 7, 2018, 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](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml):


*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

**For Petitioners Only:**

	I caused a true and correct <b>hard copy</b> of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:
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	<b>Method of Service:</b> _____
--	---------------------------------

I certify that the foregoing is true and correct and that this document was executed on August 9, 2018  
Date

Signature: 

Name: Sherry Ramirez

Title: Legal Secretary

Party/Affiliation: Westlands Water District

Address: 400 Capitol Mall, 28th Floor

Sacramento, CA 95814