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13 BEFORE

14 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

15 CALIFORNIA WATERFIX HEARING

16 Hearing in the Matter of California Department  
17 of Water Resources' and United States Bureau  
of Reclamation's Petition for Change in Points  
18 of Diversion for the Central Valley Project and  
the State Water Project

**THE WATER FORUM'S AND  
AMERICAN RIVER WATER AGENCIES'  
OPPOSITION TO DEPARTMENT OF  
WATER RESOURCES' AND STATE  
WATER CONTRACTORS' MOTION TO  
STRIKE PORTIONS OF ORAL  
TESTIMONY FROM EXPERT PAUL  
BRATOVICH**

19 \_\_\_\_\_  
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21 **I. INTRODUCTION**

22 The Water Forum, by and through the American River Water Agencies ("ARWA"),  
23 oppose the motion on March 19, 2018 by the State Water Contractors ("SWC") to strike portions  
24 of oral testimony offered by fisheries biologist expert Paul Bratovich.<sup>1</sup>

25 \_\_\_\_\_  
26 <sup>1</sup> Petitioner Department of Water Resources ("DWR") orally joined SCW's motion to strike (WaterFix Hearing  
27 Transcript for March 19, 2018 ("Transcript"), p. 101:9-12 (p. 106 of the WaterFix website link to the Transcript  
28 available at:  
[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/transcripts/20180319\\_CWFPETHEARING.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/transcripts/20180319_CWFPETHEARING.pdf) ("Website Link")). Accordingly, The Water Forum and ARWA parties oppose  
DWR's joinder.

1 SWC's oral motion on March 19, 2018 contends that during direct oral testimony Mr.  
2 Bratovich offered surprise and new opinion testimony by referring to "gradation of effect"  
3 occurring as water temperatures increase above threshold values and by referring to specific water  
4 temperature values.

5 SWC's motion must be denied because Mr. Bratovich's expert direct oral testimony was  
6 within the scope of his written testimony, as to at least three of his expert written "findings," with  
7 the term "gradation" reflecting the term "incremental" as used throughout Mr. Bratovich's written  
8 testimony. The testimony and its context demonstrate that Mr. Bratovich's contested oral  
9 testimony was offered to explain those expert written findings, as follows: (i) specific threshold  
10 values identify a temperature at or below which water temperatures are considered suitable; (ii)  
11 temperatures above the threshold value result in increased adverse effects as water temperatures  
12 increase; and (iii) temperatures above the threshold value are those which should be evaluated for  
13 adverse effects, not those below the threshold value that are considered suitable. Moreover, Mr.  
14 Bratovich's oral testimony contested by SWC concerns basic scientific background information  
15 that is reflected in the biological opinion ("BO") on which DWR's own fishery biologist, Dr.  
16 Richard Wilder, based his testimony.

17 The contested oral testimony is reasonable and reliable expert information that the State  
18 Water Resources Control Board ("SWRCB") should consider when evaluating the evidence in  
19 this proceeding. Accordingly, the Water Forum respectfully requests that the SWRCB deny  
20 SWC's motion to strike.

## 21 **II. BACKGROUND**

22 On March 19, 2018, the Water Forum presented its case-in-chief by offering testimony  
23 and other evidence regarding: (i) injury *if* the subject change petition is approved and (ii)  
24 proposed terms and conditions to mitigate injuries by implementing the Modified Flow  
25 Management Standard for the lower American River, *if* the change petition is approved.  
26  
27  
28

1 Mr. Bratovich is a fisheries biologist with over 35 years of experience in the state of  
2 California, with expertise focused on studies and evaluations of steelhead and fall-run Chinook  
3 salmon in the lower American River since 1984.<sup>2</sup>

4 **A. SWC’s Motion to Strike**

5 Legal counsel for SWC brought the oral motion to strike on the grounds of surprise  
6 testimony and new opinions<sup>3</sup> by stating: “Mr. Bratovich made statements and drew opinions on  
7 the rough, Page 84, Line 18 through 85, Line 15 regarding gradation of temperature effects as  
8 well as a lethal temperature[.]”<sup>4</sup>

9 Specific testimony captured by this motion is: “So it’s a gradation of affect [sic] to  
10 steelhead. The higher the temperature above that stated threshold, the more adverse that effect  
11 is.”<sup>5</sup>

12 With that specific testimony framing the issue upon which Mr. Bratovich was testifying  
13 (i.e., temperatures above threshold levels go up to lethal levels), Mr. Bratovich provided oral  
14 testimony for an illustrative purpose about lethal values: “And it goes up from the threshold up to  
15 lethal levels, by the way, which we’re actually seem to be exceeding here in this plot.”<sup>6</sup> This  
16 latter statement was not offered to establish any specific quantified temperature value as a lethal  
17 level, but instead to explain Mr. Bratovich’s written findings that increasingly warmer river  
18 temperatures create adverse effects that can reach lethal levels for steelhead.

19 **B. Mr. Bratovich’s Written Testimony and Oral Direct Testimony**

20 The portion of Mr. Bratovich’s written testimony relevant to the motion states:

21 (1) “For this hearing, I have prepared exhibits and testimony on the water  
22 temperature-related effects for steelhead in the lower American River included in the NMFS 2017  
23 BO titled ‘Endangered Species Act Section 7(a)(2) Biological Opinion, Magnuson-Stevens  
24 Fishery Conservation and Management Act Essential Fish Habitat Response, and Fish and  
25

26 <sup>2</sup> Exhibit ARWA-700, ¶ 3.

27 <sup>3</sup> Transcript, p. 167:4-5 (p. 172 of Website Link).

28 <sup>4</sup> Transcript, p. 98:7 (p. 103 of Website Link). Also, SWC’s references to the rough transcript at pages 84-85 appear to be in the Transcript (final version) at p. 91 (p. 96 of Website Link).

<sup>5</sup> Transcript, p. 91:2-19 (p. 96 of Website Link).

<sup>6</sup> *Id.*

1 Wildlife Coordination Act Recommendations for the California WaterFix Project in Central  
2 Valley, California.”<sup>7</sup>

3 (2) “My analysis of the water temperature exceedance distributions referenced in the  
4 NMFS 2017 BO and presented in the WaterFix BA demonstrate that significant, incremental  
5 adverse water temperatures would result from implementation of the PA, relative to the analytical  
6 baseline (NAA).”<sup>8</sup>

7 (3) Mr. Bratovich stated that “degraded habitat in the lower American River [is]  
8 associated with warm water temperatures,” and “[i]n conclusion, implementation of the WaterFix  
9 would exacerbate water temperature conditions where the analytical baseline already represents  
10 degraded conditions for steelhead, for which the status is poor, in the lower American River.”<sup>9</sup>

11 Pertinent excerpts from direct oral testimony are:

12 (1) Tom Gohring said: “Mr. Bratovich will testify in depth about the relationship  
13 between water temperature and fishery resources[.]”<sup>10</sup>

14 (2) Mr. Bratovich articulated the issue that he sought to address in preparation for  
15 written and oral testimony: “[T]he key issue being will the changes proposed in the petition  
16 unreasonably affect fish and wildlife or recreational users of water or other public trust  
17 resources.”<sup>11</sup>

18 (3) Mr. Bratovich specified the purpose and scope of his testimony: “I’m limiting it to  
19 steelhead the Lower American River because, as Tom mentioned, we’re here representing the  
20 Water Forum and but technically it’s because it’s a federally listed species and it was thoroughly  
21 evaluated by Reclamation in the Biological Assessment, or BA, and by NMFS in the Biological  
22 Opinion, or BO.”<sup>12</sup>

23 ///

24 ///

25 <sup>7</sup> Exhibit ARWA-700, at p. 1, ¶ 6. “NMFS” refers to the National Marine Fisheries Service and “BO” refers to  
26 Biological Opinion.

26 <sup>8</sup> Exhibit ARWA-700, at p. 6, ¶ 27.

27 <sup>99</sup> Exhibit ARWA-700, at pp. 4-6.

27 <sup>10</sup> Transcript, p. 82:16-18 (p. 87 of Website Link).

28 <sup>11</sup> Transcript, p. 83:21-24 (p. 88 of Website Link).

28 <sup>12</sup> Transcript, p. 84:2-8 (p. 89 of Website Link).

1 **III. ARGUMENT**

2 **A. Legal Standard**

3 Evidence in a hearing on a petition for change is admitted in accordance with Government  
4 Code section 11513.<sup>13</sup> Under that statute, the hearing need not be conducted according to  
5 technical rules relating to evidence and witnesses, and any relevant evidence shall be admitted if  
6 it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of  
7 serious affairs.<sup>14</sup> Specific to experts, expert opinion testimony must be based on the proper  
8 foundation and “provide a reasonable basis for the particular opinion offered.”<sup>15</sup> More specific to  
9 direct oral testimony for this proceeding, witnesses may not testify outside the scope of their  
10 written testimony, so as to avoid surprise testimony.<sup>16</sup> The SWRCB’s October 30, 2015 Notice  
11 of Petition and Notice of Public Hearing and Pre-Hearing Conference to Consider the Above  
12 Petition (“Change Petition Notice”) also states that “oral testimony that goes beyond the scope of  
13 written testimony *may* be excluded.”<sup>17</sup>

14 **B. Mr. Bratovich’s Contested Oral Testimony Was Within the Scope of His**  
15 **Written Testimony.**

16 The context of the contested oral direct testimony at issue here demonstrates that the oral  
17 testimony was within the scope of Mr. Bratovich’s written testimony.

18 Mr. Bratovich’s oral direct testimony proceeded through a logical presentation of the  
19 “findings” provided for in his written testimony, which is Exhibit ARWA-700. Specifically  
20 during oral direct testimony and prior to the testimony contested by SWC, Mr. Bratovich stated:  
21 “Next finding in my testimony, presented on Pages 5 and 6 of ARWA-700 uses the information  
22 presented in the BO and in the BA to substantiate that we find differences in water temperatures  
23 in the Lower American River that indeed are substantial. We looked through those, and I will  
24 now present you some examples.”<sup>18</sup>

25 \_\_\_\_\_  
26 <sup>13</sup> Cal. Code Regs. Tit. 23, § 648.5.1; SWRCB Ruling dated March 28, 2017 at pp. 4-5.

27 <sup>14</sup> Gov. Code, § 11513, subd. (c).

28 <sup>15</sup> *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.

<sup>16</sup> SWRCB Ruling dated July 22, 2016, p. 2.

<sup>17</sup> Change Petition Notice, p. 33, section 6 (Written Testimony and Other Exhibits)(emphasis added).

<sup>18</sup> Transcript, p. 88:2-8 (p. 93 of Website Link).

1 Mr. Bratovich’s reference to pages 5 and 6 of his written testimony contains three of his  
2 five findings that capture the substance contested by SWC. First is Finding No. 3 (Substantial  
3 Differences Occur in the Water Temperature Exceedance Distributions between the Proposed  
4 Action and the No Action Alternative for Steelhead in the Lower American River), which  
5 includes in pertinent part at paragraph 23: “These substantial differences represent incremental  
6 adverse effects of the PA, relative to the NAA.”<sup>19</sup> Next is Finding No. 4 (The Substantial  
7 Adverse Effects Presented in the NMFS 2017 BO, and by Reference in the WaterFix BA, are  
8 Significant), stating at paragraph 25: “Because the status of steelhead is poor and baseline  
9 conditions are degraded in the lower American River, the substantial adverse effects described  
10 above are significant.”<sup>20</sup> And within Finding No. 5 (The Significant Adverse Effects Presented in  
11 the NMFS 2017 BO, and by Reference in the WaterFix BA, are Unreasonable), Mr. Bratovich  
12 testified in writing at paragraph 27 that his “analysis of the water temperature exceedance  
13 distributions referenced in the NMFS 2017 BO and presented in the WaterFix BA demonstrate  
14 that significant, incremental adverse water temperatures would result from implementation of the  
15 PA, relative to the analytical baseline (NAA).”<sup>21</sup>

16 Specific to SWC’s objection to Mr. Bratovich’s use of the term “gradation” as surprise  
17 testimony, the common definition of “gradation” refers to a “series of successive stages...a step  
18 or place in an ordered scale...an advance by regular degrees.”<sup>22</sup> Mr. Bratovich’s *written*  
19 testimony, including the excerpts cited above in Section II.B, refer to “significant, *incremental*  
20 adverse water temperatures” and conclude that “WaterFix would exacerbate water temperature  
21 conditions where the analytical baseline already represents degraded conditions for steelhead, for  
22 which the status is poor.”<sup>23</sup>

23 In its full context, the contested oral direct testimony is within the scope of Mr.  
24 Bratovich’s written testimony.

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26 <sup>19</sup> Exhibit ARWA-700, pp. 5-6.

27 <sup>20</sup> *Id.*

28 <sup>21</sup> *Id.*

<sup>22</sup> See, <https://www.merriam-webster.com/dictionary/gradation> [as of April 11, 2018].

<sup>23</sup> Emphasis added.

1           **C. Mr. Bratovich’s Contested Oral Testimony Falls Squarely Within**  
2           **Government Code section 11513 Because it is Reliable, Background Scientific**  
3           **Information.**

4           The motion does not challenge the foundation or otherwise seek to exclude the testimony  
5 as being irrelevant or subject to some other evidentiary objection. Instead, the motion is based  
6 only on being surprise testimony with new opinions, which the Water Forum has amply refuted  
7 by demonstrating above that the testimony is within the scope of Mr. Bratovich’s written  
8 testimony. Mr. Bratovich’s contested oral information, however, simply stated basic background  
9 scientific information on which the petitioners themselves relied in their fishery testimony.

10           DWR’s fishery biologist, Dr. Richard Wilder, relied extensively on the National Marine  
11 Fisheries Service’s California WaterFix BO in his testimony. For example, Dr. Wilder  
12 specifically cited that BO in describing his methods for determining whether any modeled water  
13 temperature changes resulting from modeled California WaterFix operations would impact  
14 steelhead - the exact subject Mr. Bratovich’s contested oral testimony concerned.<sup>24</sup> That BO in  
15 turn relies extensively on a 2003 publication by the U.S. Environmental Protection Agency  
16 (“EPA”) as stating the relevance of various water temperatures for steelhead.<sup>25</sup> That 2003 EPA  
17 document<sup>26</sup> identifies a gradation of various incremental effects on steelhead at various  
18 temperatures and states at page 19: “Exposure to temperatures above the optimal range results in  
19 increased severity of harmful effects, often referred to as sub-lethal or chronic effects (e.g.,  
20 decreased juvenile growth which results in smaller, more vulnerable fish; increased susceptibility  
21 to disease which can lead to mortality; and decreased ability to compete and avoid predation), as  
22 temperatures rise until at some point they become lethal.” As the NMFS BO demonstrates, DWR  
23 and the project proponents are well aware of the basic scientific points that Mr. Bratovich made in  
24 the contested oral testimony -- so Mr. Bratovich’s testimony cannot be surprise testimony. Mr.  
25 Bratovich should be permitted to offer oral testimony about gradation of effect because the

26 \_\_\_\_\_  
27 <sup>24</sup> See, Exhibit DWR-1013-signed, p. 55:8-23.

28 <sup>25</sup> See, SWRCB-106, pp. 273-274, 298-299, 307, 330, 335, 374, 387, 392, 448, 489, 1261.

<sup>26</sup> U.S. Environmental Protection Agency. 2003. EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards. EPA 910-B-03-002. Region 10 Office of Water, Seattle, WA.

1 contested oral testimony is the sort of evidence on which responsible persons are accustomed to  
2 rely pursuant to Government Code section 11513.

3 **IV. CONCLUSION**

4 For all of the foregoing reasons, the Water Forum and the ARWA parties respectfully  
5 request that the SWRCB deny the motion to strike and any related joinder in its entirety.  
6

7 DATED: April 11, 2018

8 STOEL RIVES LLP

BARTKIEWICZ, KRONICK

9

& SHANAHAN

10 By: /s/ Wes Miliband

By: /s/ Ryan Bezerra

11 Wesley A. Miliband

Ryan S. Bezerra

12

13 PLACER COUNTY WATER AGENCY

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15 By: /s/ Dan Kelly

16 Daniel Kelly

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**NOTICE OF AVAILABILITY**  
**and**  
**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 a true and correct copy of the following document(s):

**THE WATER FORUM'S AND AMERICAN RIVER WATER AGENCIES'  
OPPOSITION TO DEPARTMENT OF WATER RESOURCES' AND  
STATE WATER CONTRACTORS' MOTION TO STRIKE PORTIONS  
OF ORAL TESTIMONY FROM EXPERT PAUL BRATOVICH**

This Notice of Availability and Statement of Service was 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 26, 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):

I certify that the foregoing is true and correct and that this document was executed on April 11, 2018.

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