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Party to the WaterFix Hearing
Principal, California Water Research

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF
WATER RESOURCES AND UNITED
STATES BUREAU OF
RECLAMATION
REQUEST FOR A CHANGE IN POINT
OF DIVERSION FOR CALIFORNIA
WATER FIX

MOTION TO CONTINUE OBJECTION
TO HEARSAY TESTIMONY, TO
EXCLUDE EVIDENCE AND STRIKE
WRITTEN TESTIMONY, TO RULE ON
PRIOR OBJECTIONS, AND TO
ALLOW CROSS-EXAMINATION OF
ALL TESTIMONY

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1
2 INTRODUCTION AND MOTIONS

3 The website for the California Department of Water Resources (“DWR”) states that the
4 Department “is responsible for managing and protecting California’s water resources. DWR
5 works with other agencies to benefit the state’s people, and protect, restore, and enhance the
6 natural and human environment.”¹ However, in this proceeding, DWR has taken a highly
7 adversarial position in addressing the legitimate concerns of the protestants representing
8 beneficial uses in the Areas of Origin.

9 As detailed below, Planning and Conservation League, Friends of the River, Local
10 Agencies of the North Delta, and other protestants raised concerns at the pre-hearing conference
11 and subsequently that the information submitted in support of the Change Petition did not meet
12 the requirements of Water Code § 1701.1, § 1701.2 and Title 23 Cal. Code Regs. § 794. The
13 Hearing Officers deferred consideration of whether the information provided with the Change
14 Petition was sufficient to meet these statutory and regulatory requirements, on the expectation
15 that DWR and the U.S. Bureau of Reclamation (“USBR”) would provide the information in their
16 case in chief. DWR’s responsibility as an agency managing water resources in the Areas of
17 Origin required that sufficient information to meet statutory and regulatory requirements be
18 provided in advance of the hearing. As argued below, due process also required that protestants
19 be given time to examine complex information on the impacts of the proposed change on water
20 supply, flows, and water quality, and that the information be available for use in cross-
21 examination of DWR’s and USBR’s witnesses.

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23
24 ¹ From <http://www.water.ca.gov/>. Accessed on September 19, 2016.

1 As detailed below, it has become clear in the hearing that DWR and USBR did not
2 provide sufficient information on impacts to legal users of water in the exhibits submitted with
3 their case in chief. As a result, DWR's and USBR's witnesses have made frequent references to
4 modeling data that was not submitted as evidence and was not provided in a human-readable
5 format suitable for an exhibit. This has had the effect of preventing access by protestants with
6 limited resources to information needed to fully participate in the hearing. DWR's attorney also
7 successfully objected to requests by myself and other protestants' requests for an extension of
8 time to analyze the modeling data, on the basis that it was not submitted as an exhibit. DWR
9 cannot have it both ways. As argued on points and authorities below, it violates protestants' due
10 process rights for DWR's attorney and DWR's witnesses to first deny that the modeling data is
11 evidence and then refer to and rely on the modeling data as if it were submitted as an exhibit.

12 On August 25, 2016, I, Deirdre Des Jardins, raised a general objection as a party to the
13 hearing to DWR's and USBR's witnesses' references to modeling data not submitted as an
14 exhibit. Based on points and authorities below, I hereby continue that oral objection to hearsay
15 testimony on the modeling data. As argued below, the Hearing Officers must consider all of
16 DWR's and USBR's witnesses references to the modeling data as unsubstantiated hearsay. The
17 fact that the Hearing Team staff has procured the modeling study package from DWR and posted
18 it on the hearing website, while helpful, should not be considered as introducing evidence into
19 the hearing suitable for documenting projected impacts to legal users of water.

20 There were timely objections to the proposed testimony by DWR's and USBR's
21 witnesses, both on due process grounds by the Pacific Coast Federation of Fishermen's
22 Associations / Institute for Fisheries Resources ("PCFFA/IFR") and on hearsay grounds by the
23 County of San Joaquin et.al. The objections were related to issues that were raised earlier in the
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1 hearing, and which should have been resolved by the Department of Water Resources in the
2 interest of addressing concerns of protestants in the Areas of Origin.

3 Failure to consider the timely due process and hearsay objections to testimony submitted
4 before the hearing has created significant issues of due process in the hearing under Article I, § 7
5 of the California Constitution, and the Fourteenth Amendment to the U.S. Constitution. I
6 respectfully bring these issues to the attention of the Hearing Officers. As a party to the hearing,
7 I Deirdre Des Jardins, move that prior objections be fully considered in receiving and weighing
8 further testimony by DWR's and USBR's witnesses, including the testimony of the Water Rights
9 panel.

10 In addition, as argued below, changed testimony on the foundational evidence supporting
11 the use of the modeling in the hearing requires action by the Hearing Officers. DWR's witnesses
12 have testified that analyses of the 2003 CalSim model are not relevant to the hearing, because the
13 model has had extensive changes. DWR's attorney also objected to questions on the 2003
14 version of the model and on the 2003 Historic Operations Report (Exhibit DWR-505) were not
15 relevant to the 2015 CalSim model versions and Hearing Officer upheld the objections. For this
16 reason, and with supporting arguments below, I move that the Hearing Officers exclude the 2003
17 Historic Operations Study (Exhibit DWR-505) and strike related comments in the written
18 testimony of Armin Munevar (Exhibit DWR-71, p. 9 at 2-16), as well as Table 2 in Exhibit
19 DWR-514, which is based on Exhibit DWR-505.

20 Furthermore, Erik Reyes, chief of DWR's Central Valley Modeling Section, testified that
21 he thought the modeling for the 2015 Delivery Reliability Report would validate the operations
22 simulation in the 2015 model used for the Hearing. No information on the 2015 Delivery
23 Reliability Report or the underlying modeling has been submitted for the hearing. I therefore
24 request that the Hearing Officers reassess whether sufficient information has been provided on
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1 the modeling and related technical studies to satisfy requirements 6a and 6d of Enclosure D of
2 the October 30, 2016 Hearing Notice, prior to the start of Part 1B of the Hearing.

3 Finally, the Hearing Officers have proposed to deal with some of the issues raised in
4 cross-examination by recalling DWR's and USBR's witnesses to answer questions by the
5 Hearing Officers and staff. The Hearing Officers are to be commended for taking careful notes
6 during the hearing, and for coming up with two days of questions to provide "additional
7 information" and "clarification" of the information provided in support of the petition.
8 However, there are currently no plans to allow cross-examination on any new information
9 elicited by the questioning. As argued on points and authorities below, due process requires that
10 protestants be allowed cross-examination on any new information provided by witnesses in the
11 hearing. In addition, on subjects on which witnesses have previously changed their testimony
12 on cross-examination, bringing the witnesses back for further testimony without cross-
13 examination is problematical. For this reason, I respectfully request that the Hearing Officers
14 provide some time and opportunity for cross-examination on additional testimony to all
15 interested parties.

16 Finally, as noted below, the July 22, 2016 Hearing Ruling states that protestants should
17 raise concerns about the sufficiency of DWR's and USBR's cases in chief in their own cases in
18 chief. As argued on points and authorities below, the cases in chief submitted by the protestants
19 do not cure evidentiary defects in DWR's and USBR's case in chief. According to the
20 Governor's 2015-2016 budget, the Department of Water Resources has a 2015-2016 budget of
21 \$4.4 billion, and 3547 employees.² The Department clearly has the resources to analyze and
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23 ² Information from the Governor's 2015-2016 budget website [http://www.ebudget.ca.gov/2015-](http://www.ebudget.ca.gov/2015-16/StateAgencyBudgets/3000/3860/department.html)
24 [16/StateAgencyBudgets/3000/3860/department.html](http://www.ebudget.ca.gov/2015-16/StateAgencyBudgets/3000/3860/department.html). Accessed on September 19, 2016.

1 disclose the effects of the proposed changes on water supply, flows, and water quality. It is
2 manifestly unjust to shift the burden of proof to protestants representing beneficial uses in the
3 Areas of Origin, many of whom do not have the resources to examine the complex modeling
4 study packages provided by DWR outside of the hearing.

5 In the interests of fairness, and a fair hearing under California Code of Civil Procedure §
6 1094.5(b), I hereby request that the Hearing Officers rule all prima facie objections to
7 Petitioners' case in chief at the close of Part 1A of the hearing, and prior to commencement of
8 Part 1B of the hearing. At the close of Part 1A, all of Petitioners' case in chief exhibits will have
9 been submitted, and all direct testimony by DWR's and USBR's witnesses, as well as cross-
10 examination, redirect and re-cross examination will have been completed. The Hearing Officers
11 will then have sufficient information to rule on whether there is prima facie evidence that the
12 case submitted by DWR and USBR to meets statutory, regulatory, and Board requirements, as
13 well as requirements of due process and standards for use of scientific evidence in adjudicatory
14 proceedings. I hereby move that they do so.

15 16 APA EVIDENTIARY STANDARDS

17 The California Department of Water Resources has argued in their "Master Response To
18 Similar Objections Made By Protestants Collectively," dated July 20, 2016, that

19 This is not a civil or criminal trial, nor even a formal adjudicative hearing under Chapter
20 5 of the Administrative Procedures Act. The Board is not required to conduct
21 adjudicative hearings according to the technical rules relating to evidence and witnesses
22 in trial court (Cal. Gov. Code, § 11513, subd. (c)). Instead, "[a]ny relevant evidence shall
23 be admitted if it is the sort of evidence on which responsible persons are accustomed to
24 rely in the conduct of serious affairs, regardless of the existence of any common law or
25 statutory rule which might make improper the admission of the evidence over objection
26 in civil actions" (id.). (p. 5 at 15-23)

1 This bifurcated procedure in administrative hearings, whereby evidence is admitted into
2 the hearing but is weighed at the end, dates back to the passage of the original federal
3 Administrative Procedure Act in 1946. (See William H. Kuehnle, *Standards Of Evidence In*
4 *Administrative Proceedings*, New York Law School Review (April 2005), p. 846-849.) The
5 Hearing Officers' procedural ruling to consider objections at the end of the hearing has precedent
6 in *Calhoun v. Bailar* (9th Cir. 1980) 626 F.2d 145, which considered the admissibility of hearsay
7 evidence in administrative hearings.
8

9 However, the 9th Circuit decision in *Calhoun v. Bailar* on the appropriate sequence of
10 constitutional considerations was made in a case where hearsay evidence could be corroborated
11 during the administrative hearing. (See William H. Kuehnle, *Standards Of Evidence In*
12 *Administrative Proceedings*, New York Law School Review (April 2005), p. 893-898.) The
13 *Calhoun v. Bailar* precedent is arguably not intended for situations where the evidence,
14 considered as a whole, is simply inadequate, or where insufficient information has been provided
15 to establish the reliability and probativeness of scientific evidence for the purposes of the
16 hearing.
17

18 PRIOR OBJECTIONS TO INADEQUACY OF INFORMATION

19 The issue of incompleteness of information submitted in support of the Petition was
20 raised at the Pre-Hearing Conference. The February 11, 2016, Pre-conference Hearing Ruling
21 stated that the Hearing Officers believed that requiring Petitioners to submit and present their
22 Case in Chief before Protestants submitted their response would fill in the information gaps:
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1 This approach will give petitioners the opportunity to fully explain their proposed project
2 and should give the other hearing parties the ability to better evaluate how their interests
3 may be affected before they begin their cases. *If petitioners fail to adequately describe
their project, it also gives the State Water Board the opportunity to make course
corrections.* (p. 2, emphasis added)

4 A request for dismissal was filed on March 28, 2016 by Planning and Conservation
5 League et. al, citing Water Code §§ 1701.1 and 1701.2 and Title 23 of the California Code of
6 Regulations § 794. In the April 25, 2016 Ruling, the Hearing Officers responded:

7 The request to dismiss the petition is denied. Parties raised similar concerns about
8 petition completeness during the pre-hearing conference, and this issue was addressed in
9 our February 11, 2016 ruling. Rather than supplement the petition, *the petitioners are
10 expected to provide more information concerning project operations and potential effects
on legal users of water during the petitioners' case in chief.* (p. 3, emphasis added)

11 Many Protestants also submitted objections to the inadequacy of the information
12 provided in Petitioners' exhibits on July 12, 2016. The Hearing Officers stated in the July 22,
13 2016 ruling on Evidentiary Objections and Other Procedural Matters, that it was not necessary to
14 address these issues prior to the start of the Hearing, and that concerns should be raised in the
15 hearing process.

17 While the other parties still have specific and various criticisms of petitioners' evidence
18 and testimony, we disagree with those parties who contend that petitioners' case-in-chief
19 is insufficient to allow parties to meaningfully participate in Part 1 of the hearing.

20 We recognize that petitioners bear the burden of establishing that the proposed changes
21 will not injure other legal users of water. As we stated in our February ruling, however,
22 not all uncertainties can or need to be resolved before beginning the hearing. In fact, the
23 purpose of this hearing is to resolve some of the issues concerning how the proposed
24 project would be operated. At this point, any remaining uncertainty concerning the
25 proposed project and its effects should be raised in the hearing process, including but not
26 limited to cross-examination, and the protestants' cases in chief. (p. 2)

1 This procedure appears to have created significant due process issues. On cross-
2 examination, DWR's and USBR's witnesses have frequently referred to modeling data not
3 submitted as an exhibit, and not originally proposed as part of DWR's and USBR's case in chief.
4 Many protestants either lack expertise, or have not had a chance to extract or fully examine this
5 modeling data, and there has been no examination of whether DWR has supplied sufficient
6 supporting information on the modeling.
7

8 DUE PROCESS ISSUES CREATED BY REFERENCES TO MODELING DATA

9 As explained below, it became clear in the hearing on August 25, 2016 that there were
10 significant issues in that the modeling data was provided raw HEC-DSS format, a format which
11 DWR's experts asserted that only a CalSim expert could extract.³ This is not a human-readable
12 format suitable for submission as evidence.

13 Kelley Taber, representing the City of Stockton, cross-examined the modeling panel on
14 August 25, 2016, six days before the original September 1, 2016, due date for protestants' cases
15 in chief. Ms. Taber proposed questions on "the modeling itself, and how one would access the
16 information in the modeling." Mr. Mizell stated in response,

17 "If it pleases the Board, we do have staff available to answer questions on access
18 to the modeling, and how to utilize the modeling programs. Those were all in the letter
we submitted with the link to the modeling."⁴

19 However, an examination of the May 16, 2016 letter from DWR to the Board shows that Mr.
20 Mizell's recollection of an offer of assistance was incorrect, and that DWR later stated in a letter
21

22 ³ It does not require an expert on CalSim, but only someone familiar enough with computer modeling to look up the
23 appropriate node in the CalSim node map, identify it, and extract the associated data from the raw data file. DWR
could have provided a node table to assist in extraction of commonly used nodes such as those identifying reservoir
storage or key flow locations in the Delta, but declined to do so.

24 ⁴ Transcribed from hearing video. Motion will be amended to include actual transcript as soon as it is available.
25

1 on June 3, 2016, that it was under no obligation to explain the modeling at any protestants'
2 request. (See Appendix A.)

3 DWR's attorneys also asserted in their June 3, 2016 letter, "Petitioners' Opposition to
4 Requests of Protestants for Extension of Time to File and Serve Objections," that the modeling
5 data provided to the Board on May 25, 2016 was not part of the petitioners' case in chief. The
6 Hearing Officers, relying on this assertion, denied requests for an extension to examine the new
7 modeling data in their June 10, 2016 ruling on deadline extension requests:

8 The petitioners submitted a letter on June 3, 2016, opposing other parties' requests to
9 extend the deadlines for the hearing. The petitioners state that time extensions are not
10 needed because they submitted "concise testimony (133 pages for a total of 8 lead
11 witnesses)" and a majority of submitted testimony and exhibits have been publicly
12 available since February 2016.

13 (...)

14 For the reasons stated in petitioners' opposition letter, additional time beyond the 27-day
15 extension to review petitioners' testimony and exhibits is not warranted. Many parties
16 stated that they need more time to review the modeling data provided by the petitioners
17 on May 25, 2016. Any procedural or evidentiary objections at this stage of the hearing,
18 however, should concern petitioners' testimony or exhibits, and *petitioners have not*
19 *submitted the May 25 modeling data as an exhibit*. For these reasons, the requests to
20 extend all hearing deadlines by two months, and to delay the beginning of the hearing,
21 are denied. (p. 2, emphasis added.)

22 After Mr. Mizell's statement about "staff available to answer questions on access to the
23 modeling," I, Deirdre Des Jardins, made a general objection as a party to the hearing to
24 Petitioners' witnesses references to modeling data provided outside of the hearing. I stated that
25 it meant that the entire hearing was referring to exogenous information that had not been
26 introduced, and had not been properly identified, and that it created a lack of clarity about "what
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1 is available to the protestants, or if it is in human readable format, and other issues.” I, Deirdre
2 Des Jardins, party to the hearing, hereby continue that oral objection.

3 Ms. Taber stated that she noted that Mr. Tehrani had made reference to information that
4 was outside of the scope of the exhibits and written testimony, and that he was relying on the
5 modeling information that was posted on the website. Relying on Mr. Mizell’s assertion that
6 technical assistance had been offered to the protestants in accessing the modeling data, the
7 Hearing Chair stated,
8

9 “the data – all data that is being relied on by all the witnesses, should be made
10 available. It should already have been made available. Whether or not it is part of a
11 witnesses’ testimony or not, it is still evidence in the record that should be accessible to
12 all. That is certainly a point that is a hearing issue. Now the mechanics of how you
13 access that data is not something that I typically want to know about. And if that is
14 something that Mr. Mizell is offering technical assistance to access the data that is
15 already part -- that is made available for this hearing, then that is not an issue that we
16 need to dwell on as part of the hearing itself.”⁵

17 To the extent that the modeling data has not been properly submitted or introduced as an
18 exhibit at the hearing, I respectfully assert that it is not information that the Hearing Chair should
19 be considering as “evidence in the record.” In *English v. City of Long Beach (1950) 35 Cal.2d*
20 *155*, the court ruled:

21 Administrative tribunals which are required to make a determination after a hearing
22 cannot act upon their own information, and nothing can be considered as evidence that
23 was not introduced at a hearing of which the parties had notice or at which they were
24 present. (United States v. Abilene & So. Ry. Co., 265 U.S. 274 [44 S.Ct. 565, 68 L.Ed.
25 1016]; Interstate Commerce Com. v. Louisville & Nashville R. R. Co., 227 U.S. 88 [33
26 S.Ct. 185, 57 L.Ed. 431]; La Prade v. Department of Water & Power, supra; Bandini
27 Estate Co. v. Los Angeles County, supra; Carstens v. Pillsbury, supra.) The fact that there

24 ⁵ Quotation transcribed from Hearing video. Motion will be amended to include actual transcript when available.

1 may be substantial and properly introduced evidence which supports the board's ruling is
2 immaterial. (Cf., Ohio Bell Tel. Co. v. Public Utilities Com., 301 U.S. 292 [57 S.Ct. [35
Cal.2d 159] 724, 81 L.Ed. 1093].) (*Id.* at 157-165)

3 It should also be noted that it is the Department of Water Resources' insistence on
4 providing modeling data to parties outside of the hearing process that has created this situation.
5 DWR's July 20, 2016 "Master Response To Similar Objections Made By Protestants
6 Collectively" stated:

7 Petitioners do not believe it is necessary to include the complete model packages for
8 CaiSim II and DSM2 in their testimony as the testimony includes the relevant input and
9 output information used in their analysis. However, the model packages have been made
10 available to all parties, upon request. In February, March, and May 2016, DWR and
Reclamation made available the CalSim II and DSM2 modeling packages used in
analyzing CWF and Alternative 4A.

(p. 17, footnote 14.)

11 The May 25, 2016 letter from DWR to Mr. Kyle Ochendusko at the State Water Resources
12 Control Board shows that only reason that the modeling data was made available on the hearing
13 file transfer protocol(ftp) site is that Mr. Ochendusko requested it, The modeling data was not
14 identified as a staff exhibit, or proposed to be offered by the staff into evidence, so issues of
15 protestants accessing the complex modeling data and having sufficient time to analyze it were
16 not addressed. The February 11, 2016 Hearing ruling also stated:

17 In response to concerns raised by parties, hearing team staff do not currently propose to
18 offer the staff exhibits into evidence at the hearing (although staff may introduce exhibits
if strictly necessary) (p. 11)

19 Given DWR's assertion that the modeling data was not part of their case in chief, and DWR's
20 objections to protestants' request for time to extract and analyze the modeling data, I hereby
21 object to any future submission in this hearing of DWR's and USBR's modeling data into
22 evidence, based on due process considerations. At this point, DWR and USBR have submitted
23 their exhibits and proposed testimony, the deadline for objections to the proposed testimony has
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1 passed, most of DWR's and USBR's witness panels have completed testimony, protestants have
2 completed cross-examination of most of the witness panels, and have been required to submit
3 their cases in chief. As argued below, submission of the modeling data as new evidence, at this
4 late point in the hearing, violates due process.

5 PRIOR DUE PROCESS OBJECTIONS

6 PCFFA/IFR raised the issue of due process in objections filed on July 12, 2016, stating in
7 part:

8 If modeling is not in evidence, protestants are deprived of their due process right to
9 question petitioners' witnesses about that modeling. "[I]n civil proceedings a party has a
10 due process right under the Fifth and Fourteenth Amendments to the Federal Constitution
11 to cross-examine and confront witnesses." *Seering, supra*, 194 Cal.App.3d at 304,
12 quoting *In re Mary S.* (1986) 186 Cal.App.3d 414, 419. "[I]n a civil proceeding the
13 constitutional right involves general notions of procedural due process." *Id.* Because
14 petitioners' testimony based on their modeling fails to identify the underlying data as
15 necessary to permit petitioners' informed cross-examination, both the model and the
16 testimony based thereon are objectionable on due process grounds. *Id.* Moreover, since
17 the underlying data is not in evidence, such testimony is objectionable for the additional
18 reason that it assumes facts not in evidence. *Dee v. PCS Property Management, Inc.*
19 (2009) 174 Cal.App.4th 390, 404 (an opinion based on assumed facts, without adequate
20 foundation for concluding that those facts exist, is unreliable and therefore should be
21 excluded). (p. 12)

22 The Department of Water Resources "Master Response To Similar Objections Made By
23 Protestants Collectively," filed on July 20, 2016, stated that the prior rulings of the Board in the
24 Byron Bethany Irrigation District hearing allowed proceeding without the modeling being in
25 evidence:

26 The hearing officers ruled that the parties had the ability to analyze and understand the
27 model runs described in the submissions and would be able to conduct a thorough cross-
examination of the witnesses. If certain information was not available or could not be
understood or analyzed in preparation of cross-examination, the hearing officers ruled

1 that they would take that into account when assessing the relative weight and reliability
2 of the testimony. (p. 16 at 17-19)

3 To the extent this summary is correct, I respectfully point out that it is not only in
4 contradiction of the cases cited by PCFFA/IFR, it is contradiction of over a century of case law
5 requiring that all supporting information in an administrative hearing must be in the record, and
6 be accessible for full examination and rebuttal. The 103 year old opinion in *Int. Com. Comm. v.*
7 *Louis. & Nash. R.R.*, (1913) 227 U.S. 88, 93 is still being cited by state appellate courts⁶:
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9 The Commission is an administrative body and, even where it acts in a quasi-
10 judicial capacity, is not limited by the strict rules, as to the admissibility of evidence,
11 which prevail in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U.S. 25.
12 But the more liberal the practice in admitting testimony, the more imperative the
13 obligation to preserve the essential rules of evidence by which rights are asserted or
14 defended. In such cases the Commissioners cannot act upon their own information as
15 could jurors in primitive days. All parties must be fully apprised of the evidence
16 submitted or to be considered, and must be given opportunity to cross-examine witnesses,
17 to inspect documents and to offer evidence in explanation or rebuttal. In no other way can
18 a party maintain its rights or make its defense. In no other way can it test the sufficiency
19 of the facts to support the finding; for otherwise, even though it appeared that the order
20 was without evidence, the manifest deficiency could always be explained *on the theory*
21 *that the Commission had before it extraneous, unknown but presumptively sufficient*
22 *information to support the finding.* (*Id* at 93, emphasis added)

23 A California appellate decision, *Massachusetts etc. Ins. Co. v. Industrial Acc. Com.*,
24 (1946) 74 Cal.App.2d 911, 914, cited the *Int. Com. Comm. v. Louis. & Nash. R.R.* opinion in a
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⁶ See, for example, *New England Rehabilitation Hospital of Hartford, Inc. v. Chhc*, (1993), 226 Conn. 105, 142,
and *D.B. v. Div. of Occupational Pro. Licensing*, (1989) 779 P.2d 1145.

1 decision regarding an administrative proceeding of the Industrial Accident Commission, an
2 agency of the State of California.⁷

3 The *Int. Com. Comm. v. Louis. & Nash. R.R.* opinion is relevant to this hearing, in that
4 the Board’s practice of admitting testimony is quite liberal, as was the case a century ago with
5 the Interstate Commerce Commission. What DWR has arranged, with the provision of modeling
6 data outside of the hearing, is “*extraneous, unknown, but presumptively sufficient information*”
7 to support approval of the Change Petition. Clearly, any deficiency in evidence supporting the
8 Change Petition can be explained by references to this extraneous information.
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10 Clearly, over a century of case law mandates that in state or federal agency administrative
11 proceedings, parties must be “fully apprised of the evidence submitted or to be considered.”
12 This requirement precludes a state or federal agency’s consideration of evidence that parties
13 cannot fully understand or analyze, and which was not submitted as evidence. In the case of the
14 modeling data, not only was it not submitted as evidence, it was not provided in a human-
15 readable format suitable for evidence. The burden should not have been placed on protestants to
16 extract and analyze the data for cross-examination and rebuttal.⁸
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21 ⁷ The *Massachusetts etc. Ins. Co. v. Industrial Acc. Com* opinion was in turn cited in a number of later cases,
22 including *Columbia Etc. Steel Div. V. Ind. Acc. Com.*, (1953) 115 Cal.App.2d 862, *Caesar's Restaurant V. Ind. Acc.*
23 *Com.*, (1959) 175 Cal.App.2d 850, 854, *Edgar V. Workmen's Comp. App. Bd.*, *Navajo Freight Lines*, (1966) 246
24 Cal.App.2d 660.

25 ⁸ I hereby incorporate my June 20, 2016, “Request for Official Notice,” which included recommendations by the
26 Board’s 2012 scientific panel on “Analytical Tools for Evaluating Water Supply, Hydrodynamic and Hydropower
27 Effects in the Bay-Delta Plan” on what information should be provided for Board proceedings.

1 CHANGED TESTIMONY ON FOUNDATION FOR MODELING EVIDENCE

2 There are also hearing issues created by DWR and USBR’s failure to submit current
3 validation or calibration information on CalSim II for the hearing. This failure should not result
4 in a shifting of the burden of proof to protestants to do their own testing of the current model
5 version.

6 The written testimony submitted for Armin Munevar (Exhibit DWR-71) relied on
7 information from the outdated 2003 Historic Operations Report, entitled “CalSim II Simulation
8 of Historical SWP/CVP Operations, Technical Memorandum Report, November 2003 (Exhibit
9 DWR-505) for validation of the CalSim model for its proposed use in the hearing. The
10 information was summarized in Table 2 of DWR-514. As detailed below, during my cross-
11 examination of the modeling panel on August 26, 2016, DWR’s attorney successfully objected
12 that questions on the 2003 model and the 2003 Historic Operations Report were not relevant to
13 the model version used for the hearing. Erik Reyes, the Chief of the Central Valley Modeling
14 Section in Department of Water Resources’ Bay Delta Office (Exhibit DWR-27, p. 1), also
15 testified that extensive changes had been made to the CalSim model since 2003, and that he
16 believed that the 2015 Delivery Reliability Report modeling validated the 2015 CalSim model
17 version submitted for the Hearing.

18 Gov. Code § 11513(f) allows the Hearing Officers to exclude evidence whose “probative
19 value is substantially outweighed by the probability that its admission will necessitate undue
20 consumption of time.” Clearly, the Hearing Officer already ruled that the 2003 model and 2003
21 Operations Report are of little probative value and time should not be spent on questions related
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23
24

1 to them. For these reasons, I, Deirdre Des Jardins, as a party to the hearing, hereby request that
2 the Hearing Officers exclude from evidence the 2003 Historic Operations Report (Exhibit DWR-
3 505) and page 3 of Exhibit DWR-514, containing Table 2, which summarizes results from that
4 report.

5 A great deal of confusion was created in the hearing by repeated statements that the
6 CalSim model could not be calibrated. Armin Munevar' written testimony stated:

7 Because it is a simulation, based on a combination of historical hydrology, the
8 current regulatory environment and projected changes to the hydrology due to climate
9 change, CalSim II cannot be calibrated and therefore, should not be used in a predictive
10 manner. (Exhibit DWR-71, p. 9 at 13)

11 These statements are false in their implication. As Erik Reyes testified on cross-
12 examination, the hydrologic components of the CalSim model can be calibrated and has been
13 calibrated. In my August 26, 2016 cross-examination, I questioned Mr. Reyes on statements by
14 DWR in 2005 that the CalSim model hydrologic components had been calibrated:

15 MS. DES JARDINS: So it states here -- this is a prior statement by the
16 Department of Water Resources -- "Calibration of some of the most important
17 components of the model is possible and has been done. For instance, one of the most
18 important components of the model, its hydrologic component, has been calibrated."
19 There's some details.

20 Do you agree that the hydrologic component can be calibrated and has been
21 calibrated?

22 WITNESS REYES: Yes, I agree that it can be calibrated and has been
23 calibrated. Yes. (Partial Tr. 12:2, August 26, 2016.)

24 Because DWR's witnesses changed their testimony under cross-examination about the ability to
25 calibrate the CalSim model, and this information is foundational to the modeling evidence, I
26

1 Deirdre Des Jardins, hereby object to any further testimony by the witnesses without cross-
2 examination.

3 The only evidence on the hydrologic calibration provided by DWR and USBR for the
4 hearing was the 2003 Historic Operations Report referenced in Armin Munevar's testimony,
5 which provided information on the 2003 version of the model. But DWR's attorney objected to
6 questions on the 2003 model as not being relevant to the Hearing:
7

8 MR. MIZELL: (...)

9 If Ms. DesJardins has questions about the existing models and the validation or
10 calibration of the existing models, I'm happy to not object to those. But this is very old
11 critique at this point, and I don't see how it's relevant to what we've presented.
(Partial Tr: 4:18, August 26, 2016.)

12 The Hearing Officer later barred further questions on the 2003 version of the model,
13 directing me to ask questions instead about the version of the modeling used for the Hearing. The
14 following is from the transcript:

15 CO-HEARING OFFICER DODUC: No. We are moving on.

16 Ask your next question, and make sure that your cross-examination of these
17 witnesses is on their direct testimony on the modeling they produced, on the output of
18 that modeling in support of the petitioners' project.

19 (Partial Tr. 19:22, August 26, 2016.)

20 I did explain that my questions related to Munevar's testimony:

21 MS. DES JARDINS: Respectfully, this is meant to explore the direct testimony
22 in DWR-71 that a historical validation study matched the inflows at Freeport with plus or
23 minus 3 percent accuracy. And I would argue based on this that there's other
24 considerations, like, if that plus or minus 3 percent is April to October in critical dry
25 years, that might be significant. (Partial Tr., 17:20, August 26, 2016.)
26

1 These were the specific paragraphs in Munevar's testimony (Exhibit DWR-71) that I was
2 referring to:

3 The CalSim II Simulation Study results that are summarized in Exhibit DWR-
4 514, p.3, Table 2 show that simulated SWP Table A and CVP south-of-Delta deliveries
5 during the drought (1987-1992) were within 5 percent of historical values, suggesting a
6 close fit between simulated and actual values.

7 A comparison of Sacramento Valley inflow to the Delta (flow at Freeport) is a
8 good measure of how well Sacramento Valley hydrology is simulated by CalSim II.
9 Exhibit DWR- 514, p. 3, Table 2 shows that for this quasi-validation run CalSim II
10 simulated Delta inflows were 0.3 percent greater than historical, a reasonably close fit
11 between simulated and actual values.

12 Comparison of the Net Delta Outflow Index, a measure of how well the
13 SacramentoSan Joaquin Delta is represented by CalSim II, also show a close fit between
14 simulated and actual. Exhibit DWR-514, p. 3, Table 2 shows simulated values are 3.5
15 percent less than historical during the 1987-1992 time-period. This exhibit also shows
16 that simulated long-term (1975-1998) average deliveries compare quite well and are
17 within 7 percent of historical values, suggesting a reasonably close fit between simulated
18 and actual values. DWR and Reclamation have continued to improve CalSim II since
19 2003. A comparison of Sacramento Valley inflow to the Delta (flow at Freeport) is a
20 good measure of how well Sacramento Valley hydrology is simulated by CalSim II.
21 Exhibit DWR-514, p. 3, Table 2 shows that for this quasi-validation run CalSim II
22 simulated Delta inflows were 0.3 percent greater than historical, a reasonably close fit
23 between simulated and actual values. (p. 9 at 2-17.)

24 Subsequent testimony by Erik Reyes showed that the Hearing Chair was correct in her
25 judgement to not spend further time on examining the 2003 version of the CalSim model, or
26 Munevar's references to 13 year old testing. Reyes' testimony showed that the model had been
27 extensively revised, and Reyes stated that the 2003 validation of the model had been redone, per
the recommendations of the 2003 CalSim peer review panel.

I, Deirdre Des Jardins, as a party to the hearing, hereby move to strike the above
paragraphs from Mr. Munevar's written testimony (Exhibit DWR-71, p. 9 at 2-16) on the
grounds that they are discussing a 2003 version of the model, that information on the 2003
version is not relevant to the 2015 model version used for the hearing, and these statements were
excluded from cross-examination for this reason.

1 The following testimony by Erik Reyes under cross-examination by Mr. Porgans supports
2 this motion.

3 WITNESS REYES: I believe Mr. Munevar said that in 2004 there was a response
4 to the peer review. In other words, we tried to address issues that were raised in the peer
5 review, and we also had our own takes on some of these recommendations.

6 And then from 2004 to 2010, we periodically update our model with any new
7 information or any updates in operations, regulations. Any errors, if we find them, we try
8 to correct. And in 2010 there was a process called the "common assumptions process"
9 where we tried to incorporate a bunch of these changes and update the model.

10 MR. PORGANS: So the idea -- the CalSim II, then, that was updated in 2010, did you --
11 are you saying you applied that to the California WaterFix or not?

12 WITNESS REYES: Initially it was applied to BDCP. For California WaterFix in terms
13 of what we're presenting for the hearings, it's a 2015 version of that model.
14 (Partial Tr. 131:24, August 16, 2016)

15 Reyes' testimony raises the issue that DWR and USBR have failed to submit sufficient
16 information documenting the development of the 2015 version of the CalSim model. Enclosure
17 D of the October 30, 2015 Hearing Notice states:

18 6a. Exhibits based on technical studies or models shall be accompanied by sufficient
19 information to clearly identify and explain the logic, assumptions, development, and
20 operation of the studies or models. (p. 33)

21 Based on Reyes' testimony, I hereby request that the Hearing Officers assess whether
22 sufficient information on the development, current assumptions, and current operations of the
23 2015 version of the CalSim model used for the Hearing, was submitted to meet requirement 6a
24 of Enclosure D of the Hearing Notice. Due process required that sufficient information be
25

1 available for cross-examination and for review in preparation of protestants' cases in chief. Due
2 process also requires that the information be available for rebuttal.⁹

3 Further cross-examination of Erik Reyes elicited testimony that the 2003 Historic
4 Operations Study had been superseded. Mr. Reyes responded to the following excerpts from the
5 2003 CalSim II Peer Review (Exhibit DDJ-101), which showed that the peer review panel
6 mandated that the study be redone.

7 MS. DES JARDINS: (...)
8 (referring to excerpt from the 2003 CalSim Peer Review¹⁰, Exhibit DDJ-121, p. 31)

9 And this is what it states. "There are a number of elements in the CalSim II
10 validation report which reduced confidence, including State Water Project demand south
11 of the Delta, were set at historical deliveries with no restriction and at the contractors'
12 request level in restricted years."

13 And then it says, "The validation run does not provide reliable information on how well
14 the model can represent these demands."

15 Let's scroll down a little more.

16 "The report estimates" -- "provides estimates of State Water Project and Central
17 Valley Project deliveries south of the Delta, but then adjusts them for changes in storage
18 before presenting comparisons of those results. This process merely checks that the
19 model is preserving the water balance and does not present a legitimate validation of
20 model deliveries.

21 The report provides statistics on long-term" --

22 CO-HEARING OFFICER DODUC: And your question is?

23 MS. DES JARDINS: Is, so, can you address -- can you address -- you had
24 promised in 2004 to do another validation run, and it was addressing these concerns.

25 ⁹ As argued previously, due process under the XIV amendment to the U.S. Constitution, and Article I, § 7 of the
26 California Constitution, as interpreted in *Int. Com. Comm. v. Louis. & Nash. R.R., supra, Massachusetts etc. Ins.*
27 *Co. v. Industrial Acc. Com., supra*, and *English v. City of Long Beach, supra*, and as well as the Board's October 30,
2015 Hearing Notice require that the information specified in Enclosure D of the Hearing Notice have been
submitted as an exhibit. Requiring the information to be submitted as an exhibit also resolves uncertainty about
what information has been made available to protestants.

¹⁰ The December 2003 Strategic Review of CALSIM II, sponsored by the Bay-Delta Authority Science Program,
titled, "A Strategic Review of CALSIM II and its Use for Water Planning, Management, and Operations in Central
California."

1 to admit modeling evidence based entirely on hearsay statements by DWR's modelers, and then
2 require protestants to rebut the hearsay testimony.

3 For this reason, the Hearing Officers must ensure that the Petitioners have provided
4 adequate foundational evidence for the proposed use of the modeling evidence in the hearing,
5 and that sufficient information on the foundational evidence is available for cross-examination as
6 well as rebuttal. Enclosure D of the October 30, 2015 Hearing Notice also states that:

7 6d. Exhibits that rely on unpublished technical documents will be excluded
8 unless the unpublished technical documents are admitted as exhibits. (p. 34)

9 I, Deirdre Des Jardins, party to the hearing, hereby request that the Hearing Officers
10 assess whether there are sufficient published technical documents on the current version of the
11 model to support its use in the hearing.¹¹ Finally, some of the protestants have prepared rebuttal
12 CalSim or DSM2 modeling for their cases in chief, at enormous time and expense. Any
13 resolution of the foundational issues with respect to the CalSim modeling should not result in
14 exclusion of this rebuttal evidence or rebuttal testimony.

15 PRIOR OBJECTIONS TO HEARSAY TESTIMONY

16 The October 30, 2015 Hearing Notice, Enclosure D, stated the following with respect to
17 hearsay evidence:

18 12. RULES OF EVIDENCE: Evidence will be admitted in accordance with Government
19 Code, section 11513. Hearsay evidence may be used to supplement or explain other
20 evidence, but over timely objection shall not be sufficient in itself to support a finding
21 unless it would be admissible over objection in a civil action. (p. 36.)

22
23 ¹¹ During cross-examination, I asked this the modelers if information on the calibration of the Sacramento Valley
24 Hydrology had been published, but DWR's attorney objected to the modelers answering, and the Hearing Officer
25 upheld the objection.

1 Objections filed by the County of San Joaquin et. al. on July 12, 2016 stated in part:

2 As reflected in the State Board's October 30, 2015 Notice of Petition, expert
3 witnesses may rely on hearsay evidence, the work of others, test results and
4 measurements from procedures conducted by others, and other material that they
5 themselves did not produce. However, the underlying work, writings, measurements,
6 and other underlying evidence must not be unreliable, speculative, improper hearsay, or
7 otherwise inadmissible. Accordingly, in the context of the Water Fix Hearing, proffered
8 expert testimony must be excluded where it is based on matter of a type on which an
9 expert may not reasonably rely or where it is unsupported by the material on which the
10 expert relies. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55
11 Cal.4th 747, 771-772.) Proffered expert testimony must be excluded if it is speculative or
12 based on assumptions not support by the record. (*Ibid.*; *Long v. Cal-Western States*
13 *Life Insurance* (1955) 43 Cal.2d 871, 882 [speculative or conjectural data are not
14 properly the subject of expert testimony]; *Korsak v. Atlas Hotels, Inc.* (1992) 2
15 Cal.App.4th 1516, 1524-1525 [If the expert uses hearsay as the basis for an opinion, it
16 should be reliable and necessary and not conjecture or speculation, and the expert must
17 not testify to the out-of-court statements as independent facts.]) Expert testimony must
18 be excluded or accorded no weight where the basis for the opinion reflects an
19 unacceptable level of uncertainty, speculation and guesswork. (*Westrec Marina*
20 *Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th
21 1042, 1051.) (p. 7 at 1.)

22 The July 22, 2016 Hearing Ruling stated:

23 We appreciate the parties' timely written submittals. Upon review, and with the exception
24 of specific issues discussed below, we have determined that it is not necessary to rule on
25 the objections at this time. (p. 1.)

26 However, no further explanation was given for not ruling on objections to testimony
27 before the Hearing started. The failure to consider the objections by PCFFA/IFR and County of
San Joaquin, cited above, and other similar objections, and the procedure of allowing Petitioners
to "fill in the gaps" in their case through cross-examination, has resulted in a great deal of
testimony under cross-examination which used hearsay references as the basis for an opinion.
This has created significant due process issues in the hearing. For this reason, I, Deirdre Des
Jardins, as a party to the hearing, move that the Hearing Officers consider the above objections to
the witnesses' testimony at the end of Part 1A of the Hearing, and ensure that there is sufficient
evidence in the Hearing record to support the the witnesses' testimony.

1
2 ISSUES IN RECALL OF PETITIONER'S WITNESSES

3 The Hearing Officers are planning to recall the DWR's and USBR's witnesses for two
4 days of answers to questions to provide "additional information" and "clarification" of the
5 information provided by the Petitioners in support of the petition, but may not allow cross-
6 examination on the elicited testimony.

7 In addition to the issues with due process issues of hearsay testimony and hearsay
8 evidence cited above, the additional testimony creates issues with the protestants' due process
9 rights to cross-examination.

10 In *Goldberg v. Kelly* (1970) 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed.2d 287, the U.S.
11 Supreme Court ruled that "almost every setting where important decisions turn on questions of
12 fact, due process requires an opportunity to confront and cross-examine adverse witnesses."
13 The court in *Manufactured Home Communities v. County of San Luis Obispo* (2008) 167
14 Cal.App.4th 705, 712 cites *Goldberg v. Kelly*, and continues:

15 The right to cross-examine applies in a wide variety of administrative proceedings.
16 (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1330, 91 Cal.Rptr.2d 171 [disciplinary
17 hearings]; *Davis v. Mansfield Metropolitan Housing Authority* (6th Cir.1984) 751 F.2d
18 180, 185 [housing authority]; *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766, 769,
19 190 Cal.Rptr. 919, 661 P.2d 1073 [welfare]; *Pence v. Industrial Acc. Comm.* (1965) 63
20 Cal.2d 48, 50-51, 45 Cal.Rptr. 12, 403 P.2d 140 [industrial accident]; *Desert Turf Club
21 v. Board of Supervisors* (1956) 141 Cal.App.2d 446, 455, 296 P.2d 882 [use permit].) It
is especially important where findings against a party are based on an adverse witness's
testimony. (*Fremont Indemnity Co. v. WCAB* (1984) 153 Cal.App.3d 965, 971, 200
Cal.Rptr. 762; *Palmer v. Rent Control Bd. of Brookline* (1979) 7 Mass.App.Ct. 110, 386
N.E.2d 1047, 1050 [rent control board erred by not allowing landlord to cross-examine
investigator who provided report to the board].)

22 As for what testimony requires cross-examination, the opinion states:

23 Where it makes a decision based on a party's testimony, the adversary is entitled to
24 question his or her opponent. (*515 Associates v. City of Newark* (1977 D. New Jersey)

1 424 F.Supp. 984, 995, fn. 20; see also *Goldberg v. Kelly*, supra, 397 U.S. at pp. 269-270,
2 90 S.Ct. 1011; *Palmer v. Rent Control Bd. of Brookline*, supra, 386 N.E.2d at p. 1050;
3 *Rivera v. Div. of Industrial Welf.*, supra, 265 Cal.App.2d at p. 586, 71 Cal.Rptr. 739.)
4 (*Manufactured Home Communities v. County of San Luis Obispo*, supra, 712.)

5 Thus it seems clear that, to the extent that the Board relies on the “additional
6 information” and “clarifications” for any findings in the hearing, the Hearing Officers are
7 required to allow cross-examination of the additional testimony.

8 This is also unusual procedure in a situation where witnesses have changed their
9 testimony under cross-examination, as has happened several times during the hearing.

10 *Manufactured Home Communities v. County of San Luis Obispo* refers to such moments:

11 Cross-examination is the “ “greatest legal engine ever invented for discovery of truth. ” ’
12 [Citations.]” (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733, 95 Cal.Rptr.2d
13 620.)

14 For this reason alone, any additional testimony by DWR’s and USBR’s witnesses should
15 have cross-examination. I hereby request that the Hearing Officers allow cross-examination of
16 all testimony in the hearing, including testimony elicited under questioning by the Hearing
17 Officers and members of the Hearing Team.

18 PROTESTANTS’ CASES IN CHIEF DO NOT CURE EVIDENTIARY DEFECTS

19 The July 12, 2016 objections by the County of San Joaquin et. al. stated in part:

20 As noted, unless and until Petitioners satisfy by competent evidence their burden of
21 establishing the likelihood of "no injury" to legal users of water, the Protestants are under
22 no obligation at all to put on an affirmative case. By going forward with the WaterFix
23 Hearing as currently structured, the State Board is effectively requiring Protestants to do
24 just that. The net effect is to shift the burden of proof and persuasion with respect to "no
25 injury" from the Petitioners, i.e., to allow Petitioners to avoid their burden of proof.

1 I respectfully point out that, to the extent that protestants submit information on the
2 modeling for use in cross-examination or in their cases in chief, it does not waive the objections
3 raised by the protestants, or cure the evidentiary defects in the Petitioners' case in chief. The
4 law in California is clear that a party does not waive an "unsuccessful objection to evidence by
5 thereafter using or referring to that evidence." (See, e.g., *People v. Vengas* (1998) 18 Ca1.4th
6 47, 94; *Mary M. v. City of Los Angeles* (1991) 54 CaL3d 202, 212-213; *Warner Constr. Corp. v.*
7 *Los Angeles*, (1970) 2 Ca1.3d 285, 300, fn.17.) Thus, the fact that protestants have needed to
8 refer to Petitioners' modeling data during the hearing, or to introduce peer reviews and other
9 documents for rebuttal or impeachment purposes, does not cure the evidentiary defects to which
10 protestants objected.

12 CONCLUSION

14 In summary, the Department of Water Resources has a 2015-2016 budget of
15 \$4.4 billion, and 3547 employees. The Department clearly has the resources to make sufficient
16 information available to the protestants representing the beneficial uses in the Areas of Origin to
17 show that the proposed change will not harm their water right. Due process requires that
18 protestants be able to fully examine and rebut evidence, and to cross-examine witnesses on that
19 evidence. Due process also requires that evidence considered in the hearing needs to be
20 submitted as an exhibit, and in an appropriate format. Hearsay evidence, by itself, is not
21 sufficient support a finding, and timely objections have been made.

22 Foundational evidence supporting the proposed use of the modeling in the
23 hearing must also be provided for the hearing. Protestants also have the due process right to
24 examine and rebut foundational evidence, as well as cross-examine witnesses on that evidence.

1 For these reasons, objections on issues of foundation, due process, and hearsay must be ruled on
2 before Part 1B. The Hearing Officers should must also consider the changed testimony about
3 foundational evidence in the hearing, and also should provide protestants some opportunity to do
4 cross-examination on all evidence and testimony to be used in Board findings.

5 Respectfully submitted,

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10 Deirdre Des Jardins,
11 Principal, California Water Research
12 Party to the Hearing
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1 Appendix A

2
3 DWR'S ASSERTIONS ABOUT OFFERING ASSISTANCE ON MAY 16, 2016

4 DWR and USBR submitted a "status update" to the State Water Resources Control Board
5 on May 16, 2016, which stated that the Department would be using a new set of CALSIM and
6 DSM2 computer models in support of their case in chief, and indicated that they would be
7 providing it outside of the hearing process. An examination of the letter does not show any
8 mention by the agencies of staff available to answer questions on "how to utilize the modeling
9 programs." The letter only states the following:

10 [A]s part of testimony to be submitted on May 31, Petitioners will present updated
11 modeling relating to the proposed project and modeling on an adaptive operational range
12 for the Board's consideration of potential injury to other legal users of water. Upon
13 request, Petitioners will make available to parties the model study package used for the
14 modeling (please contact Nicole Darby at Nicole.Darby@water.ca.gov)." (p. 2)

15 DWR later indicated in the June 3, 2016 letter, "Petitioners' Opposition to Requests of
16 Protestants for Extension of Time to File and Serve Objections" that DWR was not required to
17 do any further analysis or manipulation of the modeling code or output data at the request of the
18 protestants, or even to explain information. The letter had a footnote which stated in part:

19 DWR fully responded to the requests for information providing all data reasonably in its
20 possession responsive to the requests. DWR, however, was under no obligation to
21 conduct further comparisons, manipulations or analyses, or explain or recharacterize
22 information at Cal Water Research's, or any other protestant's, request. (p. 2)

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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 to Exclude Evidence, Strike Testimony, Rule on Prior Objections

20160816 CWF Petition Hearing Transcript p. 4, 12, 17, 19, 131, 278-284

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 September 20, 2016, 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 September 21, 2016.

Signature:



Name: Deirdre Des Jardins
Title: Principal, California Water Research

Party/Affiliation:
Deirdre Des Jardins

Address:
145 Beel Dr
Santa Cruz, California 95060

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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

CALIFORNIA WATERFIX WATER)
RIGHT CHANGE PETITION)
HEARING)

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
BYRON SHER AUDITORIUM
1001 I STREET
SECOND FLOOR
SACRAMENTO CALIFORNIA

PART 1A

Friday, August 26, 2016
9:00 A.M.

VOLUME 16
Pages 1 - 286

Reported By: Deborah Fuqua, CSR No. 1248

Computerized Transcription by ProCAT

1 APPEARANCES:
2 CALIFORNIA WATER RESOURCES BOARD
3 Division of Water Rights
4 Board Members Present
5 Tam Doduc, Co-Hearing Officer:
6 Felicia Marcus, Chair and Co-Hearing Officer:
7 Dorene D'Adamo, Board Member
8 Staff Present
9 Diane Riddle, Environmental Program Manager
10 Dana Heinrich, Senior Staff Attorney (a.m.)
11 Samantha Olson, Senior Staff Attorney (p.m.)
12 Kyle Ochenduzsko, Senior Water Resources Control Engr.
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14 For California Department of Water Resources
15 James (Tripp) Mizell, Senior Attorney
16 Duane Morris, LLP
17 By: Thomas Martin Berliner, Attorney at Law
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19 U.S. Department of the Interior, Bureau Reclamation,
20 and Fish and Wildlife Service
21 Amy Aufdemberge, Assistant Regional Solicitor
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23 State Water Contractors
24 Stefanie Morris
25 Adam Kear
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1	APPEARANCES (continued)
2	Deirdre DesJardins
	Deirdre DesJardins
3	
4	
5	Pacific Coast Federation of Fishermen's Associations
	and Institute for Fisheries Resources
6	Ben Eichenberg
7	
8	Planetary Solutionaries
	Patrick Porgans
9	
10	Snugg Harbor Resorts LLC
	Nikki Suard
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12	Save the California Delta Alliance, et al.
	Michael Brodsky
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1 "CalSim II has not been calibrated or
2 validated. It's unclear whether CalSim II incorporates
3 limitations to groundwater use in the Sac Valley.
4 CalSim II does not recognize or report uncertainty.
5 Additionally, CalSim II may" not produce -- "may
6 produce results not consistent with reality. For
7 example, in 2001, California experienced water supply
8 associated with approximately the 75 percent exceedance
9 level. And the State Water Project was able to deliver
10 1,607,570 acre-feet. However, the CalSim II simulation
11 predicted a 75 exceedance [sic] level of supply of
12 roughly 2,500,000 acre-feet as read from Figure 5-1.
13 In other words, CalSim II over-predicted deliveries by
14 more than 50 percent."

15 So these were the kind of criticisms that came
16 out right after CalSim.

17 Are you familiar with this general observance?

18 MR. MIZELL: I'm going to object to the
19 relevance of this comment letter, and the question is
20 to a decades' old comment letter on a report.

21 If Ms. DesJardins has questions about the
22 existing models and the validation or calibration of
23 the existing models, I'm happy to not object to those.
24 But this is very old critique at this point, and I
25 don't see how it's relevant to what we've presented.

1 question? I got lost.

2 MS. DES JARDINS: So it states here -- this is
3 a prior statement by the Department of Water
4 Resources -- "Calibration of some of the most important
5 components of the model is possible and has been done.
6 For instance, one of the most important components of
7 the model, its hydrologic component, has been
8 calibrated." There's some details.

9 Do you agree that the hydrologic component can
10 be calibrated and has been calibrated?

11 WITNESS REYES: Yes, I agree that it can be
12 calibrated and has been calibrated. Yes.

13 MS. DES JARDINS: That's fine. Okay. That's
14 all I need. Let's go to -- scroll down a little more
15 on this section.

16 So in the absence -- so the next, "In the
17 absence of classical approach to calibration, the next
18 best approach is generally to set model parameters for
19 simulation run relying on experience and then verifying
20 the results of the simulation run by comparing to
21 historical operations."

22 And then down at the bottom, it refers to the
23 CalSim II simulation of historical operations, 2003.

24 Mr. Reyes, do you agree with these statements?

25 MR. BERLINER: I'm going to object. This

1 model itself.

2 MS. DES JARDINS: Ms. Doduc, with due respect,
3 I do have a right under Evidence -- under 1151(3) (b)
4 to ask questions on any matter relevant to the
5 proceedings. And to the extent that there may be
6 increased flows into the Delta in dry years that aren't
7 there in the model, I would argue that is relevant to
8 this proceeding.

9 CO-HEARING OFFICER DODUC: Your objection is
10 noted.

11 And to the extent that your cross-examination
12 is directed to questioning the witnesses on the flows
13 and on the other results of the modeling, that is, in
14 my opinion, relevant and should proceed. However, I
15 will not allow you to explore in general terms the
16 issue of model reliability.

17 Focus your cross-examination of these
18 witnesses, on their direct testimony as a result of
19 that model.

20 MS. DES JARDINS: Respectfully, this is meant
21 to explore the direct testimony in DWR-71 that a
22 historical validation study matched the inflows at
23 Freeport with plus or minus 3 percent accuracy. And I
24 would argue based on this that there's other
25 considerations, like, if that plus or minus 3 percent

1 on reliability are directed towards the direct
2 testimony and the results of the modeling from these
3 witnesses, you may go there, but not on the general
4 reliability of the model itself. Direct your
5 cross-exam to specific modeling output that these
6 witnesses prepared and submitted to the Board for
7 consideration.

8 MR. EICHENBERG: One more objection, I
9 suppose, is that just because, as Mr. Berliner pointed
10 out, this is the way they've always done it, doesn't
11 mean that it's the right way to do it. And if the
12 science is wrong, then I think that's relevant to this
13 Board. You know, people believed that the Earth was
14 flat for a long time, and that doesn't mean that it
15 should never have been questioned.

16 CO-HEARING OFFICER DODUC: Comments are noted.

17 MS. DES JARDINS: Ms. Doduc --

18 CO-HEARING OFFICER DODUC: No. We are moving
19 on.

20 MS. DES JARDINS: Yeah. I just --

21 CO-HEARING OFFICER DODUC: No. We are moving
22 on. Ask your next question, and make sure that your
23 cross-examination of these witnesses is on their direct
24 testimony on the modeling they produced, on the output
25 of that modeling in support of the petitioners'

1 a substantial amount of input from hydrologists,
2 operators, fishery agencies that govern the way these
3 -- the CalSim model in particular runs that is
4 unparalleled in other models that exist right now.

5 CO-HEARING OFFICER DODUC: So in your opinion
6 -- and others may disagree, but in your opinion and
7 your expertise with these models, are there any fatal
8 flaws in assumptions or basic modeling parameters that
9 you would want to revise?

10 WITNESS MUNEVAR: Was that the end?

11 CO-HEARING OFFICER DODUC: Yes.

12 WITNESS MUNEVAR: No, no.

13 CO-HEARING OFFICER DODUC: So you're confident
14 in the tools that you have used and confident in the
15 result that came from those tools in presenting your
16 petitions to the Board?

17 WITNESS MUNEVAR: I am confident in the tools
18 that were used and the application of the models for
19 the purpose of WaterFix in terms of comparative --
20 comparative evaluation.

21 CO-HEARING OFFICER DODUC: Yes, for
22 comparative evaluations.

23 Mr. Porgans.

24 MR. PORGANS: Great. Anyway, moving along,
25 then, I want to go back and focus in on -- you said

1 And so we haven't gone back and revalidated
2 because we've only been trying to improve the model.

3 CO-HEARING OFFICER DODUC: Ms. DesJardin --

4 MS. DES JARDINS: I just have one follow-up
5 question on this, and then I'll be done. But I would
6 like to go back to what -- the 2003 period, you said
7 about the historic validation.

8 CO-HEARING OFFICER DODUC: Is this the last
9 question of your cross-examination?

10 MS. DES JARDINS: Yes, this is. Yes.

11 CO-HEARING OFFICER DODUC: And it is?

12 MS. DES JARDINS: Yeah.

13 Can you close this. And then let's go to
14 "DesJardin," and then go to "Additional Exhibits." And
15 yeah, 121, thank you.

16 And this is what it states. "There are a
17 number of elements in the CalSim II validation report
18 which reduced confidence, including State Water Project
19 demand south of the Delta, were set at historical
20 deliveries with no restriction and at the contractors'
21 request level in restricted years."

22 And then it says, "The validation run does not
23 provide reliable information on how well the model can
24 represent these demands."

25 Let's scroll down a little more.

1 "The report estimates" -- "provides estimates
2 of State Water Project and Central Valley Project
3 deliveries south of the Delta, but then adjusts them
4 for changes in storage before presenting comparisons of
5 those results. This process merely checks that the
6 model is preserving the water balance and does not
7 present a legitimate validation of model deliveries.
8 The report provides statistics on long-term" --

9 CO-HEARING OFFICER DODUC: And your question
10 is?

11 MS. DES JARDINS: Is, so, can you address --
12 can you address -- you had promised in 2004 to do
13 another validation run, and it was addressing these
14 concerns.

15 You know, and you're now saying that you don't
16 believe your peer review panel that it needed to be
17 run, redone?

18 CO-HEARING OFFICER DODUC: So for the record,
19 this is an excerpt from?

20 MS. DES JARDINS: This is an excerpt from the
21 2003 peer review that you've -- that they refer to.
22 This is the peer review, and the peer review did look
23 at the historic validation study.

24 MR. BERLINER: I'm going object on the grounds
25 that this is asked and answered. Mr. Reyes already

1 testified that they've updated the water delivery
2 capabilities of the model. It's just rehashing the
3 same question.

4 MS. DES JARDINS: But it's never been
5 revalidated. And the peer review panel did recommend
6 it.

7 I'm just saying, you know, why are you
8 ignoring the recommendations? It's something that you
9 committed to doing in response to this peer review.

10 CO-HEARING OFFICER DODUC: Mr. Reyes --

11 Let Mr. Reyes answer, for the record, please.

12 WITNESS REYES: Every two years, the
13 Department produces the delivery reliability, or
14 delivery capability report is what is called now. And
15 that is an estimation of our ability to deliver water.
16 And that is sort of our update or validation of recent
17 deliveries.

18 MS. DES JARDINS: Mr. Reyes, I've looked at
19 that report, and it says that your minimum delivery is
20 20 percent. But your minimum deliveries are zero
21 percent.

22 CO-HEARING OFFICER DODUC: Mr. Mizell?

23 MR. MIZELL: Objection, no question pending,
24 making testimony, argumentative.

25 MS. DES JARDINS: I would like that ask

1 Mr. Reyes -- let me rephrase that.

2 Haven't -- you know, haven't -- didn't you
3 notice -- you had done this 82-year study, and it's
4 like the minimum is 20 percent. Have you not
5 considered doing this validation in light of that your
6 deliveries in 2014 were zero.

7 MS. MORRIS: Objection, relevance,
8 misstates -- assumes facts not evidence.

9 CO-HEARING OFFICER DODUC: Objection, noted.

10 And Mr. Reyes, do you have an opinion to offer
11 on that question?

12 WITNESS REYES: Sure. As far as the DCR, I
13 don't recall a 20 percent minimum. If anything, I
14 believe it was 10 percent or 11 percent in the 2015
15 model.

16 And then also, a zero percent allocation, I
17 don't know if that's true either. I'm just -- I'm not
18 an operator, so I don't know that number.

19 CO-HEARING OFFICER DODUC: Okay. Thank you.

20 MS. DES JARDINS: Okay. So the other thing is
21 that the delivery reliability report --

22 CO-HEARING OFFICER DODUC: Are you asking a
23 question or are you testifying?

24 MS. DES JARDINS: I wanted to ask did your
25 CalSim simulations that you've been doing for the

1 delivery reliability report, have they shown that you
2 can meet D1641 in all years? Haven't they?

3 CO-HEARING OFFICER DODUC: Are you able to
4 answer the question? If you do not know, you do not
5 know?

6 WITNESS REYES: I believe they do meet D1641.
7 Yeah.

8 MS. DES JARDINS: And so isn't what you're
9 seeing now, isn't that substantially different than
10 what the model predicts, at least the 82-year runs that
11 you've been doing?

12 CO-HEARING OFFICER DODUC: Ms. Morris?

13 MS. MORRIS: Yeah, I don't know -- it's
14 unclear. The question is ambiguous. And I think if
15 there's a specific question, you need to identify what
16 you're asking about. It's too broad.

17 MS. DES JARDINS: I'm sorry. So I wanted to
18 refer to the temporary urgency change petition that you
19 filed in 2014.

20 CO-HEARING OFFICER DODUC: Which is not
21 reflected in the modeling.

22 MS. DES JARDINS: Yes.

23 So, and your modeling didn't show that you
24 were going to need to do that. So I'm -- you know.

25 MR. MIZELL: I'm going to object. We've spent

1 some time in the operations panel with John Leahigh
2 explaining how the models do not necessarily capture
3 the outlier years, such as the extreme circumstances of
4 the last four years of drought, five years of drought.

5 That testimony is on the record and
6 Ms. Des Jardins had her opportunity and did ask
7 questions about the TUCPs at that time.

8 MS. DES JARDINS: Respectfully, there's two
9 components to this. One is they asked -- the modelers
10 testified, the operators testified, and then there's
11 how -- about how they run the project using
12 spreadsheets. They do not use CalSim to run the
13 project.

14 And the question is you say that you have
15 been -- you have accurately captured how they run the
16 project, but the model did not predict situations like
17 the TUCP in 2014 and 2015.

18 CO-HEARING OFFICER DODUC: Let me just ask the
19 panelists in general. Are any of you confident enough
20 in your understanding of TUCPs and how the operation
21 people use and determine the need for a TUCP to answer
22 any questions regarding TUCPs?

23 I see shaking of heads. I will take that as
24 no one here believes they have the expertise to answer
25 questions specific to TUCP and how the Department or

1 the Bureau, for that matter, uses TUCPs, and TUCPs were
2 not part of the modeling.

3 WITNESS MUNEVAR: That's correct.

4 MS. DES JARDINS: Yeah, I just -- is there
5 anything in the modeling that you've done with the
6 delivery reliability report that indicates that you
7 would run out of water to meet D1641 requirements in
8 any of the water years that are modeled?

9 CO-HEARING OFFICER DODUC: If you can answer
10 that.

11 WITNESS REYES: I'd to have look at the
12 specific numbers and see if we're going to dead storage
13 or not and depending on what situation. I don't know
14 offhand.

15 CO-HEARING OFFICER DODUC: Okay.

16 MS. DES JARDINS: Okay. Thank you. That
17 concludes my questioning.

18 CO-HEARING OFFICER DODUC: Thank you.

19 And that concludes the cross-examination.

20 Mr. Mizell, do you have any redirect?

21 MR. MIZELL: No, we do not. Thank you.

22 CO-HEARING OFFICER DODUC: And in that case, I
23 thank all the witnesses. This Panel is dismissed
24 unless we call you back at the end of Part 1A for
25 additional questions from the Board and the Board

1 STATE OF CALIFORNIA)
2 COUNTY OF MARIN) ss.

3 I, DEBORAH FUQUA, a Certified Shorthand
4 Reporter of the State of California, do hereby certify
5 that the foregoing proceedings were reported by me, a
6 disinterested person, and thereafter transcribed under
7 my direction into typewriting and is a true and correct
8 transcription of said proceedings.

9 I further certify that I am not of counsel or
10 attorney for either or any of the parties in the
11 foregoing proceeding and caption named, nor in any way
12 interested in the outcome of the cause named in said
13 caption.

14 Dated the 2nd day of September, 2016.

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DEBORAH FUQUA
CSR NO. 12948