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**From:** Randhawa, Baljit@DWR <Baljit.Randhawa@water.ca.gov>  
**Sent:** Tuesday, June 06, 2017 11:02 AM  
**To:** CWFhearing; Doduc, Tam@Waterboards; Marcus, Felicia@Waterboards  
**Cc:** abl@bkslawfirm.com; aferguson@somachlaw.com; ahitchings@somachlaw.com; ajr@bkslawfirm.com; amy.aufdemberge@sol.doi.gov; apeltzer@prlawcorp.com; awaren@nrdc.org; barbara@restoredelta.org; barbarav@aqualliance.net; barry@solagra.com; bdalymns@citlink.net; bjohnson@tu.org; blancapaloma@msn.com; bobker@bay.org; bradpappa@gmail.com; brettgbaker@gmail.com; Britton, Sarah@saccounty; bwright@friendsoftheriver.org; Wilcox, Carl@Wildlife; caroleekrieger7@gmail.com; colin@ejcw.org; connere@gmail.com; CWFhearing; daladjem@downeybrand.com; daniel@kaydix.com; dcooper@minasianlaw.com; dcoty@bpmnj.com; ddj@cah2oresearch.com; dean@hprlaw.net; deltakeep@me.com; dkelly@pcwa.net; dgarrett@volkerlaw.com; dobegi@nrdc.org; dohanlon@kmtg.com; dorth@davidorthconsulting.com; empappa@gmail.com; evielma@cafecoop.org; elamoe@minasianlaw.com; fetherid@ebmud.com; fmorrissey@orangecoveid.org; friendsofsfestuary@gmail.com; gadams@fclaw.com; info@californiadelta.org; Mizell, James@DWR; jailin@awattorneys.com; jtb@bkslawfirm.com; jconway@rd800.org; jfox@awattorneys.com; jennifer@spalettalaw.com; Herrick, John @aol.com; Minton, Jonas; john.luebberke@stocktonca.gov; Rubin, Jon@sldmwa.org; jph@tulareid.org; jrobinson@cityofsacramento.org; jsagwomack@gmail.com; jsalmon@ebmud.com; jvolker@volkerlaw.com; kcorby@somachlaw.com; kelweg1@aol.com; kharrigfeld@herumcrabtree.com; kobrien@downeybrand.com; kpoole@nrdc.org; ktaber@somachlaw.com; kyle.jones@sierraclub.org; lcaster@fclaw.com; matlas@jmatlaslaw.com; matthew@mlelaw.com; mbently@countyofcolusa.org; melissa.poole@wonderful.com; mhagman@lindmoreid.com; michael@brodskylaw.net; mjatty@sbcglobal.net; mkropf@countyofcolusa.com; mlarsen@kdwcd.com; mnikkel@downeybrand.com; Van Zandt, Michael@hansonbridgett.com; myoung@awattorneys.com; ncardella@prlawcorp.com; office@ecosacramento.net; Meserve, Osha@semlawyers.com; Pogledich, Philip@yolocounty; pminasian@minasianlaw.com; pp@planetarysolutionaries.org; Miljanich, Peter@solanocounty; psimmons@somachlaw.com; pwilliams@westlandswater.org; Akroyd, Rebecca@KMTG; randy@ejcw.org; rbernal@ci.antioch.ca.us; rmaddow@bpmnj.com; rdenton06@comcast.net; rmburness@comcast.net; roland@ssjmud.org; rsb@bkslawfirm.com; rsmith@downeybrand.com; russell@spalettalaw.com; Hernandez, Ryan@dcd; rzwillingner@defenders.org; sae16@lsid.org; schaffin@awattorneys.com; sdalke@kern-tulare.com; sgeivet@ocsnet.net; smorris@swc.org; Sophie.Froelich@Roll.com; sonstot@awattorneys.com; srothert@americanrivers.org; ssaxton@downeybrand.com; ssdwaterfix@somachlaw.com; stephen.siptroth@cc.cccounty.us; sunshine@snugarbor.net; svolker@volkerlaw.com; sgrady@eslawfirm.com; red@eslawfirm.com; tara.mazzanti@stocktonca.gov; tgohring@waterforum.org; thomas.esqueda@fresno.gov; tim@restoredelta.org; tkeeling@freemanfirm.com; trobancho@freemanfirm.com; torr@earthjustice.org; towater@olaughlinparis.com; vkincaid@olaughlinparis.com; wes.miliband@stoel.com; Femlen, William@solanocounty.com; wirthsoscranes@yahoo.com; ygarcia@earthjustice.org  
**Subject:** DWR'S Motion for Protective Order  
**Attachments:** DWR'S Motion for Protective Order.pdf; A- Leahigh Direct.pdf; B- May 5 and 8 emails.pdf; C- OLaughlin Cross.pdf; D- Spaletta Cross.pdf; E- SJTA Recross.pdf; F- Parties Re-cross Estimates.pdf; Proof of Service - DWR'S motion for protective order.pdf

Dear Hearing Officers Doduc and Marcus,

The Department of Water Resources respectfully submits its Motion for Protective Order and Exhibits A-F.

This message is electronically served upon the parties indicated in the revised service list dated May 31, 2017. A copy is being mailed to Clifton Court L.P.

Respectfully

**Bobbie Randhawa**  
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Department of Water Resources  
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7 Resources

8 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9  
10 **HEARING IN THE MATTER OF**  
11 **CALIFORNIA DEPARTMENT OF WATER**  
12 **RESOURCES AND UNITED STATES**  
13 **BUREAU OF RECLAMATION REQUEST**  
14 **FOR A CHANGE IN POINT OF**  
15 **DIVERSION FOR CALIFORNIA WATER**  
16 **FIX**

**CALIFORNIA DEPARTMENT OF**  
**WATER RESOURCES' MOTION FOR**  
**PROTECTIVE ORDER REGARDING**  
**SAN JOAQUIN COUNTY'S AND**  
**NORTH SAN JOAQUIN WATER**  
**CONSERVATION DISTRICT'S NOTICE**  
**AND SUBPOENA DUCES TECUM**

17 California Department of Water Resources ("DWR") requests that the Hearing  
18 Officers issue an order pursuant to Government Code section 11450.30, subdivision (b)  
19 protecting it from the unreasonable demands in San Joaquin County's and North San  
20 Joaquin Water Conservation District's ("San Joaquin Parties") Notice and Subpoena  
21 Duces Tecum Requesting the Appearance at Hearing and Production of Documents  
22 ("Notice"). The Notice is duplicative and untimely, and does not comply with the laws and  
23 regulations that apply to this proceeding. The Hearing Officers should vacate the Notice,  
24 making it clear that parties should seek information in a timely manner and further  
25 duplicative untimely requests will not be permitted.

26 **I. STATEMENT OF FACTS**

27 DWR served its rebuttal testimony and exhibits in this proceeding on March 23,  
28 2017. This included DWR-78, which is the written rebuttal testimony of DWR witness

1 John Leahigh, and Exhibit DWR-10, which was generated in PowerPoint and contains  
2 charts on pages 6, 8, 10, and 12.<sup>1</sup> (See Exhibit A.) Mr. Leahigh explained each of these  
3 charts in his written rebuttal testimony. (DWR-78, at pp. 5-9.) On May 4, 2017, Mr.  
4 Leahigh presented his rebuttal testimony.

5 More than a month after they received Mr. Leahigh's rebuttal testimony, on May 5,  
6 2017, San Joaquin Parties requested the data that was used to generate the charts in  
7 DWR-10. (See Exhibit B, at pp. 2-3.) On May 8, 2017, DWR produced to all parties  
8 DWR-903 to DWR-906, which are tables of the data that underlie the charts in DWR-10  
9 at pages 6, 8, and 10. Also on May 8, 2017, DWR informed the parties that the data  
10 underlying the chart in DWR-10 at page 12 are CALSIM results that have already been  
11 made available to the hearing parties. (See Exhibit B, at pp. 1-2.)

13 On May 9, 2017, San Joaquin Tributaries Authority, et al. ("SJTA") and San  
14 Joaquin Parties cross-examined Mr. Leahigh extensively regarding DWR-10, DWR-78,  
15 and DWR-903 to DWR-906. (See Exhibits C & D.) During SJTA's cross examination,  
16 Hearing Chair Doduc informed counsel for SJTA that "[Y]ou've actually been quite artful,  
17 and you've laid out what the table is and what it shows. It's obvious the data is what's  
18 available here. You've made your point. It's in the record." (Exhibit C, at 99:24-100:4.)

20 While being cross examined by San Joaquin Parties later on May 9, 2017, Mr.  
21 Leahigh indicated that he created DWR-903 to DWR-906, which are data tables, by  
22 pulling the data from the Excel file that was used to create the charts in DWR-10 at  
23 pages 6, 8, and 10. San Joaquin Parties began calling the Excel file "a master  
24 spreadsheet." (See Exhibit D, at 252:5-252:7.) After San Joaquin Parties requested the  
25 Excel file from which DWR-903 to DWR-906 were pulled, Hearing Chair Doduc ruled that  
26

27 <sup>1</sup> DWR-850 is the chart on page 6 of DWR-10; DWR-851 is the chart on page 8 of DWR-10; DWR-  
28 852 is the chart on page 10 of DWR-10; and DWR-853 is the chart on page 12 of DWR-10.

1 DWR provided the data that supports Mr. Leahigh's rebuttal testimony in DWR-903 to  
2 DWR-906, and if the Excel file "contains other data that is not part of his rebuttal, it would  
3 be outside the scope for [San Joaquin Parties'] cross-examination." (*Id.*, at 253:12-  
4 253:17.)

5 Even after this ruling, San Joaquin Parties submitted a second request for the  
6 Excel file and a separate request for "a master spreadsheet." (*Id.*, at 254:14-254:24.)  
7 DWR objected to this request. (*Id.*, at 255:10-255:15.) On May 12, 2017, SJTA asked  
8 Mr. Leahigh questions on re-cross. (See Exhibit E.) San Joaquin Parties chose not to  
9 participate in re-cross, thus waiving their right to further cross examine Mr. Leahigh in  
10 this phase of the proceeding. (See Exhibit F.)

12 On June 2, 2017, more than two months after they received Mr. Leahigh's rebuttal  
13 testimony, San Joaquin Parties served their Notice requesting that a DWR witness  
14 appear at the hearing on June 15, 2017 and provide the Excel versions of the data  
15 tables DWR-903 to DWR-906 and the Excel file that San Joaquin Parties began calling  
16 the "master spreadsheet" during their cross examination of Mr. Leahigh on May 9, 2017.

## 18 **II. ARGUMENT**

19 San Joaquin Parties' Notice has the legal effect as a subpoena issued under  
20 Government Code section 11450.010. (Gov. Code, § 11450.10.) A person served with a  
21 subpoena, or, as in this case, a written notice requesting attendance of a witness and  
22 documents, may object to the terms of the subpoena or notice by a motion for a  
23 protective order. (Gov. Code, § 11450.30, subd. (a).) The hearing officers may issue any  
24 order that is appropriate to protect the parties or the witness from unreasonable  
25 demands. (Gov. Code § 11450.30, subd. (b).)

1 The Hearing Notice and the Board's regulations indicate what statutes govern  
2 Board hearings. (Cal. Code Regs., tit. 23, § 648; October 30, 2105 Hearing Notice, at p.  
3 31.) The rules of evidence for Board hearings are set forth in Government Code section  
4 11513. (Cal. Code Regs., tit. 23, § 648.5.1.) The hearing need not be conducted  
5 according to technical rules relating to evidence and witnesses. (Gov. Code, § 11513  
6 (c).) The presiding officer has discretion to exclude evidence if its probative value is  
7 substantially outweighed by the probability that its admission will necessitate undue  
8 consumption of time. (Gov. Code, § 11513 (f).)

9  
10 The Hearing Officers have repeatedly instructed the parties that duplicative  
11 motions or requests on issues already addressed are strongly discouraged. (See, e.g.,  
12 February 11, 2016 Ruling, at p. 10; March 4, 2016 Ruling, at pp. 3 & 7; April 25, 2016  
13 Ruling, at p. 4; and July 13, 2016 Ruling, at p. 2)

14 **A. San Joaquin Parties' Notice is Unreasonable.**

15 San Joaquin Parties' Notice is unreasonable because it is duplicative and  
16 requests information that is outside the scope of Mr. Leahigh's rebuttal testimony. The  
17 hearing officers may protect DWR from San Joaquin Parties' unreasonable demands.  
18 (Gov. Code § 11450.30, subd. (b).)

19  
20 Hearing Chair Doduc denied San Joaquin Parties' request for this same  
21 information on May 9, 2017. In their Notice, San Joaquin Parties did not provide  
22 additional information justifying the Notice beyond what they provided on May 9, 2017. In  
23 the affidavit attached to their Notice, San Joaquin Parties indicate that they need the  
24 data in the "master spreadsheet" to analyze or critique decisions that DWR made about  
25 which data to include in the charts in DWR-10. However, Hearing Chair Doduc indicated  
26 that DWR provided the data that supported Mr. Leahigh's rebuttal testimony and that  
27  
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1 other data that may be in the Excel file is not part of his rebuttal and not within the scope  
2 of San Joaquin Parties' cross-examination.

3 In their affidavit, San Joaquin Parties' Notice also indicated that verification of the  
4 data DWR submitted in rebuttal is proper sur-rebuttal. But this is not the purpose of sur-  
5 rebuttal. In their April 13, 2017 ruling, the Hearing Officers explained that sur-rebuttal  
6 testimony and exhibits would be permitted because of the amount of new information  
7 contained in the written rebuttal testimony and exhibits that were submitted. The time to  
8 seek to understand Mr. Leahigh's testimony was on cross examination, which has now  
9 passed.  
10

11 Verifying the data that DWR submitted in rebuttal should have been done on  
12 cross-examination. Indeed, counsel for SJTA did just that, which was confirmed by  
13 Hearing Officer Doduc. San Joaquin Parties indicate they will instead use sur-rebuttal to  
14 verify the data in the Excel file to determine which operational data DWR has chosen to  
15 omit, and inquire how the omitted data might affect the value and conclusions to be  
16 drawn from DWR's rebuttal testimony and exhibits. From this offer of proof, it is clear that  
17 San Joaquin Parties seek not to understand DWR's rebuttal evidence, but instead to  
18 obfuscate and confuse issues and use the requested data to present their own version  
19 of how they believe DWR should have presented its rebuttal testimony and perhaps  
20 even its case-in-chief.  
21

22 If San Joaquin Parties were truly interested in understanding Mr. Leahigh's  
23 rebuttal testimony, they would have used their cross examination time, re-cross, and the  
24 hearing process to inquire about DWR-10, DWR-78, DWR-851 to DWR-853, and the  
25 basis for Mr. Leahigh's opinions, instead of submitting duplicative requests for data that  
26  
27  
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1 was already produced or determined to be outside the scope of Mr. Leahigh's rebuttal  
2 testimony.

3 **B. Production of the Excel File Will Result in Undue Consumption of**  
4 **Hearing Time.**

5 San Joaquin Parties cite state and federal evidence laws that are not applicable in  
6 this proceeding, and according to the laws that do apply to this proceeding, the  
7 requested production would result in an undue consumption of hearing time. San  
8 Joaquin Parties' affidavit says that if a party is allowed to submit a summary of data, but  
9 the other parties are not able to see the data from which the summary was prepared, the  
10 other parties will be prejudiced because they cannot verify the accuracy of the  
11 summarized information, nor can they determine if any relevant data was omitted from  
12 the summary. San Joaquin Parties justify this statement by citing Federal Rule of  
13 Evidence 1006 and the Law Revision Commission Comments on California Evidence  
14 Code section 1521.  
15

16 Federal Rule of Evidence 1006 and California Evidence Code section 1521 are not  
17 applicable in this proceeding. Instead, Government Code section 11513 provides the  
18 rules of evidence for this hearing. (Cal. Code Regs., tit. 23, §§ 648 & 648.5.1; October  
19 30, 2015 Hearing Notice, at p. 31.) According to Government Code section 11513, the  
20 Hearing Officers can exclude evidence if its probative value is substantially outweighed  
21 by the probability that its admission will necessitate undue consumption of time. (Gov.  
22 Code, § 11513 (f).) SJTA and San Joaquin Parties already spent a significant amount of  
23 hearing time cross examining and re-crossing Mr. Leahigh on the data that was included  
24 in the charts in DWR-10. Allowing the parties to cross examine Mr. Leahigh on data that  
25 was not included in his rebuttal testimony, which was also already determined to be  
26 outside the scope of the hearing, would result in an undue consumption of hearing time.  
27  
28

1           **III.     CONCLUSION**

2           San Joaquin Parties' Notice is unreasonable because it is duplicative and requests  
3 information that is outside the scope of Mr. Leahigh's rebuttal testimony. The Notice  
4 comes more than two months after San Joaquin Parties received Mr. Leahigh's rebuttal  
5 testimony, and the time to cross examine him on these issues has passed. The parties  
6 cross examined and re-crossed Mr. Leahigh on these issues, and further hearing time  
7 spent on these issues would be undue. Nor is the production of this data applicable to  
8 the sur-rebuttal phase of this proceeding. For these reasons, DWR requests that the  
9 Hearing Officers vacate San Joaquin Parties' Notice.  
10

11 Dated: June 6, 2017

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES



Robin McGinnis  
Office of the Chief Counsel



**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):

DWR'S motion for protective order

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 May 31, 2017, posted by the State Water Resources Control Board at

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml):

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

**For Petitioners Only:**

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

**Method of Service:** U.S Postal

I certify that the foregoing is true and correct and that this document was executed on June 6, 2017  
Date

Signature: 

Name: Bobbie Randhawa

Title: Legal Secretary

Party/Affiliation: DWR

Address: 1416 Ninth Street 1104  
Sacramento, CA 95814