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**Subject:** RE: DWR's Response to CCLP's Reply to DWR - Order of Presentation - Part 2 Sur-Rebuttal  
**Date:** Wednesday, September 26, 2018 8:42:57 AM  
**Attachments:** [Statement of Service 09-26-2018.pdf](#)

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Deirdre Des Jardins, principal at California Water Research, "California Water Research," respectfully points out that Water Code section 1701.1(d) requires that the WaterFix Water Right Change Petition include "sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water." The information on impacts to CCLP's water right was therefore required, under statute, to be in the noticed petition. Information needed to clarify the petition should not be considered as simply responses to Part 2 rebuttal cross-examination.

California Water Research has also previously pointed out that specialized hydrodynamic model inputs are not accessible to protestants who do not have the training to access or interpret the model inputs and outputs. Some of the testimony concerns the DSM2 model and model inputs. This testimony is therefore new information.

The Hearing Officers have the discretion to require information to clarify the petition under Water Code section 1701.3, but it should be provided in such a way that there is sufficient notice to the parties. Notice is fundamental to due process under the state and federal constitutions. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612 [156 Cal.Rptr. 718, 596 P.2d 1134]; see also *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428-430 & fn. 5 [71 L.Ed.2d 265, 272-273, 102 S.Ct. 1148].)

This is Part 1 of 2 part service due to email server limitations.

Deirdre Des Jardins  
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**From:** Mizell, James@DWR <James.Mizell@water.ca.gov>

**Sent:** Wednesday, September 26, 2018 6:49 AM

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**Subject:** DWR's Response to CCLP's Reply to DWR - Order of Presentation - Part 2 Sur-Rebuttal

DWR is compelled to correct fundamental misstatements or omissions of the record contained in Mr. Emrick's reply to DWR. Despite his enthusiasm for quotation marks it is incorrect to conclude that the need for DWR to present witnesses in sur-rebuttal is due to actions by DWR.

1. DWR's project has included a control structure on the Jones Pumping Plant Intake Channel for approximately the past nine years. The inclusion of the control structure in the SEIR is not a change.
2. By deciding to avoid CCLP's property DWR has reduced the impacts to Ms. Womack, not increased them.
3. DWR was well aware of CCLP's diversion point. Mr. Emrick refers to Ms. Womack's cross-examination of a panel on fish biology and modeling about engineering structures as somehow indicative of the knowledge possessed by the design team at DWR.
4. Had Ms. Womack asked the appropriate engineering witness when he was available, Mr. Bednarski, she would have received an answer similar to the written responses Mr. Bednarski gave in reply to CCLP's written cross-examination and contained in his sur-rebuttal testimony.
5. DWR's FEIR and SEIR provide information describing the impacts to CCLP, as demonstrated by Mr. Bednarski's and Dr. Chilmakuri's recital of evidence already in the record.
6. DWR's written responses to CCLP's written cross-examination were entirely responsive. The Hearing Officers indicated at the time they granted the written cross-examination that DWR was to provide objections to questions in writing and provided a single submission date. It would have been inappropriate to have a witness attest to legal objections. Rather, DWR described in the first paragraph of that submission the witness who drafted the non-legal arguments in the document. That first paragraph states, "Through this written response, DWR submits the responses of Mr. Bednarski..."
7. Well before Part 2 DWR has examined the impacts to CCLP's diversion as is demonstrated by the fact its witnesses are merely utilizing analysis and evidence already in the record to respond to the Hearing Officers' order to submit sur-rebuttal.

The simple fact is that Mr. Emrick is avoiding the fact that his client, if that is what you call someone with a "special advisor," has failed repeatedly over the course of the years this hearing has occurred to grasp the simple and accommodating rules the Hearing Officers have set forth for submission of evidence and cross-examination. The Hearing Officers have repeatedly accommodated this failing. The present situation is solely due to CCLP's inability to properly conduct cross-examination of the appropriate witnesses at the time those witnesses appeared in the rebuttal phase of this hearing.

Regards,  
Tripp Mizell  
Sr. Attorney, DWR

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**From:** Matt Emrick [<mailto:matthew@mlelaw.com>]  
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**Subject:** Re: Reply to DWR - Order of Presentation - Part 2 Sur-Rebuttal

*Service List - 1*

## **Reply to DWR's Objection on change to presentation in order.**

I do not wish to "paper" the hearing team regarding the order of presentation issue just before the start of the proceeding. However, because DWR has stated it intends to have witnesses at the hearing tomorrow morning, I thought it was important to provide DWR and the Board with the argument against DWR proceeding in such a manner.

First, DWR is in this "present situation" due to its own actions: 1) DWR changed its project this summer (which DWR indicates will again change in Mr. Bednarski's testimony); 2) DWR decided against condemning CCLP's property as part of its project - thus impacting CCLP's water rights that would have been taken by eminent domain; 3) DWR was unaware of CCLP's diversion locations in relation to project modifications and apparently unaware of CCLP's contractual agreement with the Bureau of Reclamation re: in-canal diversion location; 4) DWR's witnesses were not able to adequately respond to questions from CCLP during rebuttal (panel 3) (although Mr. Valles and Dr. Chilmakuri did make good faith attempts to do so, much of their testimony unfortunately demonstrated a lack of adequate knowledge at that time); 5) DWR's Supp EIR and associated documents failed to adequately describe project modifications and impacts to CCLP; 6) DWR provided inadequate responses to written questions from CCLP; and 7) DWR never disclosed the Byron Tract Forebay, or its change in strategy re: condemnation of CCLP property and water rights, or its changed south Delta operations - and never analyzed potential impacts to CCLP's in-canal diversion - until this summer during the rebuttal phase of part 2 - and therefore DWR's arguments that CCLP had "years" to prepare for cross-examination is simply not correct.

Second, the original order from the Board did not set a date certain for DWR CCLP water impacts testimony. Rather, the ruling stated that the testimony would occur during the sur-rebuttal phase. DWR was given 3 additional days (Sept 24 at 5 pm) to submit its CCLP impact testimony beyond that granted to those parties who actually requested sur-rebuttal (sur-rebuttal

testimony due at Sept 21 at noon).

Ms. Womack has indicated she is available over the next couple of weeks to cross DWR's witnesses. The present sur-rebuttal is not likely to extend past Oct. 1 - and the Board will likely have a pretty good idea of timing of the entire proceeding tomorrow morning. Therefore there is plenty of opportunity within the dates set aside for sur-rebuttal for DWR's CCLP witnesses to testify following protestant's sur-rebuttal without prejudice to DWR and without delaying these proceedings in any way. CCLP should not have to bear the burden of DWR's prior inability to answer questions and provide adequate information relating to impacts on CCLP's water rights and diversions from the proposed CWF.

Very respectfully submitted,

**-MATTHEW EMRICK**

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**Sent:** Tuesday, September 25, 2018 5:19 PM

**Subject:** Order of Presentation - Part 2 Sur-Rebuttal

### *Service List - 1*

On behalf of the City of Antioch - and as special advisor to CCLP - I join in Land's Request regarding order of presentation for sur-rebuttal. It appears fundamentally unfair to allow DWR to put its witnesses on first when in fact DWR opted out of sur-rebuttal in the first place. DWR's witnesses are testifying solely with respect to impacts on CCLP's water rights. Dr.

Chilmakuri's testimony contains fairly significant modeling testimony. It would be nearly impossible for CCLP to prepare proper cross-examination on such testimony in less than 2 days.

Therefore, on behalf of Antioch and as special advisor to CCLP, I respectfully request that the Board move DWR's non sur-rebuttal witnesses to last in order.

Thank you for your consideration.

-MATTHEW EMRICK

Special Counsel to City of Antioch and CCLP