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24 San Joaquin County Flood Control and
25 Water Conservation District, and
26 Mokelumne River Water and Power Authority

27
28
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

**PART 2 OPENING STATEMENT OF
PROTESTANTS COUNTY OF SAN
JOAQUIN, SAN JOAQUIN COUNTY
FLOOD CONTROL AND WATER
CONSERVATION DISTRICT, AND THE
MOKELUMNE RIVER WATER AND
POWER AUTHORITY**

1 **I. INTRODUCTION**

2 Protestants San Joaquin County, San Joaquin County Flood Control and Water
3 Conservation District, and Mokelumne River Water and Power Authority (“San Joaquin
4 County Protestants”) will present witnesses in Part 2 jointly with several other
5 protestant groups, including Sacramento County and Sacramento County Water
6 Agency, Yolo County, Local Agencies of the North Delta (“LAND”), California
7 Sportfishing Alliance/C-WIN/AquaAlliance, and Central Delta Water Agency/South
8 Delta Water Agency. Building on evidence submitted in Part 1, the San Joaquin
9 County Protestants’ Part 2 case in chief further explains how the proposed Delta
10 Tunnels (inaptly dubbed “California Waterfix”), if approved and constructed, would
11 unreasonably disrupt and adversely affect the lives of Delta communities and result in
12 serious injury to the environment and public trust resources. More broadly, the project
13 would undermine the public interest of not only Delta and Northern California
14 communities but of all Californians whose long-term interest lies in development of a
15 sustainable, balanced, and affordable water supply and delivery system.

16 The San Joaquin County Protestants’ Part 2 case in chief witnesses include: (1)
17 **John Lambie** (Delta hydrogeology and hydrology as it relates to groundwater/public
18 interest/public trust); (2) **Josef Tootle** (Public Interest and Public Trust resources; proposed
19 spoils disposal plan; tunneling activities’ impacts, including ground loss and impacts on levees
20 and islands); (3) **Kris Balaji** (Transportation dynamics and infrastructure in the Delta; project
21 impacts on transportation and public safety); (4) **Marc Del Piero** (project impacts on public
22 trust resources; balancing the public trust; essential elements of a competent public interest
23 analysis; Delta flow criteria compliant with California law); (5) **Christopher Neudeck** (Delta
24 levees; project impacts on levees and reclamation districts); (6) **Fraser Shilling, Ph.D.** (Public
25 trust/public interest: unreasonable environmental and community impacts/inconsistency with
26 state water policy); (7) and **Dr. Jeffrey Michael** (Public interest: cost/benefit analysis and
27 financial feasibility of the project; project impacts on recreation, recreation-related activities,
28

1 and Delta tourism; effects of the project on the local and regional economy; socio-economic
2 impacts of the project on Delta communities).¹

3
4 **II. OVERVIEW: PETITIONERS' PROPOSED CHANGE OF USE FAILS TO**
5 **PROTECT THE PUBLIC TRUST, WATER QUALITY AND THE PUBLIC**
6 **INTEREST.**

7 As the San Joaquin County Protestants observed during Part 1, the San Joaquin
8 County has long been ground zero for damaging impacts of water exports for suppliers
9 the Central Valley Project (CVP) and State Water Project (SWP), and would again
10 bear the brunt of impacts from the proposed for two massive Delta new tunnels, which
11 will remove more high-quality freshwater, entrench unsustainable exports, and make a
12 damaged Delta ecosystem worse.

13 During Part 2, protestants will present testimony confirming that Petitioners have
14 failed to carry their burden of showing that the proposed change of use would protect
15 public trust resources and water quality, and serve the public interest. The project
16 would violate laws protecting the Delta, and contrary to them, would entrench rather
17 than reduce reliance on unsustainable water exports and transfers. New intakes
18 proposed for the northern Delta may divert up to a third of the flow of the Sacramento
19 River, adding further risks for protected fish species.

20 Adverse construction and operational impacts include, among others, problems
21 with terrestrial habitat, salinity and other contaminants, as well as risks to groundwater
22 basins, agriculture, and drinking water. John Lambie's testimony (SJC-223) provides
23 information regarding the effects on surface water to groundwater interaction that
24 would result from operation of the new diversions proposed on the Sacramento River
25 as part of the Delta tunnels project. Josef Tootle's testimony (SJC-285) speaks to

26 ¹ Dr. Michael is listed as a witness for several parties, including South Delta Water
27 Agency, Central Delta Water Agency, Sacramento County, and the San Joaquin
28 County Protestants. We understand that there was some problem in the uploading of
Dr. Michael's testimony, as a result of which it is not yet available on the SDWA/CDWA
FTP site. We trust that problem will soon be resolved.

1 project impacts arising from a huge influx of spoils generated during construction,
2 which using petitioners' figures would be the equivalent of 13.35 Great Pyramids of
3 Giza. Mr. Tootle will also explain the ground loss problems likely to occur during
4 construction of the tunnels. Christopher Neudeck's testimony (SJC-291) finds that the
5 project will have significant impacts on the ongoing ability of reclamation districts to
6 perform routine operation and maintenance operations and interfere in major
7 improvement projects intended to sustain the current level of flood protection provided
8 by the Delta's levees. Kris Balaji, San Joaquin County's Director of Public Works, will
9 describe in some detail the damage to Delta roads and other transportation infrastructure
10 likely to occur during the estimated 14-year construction period. (SJC-323).

11 Examining both local and statewide concerns, Dr. Fraser Shilling (LAND-135)
12 will address: (a) interference with wildlife movement; (b) negative impacts on human
13 communities; (c) incompatibility with sustainability principles; and (d) inconsistency
14 with regional water management. Dr. Shilling will describe how the project's road
15 impacts would adversely affect terrestrial biodiversity and how the scale of
16 construction and operation of the tunnels would generate adverse regional health
17 impacts. Dr. Shilling explains how the proposed project would conflict with the state's
18 Integrated Regional Water Management planning and the Sustainable Groundwater
19 Management Act (SGMA).

20 Rarely has environmental review of a major infrastructure project labored so
21 mightily and so long to avoid directly addressing its most damaging consequences.
22 Several years have passed since "red flag" reviews from other agencies on the Bay
23 Delta Conservation Plan (BDCP) finally signaled to DWR and USBR what should have
24 been clear already: that construction of a massive twin tunnel project, which would
25 greatly reduce the natural flow of water through the Delta below its already-
26 unsustainable levels, cannot qualify as a Habitat Conservation Plan (HCP) and Natural
27 Community Conservation Plan (NCCP) under the requirements of federal and state
28

1 laws. Failing as a HCP and NCCP also undermined BDCP's tenuous financing, which
2 largely rested on obtaining fifty-year assurances for water contractors based on those
3 plans.

4 Offering very little beyond a constantly shifting boundary analysis that has
5 elicited extensive technical criticism (the latest project scenario, CWF H3+, postdates
6 the Final EIR-EIS), DWR's case for the Petition chiefly invites a "trust us" approach to
7 regulatory compliance, relying heavily on vague assurances of future regulatory
8 compliance and "adaptive management" that invites avoidance, despite contrary
9 recommendations of the Delta Independent Science Board (DISB) and other scientific
10 critics. But the trust DWR seeks is not its entitlement, and cannot salvage its attempt to
11 secure a project that is baselessly defined to assume the need for dual conveyance,
12 and which even now lacks thorough assessment of project benefits and costs and the
13 water, if any, available for exports through the proposed new intakes. Approving the
14 Petition would damage public trust resources and the public interest, building
15 prejudicial momentum for a tunneling project that creates no new water and may still
16 prove incapable of lawfully transporting water. Investing untold billions in this
17 underground white elephant would strongly disserve the public interest and needlessly
18 divert scarce resources from better investments in water reliability, water quality,
19 reuse, storage, drought and flood protection, and ecosystem improvements.

20
21 **III. The Buck Stops Here: The Public Interest Requires Board Action to**
22 **Protect the Delta's Public Trust Resources, Water Quality, and Beneficial**
23 **Uses, Rather than Deference to Petitioners and Water Exporters.**

24 Petitioners recognize that for the Board to grant the Petition, they must
25 demonstrate non-injury to any legal user of water, comply with the Delta Reform Act of
26 2009 and other laws protecting the Delta, and meet the requirements of other state
27 and federal laws, including those protecting water quality, recreation, navigation, fish
28 and wildlife, and other public trust resources. (See SWRCB-1, supplemental
information, pp. 10-14 [citing Water Code 1701.2].) Under Water Code 1702, the

1 petitioner must establish “that the change will not operate to the injury of any legal user
2 of water involved.” Settled California law includes public trust interests among these
3 lawful uses and directs the Board to protect them whenever feasible, while also
4 protecting all beneficial uses against degradation of water quality, and ensuring water
5 uses are reasonable and in the public interest. (See, e.g., See *United States v. State*
6 *Water Resources Control Board* (“Racanelli decision”)(2007) 182 Cal.App.3d 82, 141-
7 150; CSPA-208 (Del Piero), pp. 24-26.)

8 This Board cannot proceed on a blank slate as it evaluates DWR’s latest
9 assurances that despite the continuing lack of concrete operational commitments
10 supporting the petition, its managers will somehow bolster the reliability of already-
11 unsustainable Delta exports, satisfy present and future regulatory conditions, and
12 adhere to the aging Delta water quality requirements last addressed but not fully
13 updated 17 years ago in Decision 1641 (SWRCB-21). Almost forty years have now
14 passed since the Board, in D-1485, recognized the legal imperative to protect the
15 Delta’s water quality and public trust resources as well as existing water rights, and the
16 Board’s continuing reservation of jurisdiction in all water rights permits for the SWP
and CVP to enforce that protection. (SWRCB-23, pp. 6-9.)

17 The Board recognized in D-1485, and continues to recognize, two “broad
18 statutory mandates” in exercising this reserved jurisdiction: “(1) protection of vested
19 water rights, and (2) protection of the public interest.” (SWRCB-23, p. 9.) In exercising
20 these twin responsibilities, the Board treats as of “controlling importance” the priority of
21 Delta beneficial interests over exports recognized in the Delta Protection Act of 1959,
22 Wat. Code, §§ 12200-12205, and assigns “first priority to satisfaction of vested rights
23 and public interest needs for water in the Delta and relegates to lesser priority all
24 exports of water from the Delta to other areas for any purpose.” (*Id.*) These statutory
25 policies are also subject to the “overriding constitutional provision” in article X, section
26 2 of the California Constitution that all uses of water and diversions of water must be
reasonable. (*Id.*)

27 One might have expected that the Delta’s chronic shortages of freshwater,
28

1 growing problems with salinity and other contaminants, and precipitous decline in
2 pelagic organisms in the years since D-1485 would have encouraged the Petitioners to
3 approach their Part 2 duties, and the Board's Part 2 duties with some measure of
4 humility. If that history itself were not a sufficient signal, it should have come from the
5 Legislature's 2009 recognition that the Delta's status quo is unsustainable, that
6 reliance on Delta exports must be reduced, and that "the constitutional principle of
7 reasonable use and the public trust doctrine" as foundations of state water
8 management policy that are "particularly important and applicable to the Delta." (Wat.
9 Code, § 85023.) It should also have come from the Board's recognition in 2010 that
10 the "best available science suggests that current flows are insufficient" to protect the
11 Delta's "public trust resources" (SWRCB-25, p.2), from judicial invalidation of key parts
12 of the Delta Plan, from the recognition by federal fisheries agencies of still-unmitigated
13 project impacts.

14 Despite these clear signals, a disturbing sense of *déjà vu all over again*
15 pervades petitioner DWR's exhortations of faith in its water managers to meet all future
16 regulatory requirements and avoid harming almost everything, almost all the time.
17 (See, e.g., DWR 51 (Pierre), DWR-61 (Leahigh), DWR-1010 (Buchholz).) At times, a
18 nearly breathtaking duality emerges from DWR's attempts to explain away
19 divergences from regulatory standards. As just one illustration, DWR rationalizes
20 reliance on TUCPs during California's recent multi-year drought as a response to an
21 unforeseeable outlier event, without also critically examining how the tunnels project
22 might operate in practice under a "new normal" of prolonged droughts due to climate
23 change—a fatal deficiency for a project largely promoted for its climate resilience.

24 Here, however, neither the law nor the future of the Delta ecosystem allows the
25 Board to approach Part 2 issues by uncritically relying on Petitioners' rote assurances
26 that they will meet future regulatory requirements. The 2009 Delta Protection Act's
27 goal of providing California a "more reliable water supply" cannot be lawfully achieved
28 by subordinating the other "coequal" goal of "protecting, enhancing and restoring the
Delta ecosystem" (Wat. Code, § 85054). or by allowing DWR to evade its duty under

1 the Act's statewide policy to reduce reliance on Delta water (Wat. Code, § 85021). As
2 the Legislature made clear, when close calls need to be made, "permanent protection
3 of the Delta's natural and scenic resources" remains "*the paramount concern to*
4 present and future residents of the state and nation. (Wat. Code, § 85022, subd. (c)(2)
5 (emphasis added); accord, *In Re Bay-Delta Programmatic Environmental Impact*
6 *Report Coordinated Proceedings* (2000) 43 Cal.4th 1143, 1168.)

7 Nearly a decade ago, when the California Supreme Court narrowly upheld the
8 2000 CALFED EIR, it candidly observed that the CALFED program was premised on
9 the "unproven" theory that it was "possible to restore the Bay-Delta's ecological health
10 while maintaining and perhaps increasing Bay-Delta water exports through the CVP
11 and SWP. If practical experience demonstrates that the theory is unsound, Bay-Delta
12 water exports may need to be capped or reduced." (*In Re Bay-Delta Programmatic*
13 *Environmental Impact Report Coordinated Proceedings, supra*, page 4, 43 Cal.4th at
14 p. 1168.)

15 The Part 2 testimony of Mark Del Piero (CSPA-208), a former attorney member
16 of the Board, is co-sponsored by the San Joaquin County Protestants and cogently
17 explains the Board's duty and historic need in this proceeding to rise to the occasion
18 and use its authority to protect the Delta's beneficial and public trust uses, water
19 quality and the public interest. The Board's exercise of its authority in the Mono Lake
20 and Big Bear cases provide a useful template for how the Board should approach its
21 duties here after decades of unchecked declines in the Delta ecosystem.

22 Mr. Del Piero criticizes Petitioners' purported adaptive management concepts,
23 which more closely resemble maladaptive avoidance and rationalize "kicking the can
24 down the road." He testifies as to the lack of public benefit, and the potentially
25 withering economic costs that the dual tunnels will impose on the residents of
26 California. (CSPA-208; see also testimony of Bill Jennings (See CSPA 2-Revised 2, p.
27 22) (noting that CALFED was also touted as an "elaborately structured water planning
28 and adaptive management program," one, which invoked the concept of adaptive
management 132 times in its Record of Decision alone).)

1 Finally, Mr. Del Piero explains why CEQA compliance, even if it had not been
2 challenged in 18 pending court actions, cannot substitute for the Board's protection of
3 reasonable and beneficial uses, water quality and the public trust. (See, also, CSPA-
4 200 (Jennings), pp. 44-50.) He notes that the Petitioners' project conspicuously lacks
5 comprehensive water availability analysis, financial analysis, or even concrete and
6 binding terms of operation. His analysis is consistent with the observation of Ronald
7 Robie, a former DWR director and prominent jurist, that "the State Water Resources
8 Control Board has primary authority for ensuring meaningful implementation of the
9 public trust and the protection of trust values in the area of water resources. Thus,
10 effective implementation of the public trust doctrine must always begin in the
11 proceedings the Board conducts to manage water quality and water rights throughout
12 the state." (R. Robie, *Effective Implementation of the Public Trust Doctrine in*
13 *California Water Resources Decision-Making: A View From the Bench*, 45 U.C. Davis
14 L. Rev. 1099, 1175-1176 (2012);
15 [https://www.law.berkeley.edu/files/CLEE/Robie_2012_UCDLR_ViewFromTheBench.p
16 df.](https://www.law.berkeley.edu/files/CLEE/Robie_2012_UCDLR_ViewFromTheBench.pdf)

17 **IV. Granting the Petition Would Disserve the Public Interest, Perpetuating** 18 **Costly Reliance on Paper Rights to an Oversubscribed Delta.**

19 Mr. Del Piero's testimony posits that the Delta lacks the "wet" water to sustain
20 the exports anticipated from the project by DWR and its contractor beneficiaries
21 consistently with protection of the Delta's trust resources and beneficial land uses in
22 the Delta. Producing rivers of paper to rationalize a twentieth century megaproject that
23 conspicuously adds no new water sources, storage, or major conservation
24 commitments, Petitioners have given California one more instructive example of the
25 "aura of unreality" that has too often pervaded state water planning. (*Planning and*
26 *Conservation League v. Department of Water Resources* (1995) 83 Cal.App.4th 892,
27 913; see also SJC-208, RTD-131, CWIN-205.)
28

1 The evidence in Phase 2 will confirm that in their zeal to resuscitate a Delta
2 conveyance project with no firm federal commitments and dwindling support among
3 state contractors, DWR and other tunnel supporters have offered strikingly inconsistent
4 accounts on such basic issues as the project's effect on water supply, how it operates,
5 and what it costs. Failing to analyze any meaningful alternatives to dual conveyance,
6 the petitioners fail to offer relief from the project's compounding of problems with an
7 oversubscribed Delta. Moreover, since the revised project cannot prevent stricter
8 restrictions likely to emerge in proceedings on Delta flow, water quality, and species
9 protection, approval of the change petition would enable a dangerous gamble to invest
10 billions in tunnels that contribute little to water reliability and may end up as virtually
11 waterless stranded assets.

12 **V. The Petition Must Be Rejected Due to the Petitioners' Reliance on a**
13 **Shifting, Inconsistent and Unaccountable Description of Project**
14 **Operation.**

15 Far from proving the Petition would serve the public interest, Petitioners
16 commenced Part 2 by adding to earlier concerns about the amorphousness of a Delta
17 tunnels project that after years of shifting and inconsistent development remains in key
18 respects undefined, un-engineered, and unfunded. Following EPA's issuance of a
19 failing grade for the EIR-EIS and federal fisheries agencies' decision to rely largely on
20 program-level analysis in their Biological Opinions, DWR's ostensible co-Petitioner,
21 Bureau of Reclamation, still has neither approved nor funded the project, nor have
22 other key stakeholders. The Bureau's Record of Decision has never been prepared.

23 Mindful of this problem, the Board, while finding the project description nominally
24 complete for purposes of processing the application under 23 Cal. Code Regs, section
25 794, directed the Petitioners to provide an updated summary of operating criteria that
26 "makes explicit whether particular criteria are proposed conditions of operation or are
27 set forth solely as modeling assumptions." (State Board August 31, 2017 order, p. 7.)
28 Remarkably, however, in its cursory September 8, 2017 filing, Petitioners rely solely on

1 stylized modeling assumptions (including a presumed “project” scenario, CWF H3+,
2 postdating the Final EIR-EIS) premised on compliance with the dated water quality
3 standards in D-1641 and biological opinions that are nearly a decade old. Petitioners
4 refused to commit even to those operational requirements, which have already failed
5 to protect the Delta. Finally, Petitioners admit that the terms likely to govern project
6 operation remain to be set, and accord DWR managers a virtual blank check to further
7 revise operations based upon what “adaptive management.”²

8 These evasions of any concrete understanding of project operations underscore
9 the wisdom of following the approach logically following from the Racanelli ruling, first
10 gaining a clear understanding of how water quality and public trust considerations
11 constrain project operations before proceeding with permit approval. Phase 2
12 testimony and evidence will confirm that the Petitioners’ account of project operation is
13 not simply “incomplete” in the more benign sense that most complex projects have
14 certain unknowns and need to retain some flexibility. Rather, the account of operations
15 empowers the boundary assessment with almost supernatural abilities to shape-shift
16 as needed to rationalize continuing with the dual conveyance, turning inconsistencies
17 into “refinements,” turning unsustainable water exports into “reliability,” turning chronic
18 shortages of freshwater into “regulatory compliance,” and turning procrastination and
19 avoidance into “adaptive management.” The evidence will also confirm other
20 dispositive problems with the project definition:

- 21 • The Petitioners’ application of existing modeling is riddled with errors, including
22 unrealistically high simulated outflows in October, leading the Petitioners to understate
23 project impacts to water quality.
- 24 • The definition of project objectives baselessly assumes the need for dual
25 conveyance, undermining the ability to identify other alternatives that may better serve
26 the public interest.

27 ² The primary achievement of Petitioners’ September 8 letter is that it manages to
28 explore new frontiers in obfuscation while simultaneously retaining the vapidness of
DWR’s “just trust us” approach to adaptive management.

- 1 • The Petitioners' refusal to accept operational conditions, even on an interim
2 basis, vitiates any assurance of establishing public accountability at this stage.
- 3 • The Petitioners' failure to rigorously account for project costs and benefits also
4 undermines any presumption that the project is in the public interest.

5 **VI. Conclusion**

6 In sum, the public interest, the Public Trust, California law, and common sense
7 all demand that this Board exercise its duties and authority wisely by denying the
8 Petition. Antonio Rossman's words apply here:

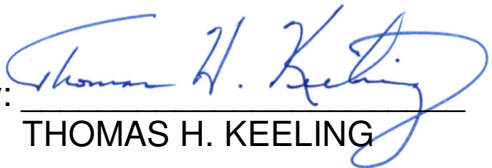
9 To restate Sam Walter Foss's words inscribed on State Office Building One
10 in Sacramento, if the 19th Century demanded men to match our mountains,
11 the 21st asks for laws to match our rivers.³

12 Equally important, the 21st century demands governmental agencies that will have the
13 strength and courage to apply the laws designed to protect public trust resources and
14 the public interest, notwithstanding political and economic pressure to the contrary.

15 Respectfully submitted,

16 Dated: December 18, 2017

FREEMAN FIRM,

17
18 By: 
19 THOMAS H. KEELING

20 Dated: December 18, 2017

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21
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25
26 ³ A. Rossmann, *Bring Us Law to Match Our Rivers*, 18 Cal. Water Law & Policy Rep.,
27 18 CAL. WATER LAW & POLICY REP. 99, 102 (January 2008); [http://landwater.org/wp-](http://landwater.org/wp-content/uploads/2014/02/Bring-Us-Law-To-Match-Our-Rivers.pdf)
28 [content/uploads/2014/02/Bring-Us-Law-To-Match-Our-Rivers.pdf](http://landwater.org/wp-content/uploads/2014/02/Bring-Us-Law-To-Match-Our-Rivers.pdf).