

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

September 3, 2024

Via Electronic Email Only

State Water Resources Control Board
Administrative Hearings Office
P.O. Box 100
Sacramento, CA 95814-0100
DCP-WR-Petition@Waterboards.ca.gov

RE: Jurisdictional Objections to Adjudication of Department of Water Resources' Petition for Change of Water Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 14445A, and 17512, respectively)

Dear Presiding Hearing Officer Kuenzi and Members of the State Water Resources Control Board,

In advance of the State Water Board's September 4, 2024 closed session hearing, Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta (collectively, the "Delta Tribal Environmental Coalition" (DTEC)) submit this letter to elevate concerns with the State Water Board's jurisdiction over the Department of Water Resources' February 22, 2024 Petition for Change of Water Rights for the Delta Conveyance Project (DCP) and the Department's August 22, 2024 request for a so-called "Minor Change" to its Petition. The Department asks the Board to authorize it to divert 6,000 cubic feet per second (cfs) of water for the DCP under four water rights permits that expired, following multiple extensions, on December 31, 2000. As DTEC discussed at length in its March 13, 2024 Protest, before the Hearings Office may proceed to adjudicate the merits of the parties' protests and the Department's Petition, the Board must first determine as a threshold matter that it has jurisdiction to consider a Petition to modify permits that, on their face, expired nearly two-and-a-half decades ago. The Department's procedurally flawed August 22, 2024 "Minor Change" request to modify Term 6 of the water rights permits to retroactively extend the expiration date for construction by over fifty years, to December 31, 2055, amplifies these jurisdictional concerns. For the reasons stated below, DTEC respectfully requests that the Board reject the "Minor Change" request as procedurally flawed, sequence DCP hearings to first determine that it has authority even to consider the Department's Petition, and conduct both jurisdictional determinations and proceedings on the merits in an open, public manner that prioritizes transparency and participation by affected parties.

A change in point of diversion or rediversion from a water body is permitted only if the petitioner can demonstrate that the proposed changes would not effectively establish a new water

right. 23 Cal. Code Regs. § 791. If the proposed changes would exceed the scope of the water rights permit at issue, the Board has no authority to proceed with the change petition, and the Department must instead submit an application for a new water right showing unappropriated water in the amounts the Department seeks to appropriate for the DCP. Wat. Code § 695; *see id.* § 1261 (requiring water rights applicants to provide “[s]ufficient information to demonstrate a reasonable likelihood that unappropriated water is available for the proposed appropriation”). Here, the water rights permits that the Department seeks to modify facially expired in December 2000. The Department never put the 6,000 cfs it now seeks to divert for the DCP to beneficial use under its expired permits and long ago forfeited its authorization to do so. *See, e.g.* Wat. Code § 1390 (A permit is “effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with [Division 2 of the Water Code], but no longer.”); *id.* at § 1395 (“Actual construction work upon any project shall begin within the time specified in the permit.”). The Department buries what is actually a request for a new right to appropriate vast quantities of water through a furtive two-step: first submitting a petition to change only the points of diversion under expired permits rather than a petition for a new water right, and then—without proper noticing—making a so-called “Minor Change” to its petition to retroactively extend the expiration date by fifty-five years. The Board should not condone such artifice. Indeed, it cannot do so without acting outside the scope of its authority.

Compounding these concerns, the Department’s so-called “Minor Change” to its Petition is procedurally and prejudicially defective and should be rejected outright. The Department asserts that it makes this change under Water Code Section 1700.4. Because the Department is proposing to (dramatically and retroactively) extend “time within which to commence or complete construction work” under its expired permits, it must, at minimum, follow the procedures under section 842 of the California Code of Regulations, including utilizing Board-supplied forms and accompanying the request with the proper filing fee. It has done neither. Should the Board allow this extension to be treated as a “change to an application” rather than what it is—a request for an extension of time—it would deprive the public, including Tribal Nations and other rights holders, of their due process rights to protest the extension and demonstrate, *inter alia*, that they hold rights that would be affected by the permit. 23 Cal. Code Regs. § 843(c).

The Board’s decisions on DWR’s so-called “Minor Change” to its expired permits and on the underlying Petition will have profound consequences for Tribal Nations and historically marginalized communities in the Bay-Delta region. Tribal Nations in the Bay-Delta and its headwaters hold water rights, including those inherent in the federal government’s reservation of land in trust to the Tribes, many of which have not yet been adjudicated or quantified. Tribal water rights are not forfeited through non-use, and the State has no authority to limit or void them or to allocate water rightfully reserved to the Tribes to other parties under state law.¹ Without first

¹ *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (“[An] Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian

comprehensively addressing tribal water rights—or at least providing Tribes the opportunity to demonstrate that they hold rights that would be affected by an extension or new appropriation—the Board perpetuates a long and acknowledged history of suppressing tribal water rights “as well as cultural, spiritual and subsistence traditions that Native American people have practiced since time immemorial” associated with these rights.² Sanctioning the Department’s procedural sleight of hand would only further undermine Tribal Nations’ efforts to assert and exercise their water rights and correct historical injustices. Given California’s complex water rights landscape, such a significant new water diversion demands a thorough public analysis with a full and fair opportunity for Tribal Nations and other stakeholders to assess and demonstrate injury to their rights and interests.

Simply put, DWR’s “Minor Change” request is anything but. The Board should reject the “Minor Change” outright and require the Department to either apply properly for an extension to its expired permit (with associated hearings) or submit a new water rights application. In either case, the Department has the burden of proving that sufficient unappropriated water is available for the proposed use and that neither Tribal Nations nor other water rights holders will be injured by the new appropriation.

Finally, the undersigned reiterate the importance of the Board’s rigorous adherence to a policy of public, open, and transparent proceedings in this and other water rights matters. Tribal Nations and disadvantaged communities already face systemic barriers to participation in governance. Closed sessions such as the one scheduled on September 4, 2024 for this and the Sites Reservoir water rights proceeding definitionally exclude the voices of those impacted by the Board’s decisions and diminish the ability of those communities to advocate for their rights and interests. They also create an appearance of impropriety and unfairness. As such, DTEC urges the Board to honor its commitments in its 2021 Racial Equity Resolution to center its work on Black, Indigenous, and people of color disproportionately represented in California’s most vulnerable communities. These groups have historically been underrepresented in water management decisions that have far-reaching implications for their livelihoods, health, and sustenance. Closed-door meetings risk perpetuating past injustices by neglecting the specific needs and perspectives of those most reliant on Bay-Delta ecosystems and resources and exacerbating historic exclusions, jeopardizing the Board’s ability to serve the public interest in these proceedings. If the Board chooses to move forward with its closed session in spite of these concerns, the undersigned protestants respectfully request that the Board issue a report with a fulsome description of closed session discussions immediately following the September 4 meeting.

purchaser.”); *see also* *Winters v. United States*, 207 U.S. 564, 576–77 (1908) (establishing the principle of Indian reserved water rights based on federal law).

² State Water Resources Control Bd. Resolution No. 2012-0050 at ¶ 7(b), https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0050.pdf.

Respectfully submitted,

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