

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Statement on Third Pre-Hearing Conference Issues Regarding Department of Water Resources' Petitions for Change of Water Rights Permits 16478, 16479, 16481, and 16482 (Applications 5360, 14443, 14445A, and 17512, respectively) for the Delta Conveyance Project

Submitted by Protestants Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, San Francisco Baykeeper, California Indian Environmental Alliance, and Golden State Salmon Association

December 9, 2024

Protestants Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, San Francisco Baykeeper, California Indian Environmental Alliance, and Golden State Salmon Association (collectively, "Protestants") submit this pre-hearing conference statement in response to the Presiding Hearing Officer's November 18, 2024 Amended Notice of Public Hearing and Procedural Ruling. Protestants also briefly address assertions raised by Petitioner Department of Water Resources ("DWR") in its December 2, 2024 Objection and Petition for Reconsideration but reserve the right to submit additional responses thereto as authorized by the Presiding Hearing Officer.

I. The Hearings Office Should Require Certainty on the Underlying Water Rights and Resolve Threshold Issues Prior to Submittal of Case-in-Chief Testimony

Before addressing the specific issues noticed for the December 9, 2024 Pre-Hearing Conference, Protestants raise three threshold matters that go to the orderly conduct of this proceeding and presentation of case-in-chief testimony and thus merit consideration at the pre-hearing stage. These matters are also the subject of DWR's December 2 Objection.

First, Protestants appreciate the Presiding Hearing Officer's unequivocal rejection of DWR's improper request to make midstream amendments to its Petitions for the purpose of modifying Term 6 of its 1972 permits within the scope of this proceeding. The Hearing Officer's straightforward ruling on this question brings important clarity to the scope of this proceeding. But it is not enough to sort out the muddle created by DWR's petitions to change long-lapsed water rights permits. Stripped to its essence, DWR's position is that the Board should approve

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petitions premised on hypothetical rights and assumptions about Project operations that have no support in DWR's application. The Board cannot do so without extending undue special treatment to DWR and distorting Water Code procedures.

As the Presiding Hearing Officer recognizes, DWR has put the Board in the untenable position of asking it to act on change petitions "without knowing whether the Board will, at some future time, grant any petitions for extension of time yet to be filed by the Petitioner or whether the Board will revoke a portion of the [State Water Project] permits."¹ DWR complains that the Hearings Office needlessly complicates and bloats this proceeding by even inquiring into its entitlements to appropriate,² but the complications are ones of DWR's own making: DWR has submitted an application to change points of diversion for permits that expired over fifteen years ago. The Board cannot lawfully approve a petition to change a water right without confirming that right exists. Nor, as the Presiding Hearing Officer identifies, can it determine whether a change in point of diversion to authorize a *new* conveyance project would interfere with other legal users of water (including tribal water users) or effectively create a new water right without ascertaining the extent of any perfected or existing rights. DWR's bold attempt to foreclose any inquiry into the existence and scope of its entitlements should be rejected outright.

Where Protestants part ways with the Hearing Officer is in the question of what to do with the anomalous posture that DWR has created. Under the law, the Hearing Officer's recognition of uncertainty in the water rights DWR seeks to use for operation of the Delta Conveyance Project should be the end of the inquiry. Before water rights can be changed, the scope of existing rights must first be resolved, and this proceeding should be held in abeyance, deemed incomplete, or denied as premature until that happens. The Hearing Officer's approach to the puzzle DWR has created instead asks the parties to present evidence under hypothetical water rights scenarios: one in which DWR is limited to the (unknown) perfected portion of its rights prior to expiration of its permits in December 2009 and one in which it is authorized to appropriate some additional (unknown) quantum of water up to the maximum amount of the face value of its 1972 permits.³ The undersigned Protestants are unaware of any precedent that authorizes the Board to proceed under such a scenario approach and submit that in addition to being unduly burdensome and confusing, it subjects DWR without legitimate justification to preferential treatment as compared to other applicants operating under California's water rights laws.

At the end of the day, it is impossible to adjudicate DWR's petitions before its contested water rights are ascertained without creating evidentiary gymnastics of the sort teed up by this

¹ Hearing Officer's Amended Notice of Public Hearing and Procedural Ruling at 5 (Nov. 18, 2024) (hereinafter "Notice").

² DWR, Objection to and Petition for Reconsideration of Hearing Officer's Amended Notice of Public Hearing and Procedural Ruling (Dec. 2, 2024) (hereinafter "DWR Objection").

³ *Id.* at 10.

scenario approach. The appropriate and straightforward course would again be to dismiss or hold the current proceeding in abeyance while DWR submits and the Board resolves either an application for a license to confirm the perfected portion of DWR's 1972 permits or an application to retroactively extend the expired permits. Staying this proceeding until the underlying entitlement subject to the change petitions is clarified is necessary to allow the Board and the parties to know exactly what project is being considered. And it prevents the Board from unlawfully proceeding to adjudicate an application over which it has no jurisdiction because the underlying entitlement does not exist.

The Hearing Officer's proposed scenario approach is made even more untenable because the two scenarios it presents are highly uncertain. Scenario A assumes that DWR at some point submits applications to extend the time to perfect its 1972 permits and that the Board grants them. But to Protestants' knowledge, the question whether Water Code section 1398 authorizes the Board to reach back to resurrect a permit that expired at least *fifteen years* prior has never been tested. The suggestion that DWR could request and the Board could grant such a request conflicts with the letter and spirit of other provisions of the Water Code that limit water rights permits to the time in which water is actually appropriated (section 1390) and the period specified in the permit (section 1397).⁴ And it raises significant questions about the equity and administrability of a system that would allow any diverter with an expired water right permit to ask the Board to bring it back to life rather than getting in the back of the queue to apply to appropriate available water. In any event, DWR has not submitted an application to extend its expired permits,⁵ and it is unclear if and when it will or what extension terms it would seek.

Scenario B goes an additional step beyond the law in suggesting that the Board can ascertain *within the scope of a change proceeding* the perfected portion of a (previously expired) water right. As Protestants discussed in their October 10 Statement, the proper procedure to confirm a right to appropriation of such water as was put to beneficial use under a permit is through a Chapter 9 licensing proceeding.⁶ Protestants agree with the November 25, 2024 Joint Initial Statement by County of Contra Costa et al. that the supplemental information the Hearings Office requests from the Board in its November 18 Notice is inconsistent with and well short of the information that would be requested through a licensing proceeding.⁷ And it is unreasonable

⁴ It also conflicts with well-established prohibitions on cold storage of water rights. *See Cal. Trout, Inc. v. State Water Resources Control Bd.* (1989) 270 Cal.App.3d 585, 618.

⁵ To the contrary, as the Hearing Officer recognizes, DWR "withdrew its pending petitions for an extension of time to perfect its conditional water rights under the [State Water Project] permits." Notice at 4.

⁶ *See* Cal. Water Code § 1610 ("if the determination of the board as to completion is favorable to the permittee, the board shall issue a license which confirms the right to the appropriation of such an amount of water as has been determined to have been applied to beneficial use"); *see* Protestants' October 10, 2024 Pre-Hearing Conference Statement at 9 n.25.

⁷ *See* County of Contra Costa et al., Joint Initial Statement in Response to November 18, 2024 Amended Notice at 2-3 (Nov. 25, 2024); *see also* State Water Resources Control Board, Division of Water Rights, *Process for Water Right Licensing*, https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/docs/licensing.pdf (specifying procedures and field data requirements for licensing determination).

to expect the Hearing Officer to fully and fairly resolve the complex issues that go into a licensing determination within a section 1701 change proceeding. Bootstrapping a licensing determination into a change petition proceeding ultimately extends special treatment to DWR to allow it to avoid the express requirements of California law.

Moreover, the dual scenario approach is itself arbitrary and risks producing an arbitrary outcome in this proceeding. The assumptions baked into each scenario lack any reasonable basis for their selection. In the absence of an understanding of DWR's actual existing water rights, the Hearings Office can only make arbitrary selections of baseline entitlements and prospective changes to evaluate DWR's petitions. In a similar vein, the dual scenario approach risks producing conflicting outcomes. What if the evidence supports DWR in one scenario and the protesting parties in the other? Is the Board simply supposed to guess at which of the two hypothetical worlds is more likely and rule on that basis? How is the Board to determine what is more likely? What if a third scenario is more likely?

Perhaps recognizing the arbitrary nature of a scenario approach, DWR asserts in its Objection that the Board could simply assume that DWR will divert only within the maximum perfected scope of its permitted right and adjudicate the petitions based on this assumption. DWR's position is, frankly, absurd. DWR has submitted petitions for a project designed to divert 6,000 cubic feet per second ("cfs") of water up to the maximum paper entitlement of its 1972 permits. What DWR is suggesting now is not the project that it has proposed and approved; it is a different project, with different environmental impacts, financial feasibility dimensions, benefit-cost implications, purposes, and implications for the host of questions the Hearing Officer must resolve on DWR's petitions.

Worse still, DWR is not forthcoming about the difference between the project it approved and petitioned for and the one it now proffers for adjudication. It has not, for instance, explained how a restriction to perfected rights would affect rates or amounts of diversion, and it baselessly contests the Board's authority to inquire into the existence and extent of perfected rights. In the same breath, DWR concedes that what it ultimately plans to operate is the approved 6,000 cfs project; that is, it will seek a conditional limitation on diversions that would be lifted if its expired permits were extended.⁸ DWR, in other words, is asking the Board to adjudicate the environmental, public trust, and other implications of a more modest project but then use that same authorization to construct a more expansive one if an eventual extension application is approved. The Hearing Officer is correct to resist this sleight of hand.

Ultimately, the Board needs to understand the project that it is adjudicating, and both it and the public are entitled to a clear, understandable, and forthright description of the project, the

⁸ DWR Objection at 3 ("[A]n approval of the additional points of diversion do not, and cannot, remove the existing limits upon the SWP diversion and rediversions that will continue to exist until a time extension is granted.")

petition, and the choices to be made. Again, the only approach consistent with the law and capable of providing the needed clarity would be to require DWR to obtain either an extension of time or a license and *then* separately apply for a change in point of diversion for the water it was legally allowed to appropriate—after the underlying entitlement is clear.

Second, Protestants are concerned with the Presiding Hearing Officer’s proposal to require DWR to submit its entire case-in-chief on the same day written comments on hearing issues are due.⁹ The Hearing Officer’s original July 31, 2024 Notice set a deadline for the parties to submit written comments on hearing issues fully three months before case-in-chief exhibits and proposed permit terms were due. The purpose of this initial comment period was to hear and resolve any “requests to modify the hearing issues identified” by the Hearing Officer, subsequent to which the Hearing Officer would consider issuing an “amended hearing notice with revised hearing issues.”¹⁰ The Hearing Officer later vacated the deadline for submittal of comments on hearing issues and none have been submitted to date—either in response to the original July 31 noticed set of hearing issues or the revised set of hearing issues identified in the November 18 Notice. The Hearing Officer’s proposal to schedule the simultaneous submittal of comments on hearing issues and submittal of case-in-chief risks rendering the former a pro forma exercise or creating tremendous waste and inefficiency should the Hearing Officer elect to revise the hearing issue and DWR be required to resubmit its case-in-chief. DWR’s objections to the revised hearing issues highlight the need to settle hearing issues based on party comments prior to submittal of case-in-chief.

To avoid these pitfalls and provide full and fair opportunity for the parties to weigh in on the scope and sequencing of hearing issues, Protestants respectfully request that the Hearing Officer defer case-in-chief submittals until the Hearing Officer finalizes the full set of hearing issues following comments and a pre-hearing conference to consider the same. If comments on hearing issues are to remain due on January 20, 2025, this would mean vacating DWR’s deadline to submit its case-in-chief exhibits and proposed project terms as well as the ensuing schedule for case-in-chief presentations by all parties and resetting this full schedule to run from at least one month after the final set of hearing issues is noticed. Protestants also respectfully request that the Hearing Officer reject the State Water Contractors’ proposal to truncate the time protestants have to prepare their case-in-chief to accommodate fulsome consideration of hearing issues.¹¹ Rather, all deadlines—including protestants’ deadline for submittal of their case-in-chief exhibits—should be pushed back to allow for resolution of hearing issues before the case-in-chief phase of this proceeding begins.

⁹ Notice at 16 (setting January 10, 2025 deadline for both DWR’s submittal of case-in-chief and submittal by all parties of written comments on hearing issues).

¹⁰ *Id.* at 12-13.

¹¹ *See* State Water Contractors’ Petition for Reconsideration of the Hearing Officer’s November 18, 2024 Amended Notice of Public Hearing and Procedural Ruling at 3 (Dec. 6, 2024).

Third, Protestants reaffirm their position that staggered presentation of cases-in-chief is appropriate. DWR complains that requiring it to put on its case-in-chief first is “clearly unfair” and “will result in efficiency.”¹² Just the opposite. As the Presiding Hearing Officer identifies, DWR bears the burden of proof on its petitions and, as in all adjudicatory proceedings, carries a corresponding duty to put on and make out its case in support of those petitions. Protestants agree with the Hearing Officer that this sequencing also promotes efficiency by enabling protestants to put on a focused and responsive case-in-chief that distills the disputed factual and legal questions rather than one unconstrained by knowledge of how DWR will prove up its petitions. The Hearing Officer’s willingness to allow for surrebuttals as warranted by the presentation of evidence more than resolves any concerns DWR might have about its ability to respond.

II. Comments on Noticed Pre-Hearing Conference Questions

Protestants respectfully submit the following responses to the third pre-hearing conference issues set forth in the November 18 Notice:

A. What time limits should apply for oral summaries of written testimony and cross-examination of witnesses?

Protestants submit that setting specific time limits for written testimony and cross-examination should wait until the threshold issues discussed above have been resolved and the number and scope of issues on which the parties will be submitting testimony is clear. Protestants further submit that time limits must respect the independent standing of all parties in this proceeding. Tribal Nations, for instance, have distinct positionalities, rights, and interests relative to each other and to other governmental protestants as well as to non-profit parties and must be accorded at least the same time for presentation of evidence and cross-examination afforded to any other governmental entity. Likewise, the interests of non-profit protestants are distinct, and each should be entitled to put on its own witnesses and be given its own time-limit for cross-examination. Requiring parties to apportion time between them for oral summaries and cross-examination would fail to respect the unique party status of each participant and would create inequities.

B. Should a site visit be conducted and, if so, how, when, and where?

Protestants strongly support a site visit to inform the Hearing Officer’s understanding of the project setting, dimensions, and anticipated impacts. Protestants respectfully request that at least four days be accorded for a site visit. One site visit day should be reserved for a tour of tribal ancestral lands to assist the Hearing Officer in formulating a complete picture of the

¹² DWR Objection at 6.

relationship of tribal protestants to the project area and potential implications for tribal lands, tribal interests, and tribal cultural resources (proposed hearing issue number 5). The locations and agenda for this portion of the site visit should be set by Protestant Tribes. Protestants similarly submit that one site visit day should be reserved for a tour of waterway-adjacent disadvantaged communities in the interior Delta to assist the Hearing Office in understanding the Project's consistency with environmental justice policies (proposed hearing issue number 6) and related public interest implications. The agenda and location for this portion of the site visit should be set by Protestants that advocate for Delta environmental justice communities (including Little Manila Rising and Restore the Delta). Neither environmental justice nor tribal implications of the Project can be properly determined without the situational awareness and sense of place that attends a site visit, and it is important that impacted Tribes and communities be accorded the agency and respect to arrange these visits. Reciprocally, Protestants have no objection to DWR reserving one or two days to arrange and set the agenda for its portions of the site visit.

C. Are there any other procedural issues concerning the hearing the participants would like to raise?

As the undersigned Protestants and other protesting parties have discussed at length in prior statements, the refusal to allow for completion of the Bay-Delta Plan prior to adjudication in this matter is improper. Much like the Hearing Officer's proposed scenario approach, proceeding to adjudicate the petitions before governing water quality controls are determined necessitates untenable hypotheticals and assumptions that cannot be resolved through flimsy permit conditions.¹³ If this were not problem enough, processing the change petitions in the face of uncertainty on both governing water quality controls *and* water rights entitlements will compound the evidentiary uncertainties. The combination of hypotheticals results in at least four different worlds of evidence for the Board to consider: (a) limited diversions with status quo water quality regulations, (b) limited diversions with an updated Bay-Delta Plan, (c) face value diversions with status quo water quality regulations, and (d) face value diversions with an updated Bay-Delta Plan. This is the antithesis of a clear record and will force the Board into arbitrary choices about whether to grant DWR's petitions.

Worse still, at most one of those hypothetical universes of assumptions could ultimately materialize,¹⁴ meaning the parties and the Hearings Office will waste immense resources

¹³ DWR has, for instance, suggested that approval of its change petitions could be conditioned on compliance with the new Bay-Delta Plan. But it is quite possible that more protective water quality standards would be wholly incompatible with the Delta Conveyance Project or would militate for a specific set of tailored permit conditions. Until applicable water quality controls are known, the Board cannot address all the issues raised in this change petition.

¹⁴ Indeed, an entirely different scenario from the four hypothesized could emerge, as the Board is still considering Plan alternatives and DWR has neither established a perfected right nor sought an extension for its expired permits.

presenting evidence and adjudicating worlds that will never exist. This waste is unnecessary: The Board could resolve DWR's existing rights through the proper procedures while it finalizes updates to the Bay-Delta Plan—and then adjudicate DWR's change petitions based on known entitlements, water quality controls, and a more accurate assessment whether the resulting operating parameters would serve the public interest, rather than the Hearing Officer's or DWR's guesses.

Moving forward ahead of the Bay-Delta Plan is illogical and arbitrary. Moving forward without knowing the existing water rights DWR has, and what water rights it ultimately seeks, is inconsistent with the law. Doing both will compound those errors to the prejudice of protestants and the public and do a disservice to the Board by failing to create a record on which an informed and evidence-based decision can be made.

Respectfully submitted,



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* This brief does not purport to represent views of Yale Law School.

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