

1 Trent W. Orr, State Bar No. 77656
A. Yana Garcia, State Bar No. 282959
2 EARTHJUSTICE
50 California Street, Suite 500
3 San Francisco, CA 94111
torr@earthjustice.org
4 ygarcia@earthjustice.org
Tel: (415) 217-2000
5 Fax: (415) 217-2040

6 *Attorneys for Protestant Restore the Delta*

7
8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

**PROTESTANT RESTORE THE DELTA'S
RESPONSE TO EVIDENTIARY
OBJECTIONS REGARDING SCOPE OF
WITNESS TESTIMONY IN PART 1B**

1 **INTRODUCTION**

2 The Point of Diversion Petition (“Petition”) before the Board involves a highly controversial
3 massive proposed change in water diversions from the Delta, which would affect countless users of
4 water throughout the Delta region and the state. It therefore comes as no surprise that numerous
5 protestants have raised profound concerns reflecting the public’s well-founded fears of the extremely
6 negative effects that granting the Petition would have on people’s lives and livelihoods.

7 In determining whether, and under what conditions, it might grant the Petition before it, the
8 State Water Resources Control Board (“Board”) must consider the effects the proposed changes in
9 use will have on the rights of legal users of water, a broad term not precisely defined in the law.
10 Because the Board recognized that this particular Petition would involve such extensive effects, it
11 determined that it would pay careful attention to the most vulnerable water users and deliberately
12 defined its consideration of legal injury in this hearing to include their concerns.

13 [G]enerally Part 1 focusses on human uses of water (water right and water use
14 impacts) and Part 2 focusses on environmental issues. *Part 1 can address human*
15 *uses that extend beyond the strict definition of legal users of water, including flood*
16 *control issues and environmental justice concerns. If a human use is associated with*
17 *the health of a fishery or recreation, testimony on this matter should be presented in*
18 *Part 2.*

19 (California WaterFix Project Pre-Hearing Conference Ruling (Feb. 11, 2016) at p. 10 [emphasis
20 added].)

21 Protestant Restore the Delta’s written testimony reflects the Board’s delineation of the scope
22 of Part 1. In response to the Board’s unquestionable commitment to open the proceeding, and
23 specifically Part 1, to include consideration of increasingly important environmental justice issues,
24 Restore the Delta painstakingly collected written testimony from residents of Delta communities
25 already experiencing the effects of diminished water supplies and reduced water quality due to lack
26 of adequate freshwater flows, salt water intrusion, and pollution from agricultural runoff and other
27 sources. These witnesses and members of their families and communities are, in many instances,
28 particularly susceptible to the health, livelihood, and other quality of life impacts that granting the
Petition threatens.

1 Despite the fact that Restore the Delta’s written testimony falls squarely within the Board’s
2 expanded consideration of legal users of water and specifically addresses environmental justice
3 concerns, Petitioner Department of Water Resources (“DWR”), along with San Luis Delta-Mendota
4 Water Agency and Sacramento Valley Group et al., object to much of RTD’s substantive testimony
5 on the basis that it should not be before the Board at this time, or that it is irrelevant to the issues in
6 the hearing. These parties argue erroneously that this and other testimony submitted by Restore the
7 Delta should only be heard in Part 2 to this proceeding, if at all.

8 DWR and its allies also erroneously argue that various other issues raised by Restore the
9 Delta in its testimony and exhibits are beyond the scope of Part 1 and/or the hearing as a whole.
10 These include discussion of a provision of the Delta Reform Act that calls for reduced reliance on
11 the Delta for California’s future water supplies and evidence that directly bears on the question of
12 whether the Petition would create a new water right.

13 Restore the Delta herein responds to DWR’s and its allies’ unfounded claims that its written
14 submissions fall outside the scope of Part 1 but reserves its response to additional evidentiary
15 objections raised by DWR and its allies to a later filing.

16 **RESPONSES TO OBJECTIONS**

17 **I. RESPONSE TO OBJECTIONS FROM DWR**

18 **A. The Board May, in its Discretion, Refuse to Consider DWR’s Late-Filed 19 Objections Entirely.**

20 In response to a request from the Board that DWR show that both its master and specific
21 evidentiary objections were filed by the Board’s noon deadline on September 21, 2016, DWR
22 submitted to the Board documents that merely reflect the preparation of its objections prior to the
23 deadline set by the Board. None of the documents submitted in response to the Board’s request on
24 September 28, 2016 indicate that DWR met the Board’s deadline, which is a deadline for
25 submission, not for completion of internal preparation. Whatever decision the Board might make
26 regarding DWR’s late-submitted filings in this instance, Restore the Delta urges the Board to ensure
27 that its enforcement of submission deadlines treats all parties equally. Petitioner DWR should not
28

1 receive favoritism, and its filings and submissions to the Board should be treated in the same manner
2 as those submitted by any of the Protestants.

3 **B. DWR’s Objections to Restore the Delta’s Environmental Justice Testimony Are**
4 **Inconsistent with the Board’s Prior Rulings.**

5 The Board has reaffirmed its delineation of the expanded scope of Part 1 issues throughout
6 this proceeding, restating that environmental justice concerns, as well as flood control issues and
7 other impacts to human uses of water, are appropriate subjects to be addressed in Part 1. (Hearing
8 Officers' Ruling on Revised Hearing Schedule, Revised NOIs, Electronic Service and Submissions,
9 and Other Procedural Issues, March 4, 2016, p.5-6.) When it did this, the Board further clarified that
10 even if these impacts do not amount to an injury to a legal user of water within the meaning of Water
11 Code section 1702, they would still be considered in Part 1 of these proceedings. (*Id.*)

12 DWR disregards the Board’s explicit decision to expand the scope of Part 1 beyond the
13 narrow inquiry into whether an injury to a legal user of water exists. Despite the board’s
14 unambiguous commitment to consider impacts not necessarily falling into the “injury to legal users”
15 rubric, DWR urges the Board to, in essence, refuse to consider precisely the types of concerns it
16 expressly decided to include in this portion of the Petition proceedings. (See, e.g., Department Of
17 Water Resources’ Master Objections To Protestants’ Cases-In-Chief Collectively, Sept. 21, 2016, at
18 pp. 8-9 (hereafter “DWR’s Master Objections”); and see, Ruling, March 4, 2016, pp. 5-6.)

19 **1. Restore the Delta’s testimony raises issues that fall squarely within the**
20 **meaning of “environmental justice.”**

21 As codified under state law, environmental justice means, “the fair treatment of people of all
22 races, cultures, and incomes with respect to the development, adoption, implementation, and
23 enforcement of environmental laws, regulations, and policies.” (Gov. Code § 65040.12.) Central to
24 any government entity’s commitment to strive to consider and remedy environmental justice issues,
25 is an equally strong commitment to include those individuals disproportionately impacted by
26 environmental decision making, in the decision making process. (See, Cal EPA Environmental
27 Justice Program webpage description, available at: [http://www.calepa.ca.gov/EnvJustice/
28 #sthash.4wiJSV6O.dpuf](http://www.calepa.ca.gov/EnvJustice/#sthash.4wiJSV6O.dpuf) [last accessed on September 30, 2016].)

1 In response to the Board’s decision expanding the scope of Part 1 issues to include
2 environmental justice concerns, Restore the Delta has offered the following testimony concerning
3 environmental justice communities that would be adversely affected by the approval of the Petition:
4 The testimony of Barbara Barrigan-Parrilla (RTD-20) extensively documents the existence of
5 environmental justice communities throughout the Delta region and generally describes some of the
6 issues these communities face. The testimony of Michael Machado (RTD-30) addresses the
7 potential economic impacts on the Delta region of granting the petition on legal users of water,
8 including environmental justice communities. The testimony of Esperanza Vielma (RTD-40)
9 documents the effects of granting the petition on the economically disadvantaged in the City of
10 Stockton. The testimony of Ixtzel Reynoso (RTD-60) documents the effects that granting the
11 Petition would have on farmworkers in the Delta. The testimony of Xiuly Lo (RTD-80) documents
12 the effects the petition could have on the Laotian and other Delta communities that rely on the Delta
13 for nutrition and whose health is threatened by the contamination of the fish they eat.¹ The
14 testimony of Gary Mulcahy (RTD-50) documents the effects that approval of the Petition would
15 have on the already depleted salmon runs that are central to the heritage and culture of the
16 Winnemem Wintu Tribe, a culture and heritage that have already been severely damaged by the
17 creation and operation of the Central Valley Project and State Water Project.

18 Restore the Delta also submitted as exhibits in support of its witnesses’ testimony documents
19 that describe, among other things, issues pertaining to the economic stability of Delta cities such as
20 Stockton, and documents that express various concerns that Delta city and community leaders have
21 with many aspects of the State’s water resource management plans – including those underlying the
22 Petition. (See, e.g., RTD-216, 221, 222.) Documents that describe process concerns and that
23 specifically address the exclusion of cultural, racial and ethnic minorities from the decision making
24 process surrounding the Petition before the Board are also included in Restore the Delta’s exhibits.
25 (See, e.g., RTD-245 [a letter from Restore the Delta and other organizations pointing out process

26 _____
27 ¹ Restore the Delta withdraws the Testimony of Roger Mammon (RTD-70) from its case in chief in
28 Part 1B, since it relates principally to the health of fisheries and to recreation and reserves the right
to present testimony from Mr. Mammon in Part 2. Unlike Mr. Mammon’s testimony, Mr. Lo’s
testimony relates extensively to the reliance of an environmental justice community on the Delta for
sufficient nutrition and for fish free from contaminants dangerous to human health.

1 errors in the Bay Delta Conservation Planning process that relate to a lack of adequate language
2 access for marginalized non-English or limited English speaking residents throughout the Delta
3 region].) Despite the fact that these, and Restore the Delta’s written witness testimony, address
4 environmental justice issues as defined by state law and as contemplated by the Board, DWR
5 attempts to strike virtually all of Restore the Delta’s evidence supporting its environmental justice
6 concerns.

7 With respect to the statements made in Restore the Delta’s witnesses’ written testimony,
8 DWR attempts to summarily dismiss all statements made by Restore the Delta’s environmental
9 justice witnesses by broadly asserting that Barbara Barrigan-Parrilla, Michael Machado, XuilyLo,
10 Gary Mulchacy, Esperanza Vielma, and Ixtzel Reynoso all express “policy statements” that only
11 “attempt” to show the effects to environmental justice communities through “possible” impacts to
12 water quality. (DWR Objections to RTD Part 1 Testimony at p. 4.) While Restore the Delta
13 reserves the right to address objections based on inadequate foundation, expertise, and personal
14 knowledge of its witnesses in a later filing, these objections, insofar as they are based on DWR’s
15 complete misstatement of the scope of Part 1, should be rejected.²

16 Environmental justice concerns are broad and far reaching, covering topics from direct
17 human contact with water, financial burdens to water utility customers and domestic well owners,
18 and tribal and municipal government concerns, to the right to safe, clean, affordable, and accessible
19 water, adequate for human consumption, cooking, and sanitary purposes. Each of the six witnesses
20 whose testimony DWR seeks to strike addresses one or more of these issues, and all of Restore the
21 Delta’s witnesses were carefully selected as users of water who can attest to a range of
22 environmental justice impacts that the Petition before the Board may cause throughout the Delta.

23 Barbara Barrigan-Parrilla, Michael Machado, XuilyLo, Esperanza Vielma, and Ixtzel Reynoso
24 are all residents of Delta communities directly affected by the Board’s decision whether to grant the

25 ² In its Master Objections, DWR raises a related objection based on a claim that they have received
26 inadequate notice of issues falling outside the scope of Part 1. (DWR’s Master Objections to
27 Protestants’ Case in Chief at p. 7.) Because Restore the Delta’s written testimony does in fact fall
28 under the scope of Part 1, and because the Board made clear that it would be expanding the scope of
Part 1 to hear additional testimony beyond that which narrowly describes a legal injury to human
uses of water, DWR’s claim of inadequate notice is unfounded.

1 Petition. While Gary Mulcahy lives upstream of the Delta in the Sacramento River watershed, he and the
2 Winemem Wintu Tribe, which he represents, are culturally dependent on a healthy Delta. Most of
3 these witnesses are also members of culturally, racially, economically and linguistically marginalized
4 groups. Their testimony conveys deeply personal and grave concerns that threatened spiritual and
5 cultural resources, as well as sources of food upon which they depend, will be detrimentally affected by a
6 decision to grant the Petition. This testimony and additional testimony that describes the socio-
7 economic, water supply, and water quality issues throughout the Delta unquestionably fall into the
8 category of “environmental justice” testimony. Dismissing or striking their testimony would entirely
9 contravene the Board’s clear determination to consider these issues.

10 For the foregoing reasons, the Board should reject DWR’s objections to the Restore the
11 Delta’s environmental justice testimony, including but not limited to the written testimony submitted
12 by Barbara Barrigan-Parrilla, Michael Machado, XuilyLo, Gary Mulchacy, Esperanza Vielma, and Ixtzel
13 Reynoso.

14 **C. The Delta Reform Act’s Requirement of Reduced Reliance on the Delta for**
15 **California’s Water Supplies is Relevant to This Hearing and Thus Within its**
16 **Scope.**

17 DWR and its allies further objects to Restore the Delta’s testimony that CWF would not
18 reduce reliance on water from the Delta for future California water supplies as irrelevant to this
19 hearing. (DWR Objections to Restore the Delta Testimony and Exhibits, p. 3.) The Hearing
20 Officers have ruled that Part 1 is to examine the Petition’s effects on “human uses that extend
21 beyond the strict definition of legal users of water,” including environmental justice concerns.
22 Water Code § 85021 states: “The policy of the State of California is to reduce reliance on the Delta
23 in meeting California’s future water supply needs through a statewide strategy of investing in
24 improved regional supplies, conservation, and water use efficiency.” The testimony that DWR and
25 its allies object to demonstrates the conflict between the Petition, concerning which RTD witness
26 Tim Stroshane offers testimony (RTD-10) and supporting evidence showing that the Petition
27 Facilities are intended to maintain current levels of reliance on Delta water (and could lead to
28 increased reliance thereon), and this provision of California water law. Section 85021, a provision
of the Delta Reform Act, is a clear expression by the Legislature that reduced reliance on the Delta

1 for California’s future water supplies would be beneficial to human uses of water within the Delta.
2 Astoundingly, DWR argues that California water law regarding the use of water in the Delta is
3 irrelevant to the consideration of a petition, the granting of which would result in water diversions
4 from the Delta contrary to that law.

5 All the water within the State is the property of the people of the State, but the right to the
6 use of water may be acquired by appropriation in the manner provided by law. (Cal. Water Code §
7 102.) This section does not qualify or modify the phrase “in the manner provided by law.” A change
8 petition or a new water right would not be processed in the manner provided by law (here, § 85021)
9 if the board did not also consider reduced reliance on the Delta as a State policy governing
10 appropriations. Mr. Stroshane’s testimony and exhibits provide evidence relevant to whether the
11 Petition facilities would comply with a provision of the law that affects the degree to which water
12 from the Delta is appropriated by the projects owned and operated by the Petitioners, as well as
13 whether Petitioners have even considered the § 85021 policy. As such, this testimony falls well
14 within the scope of Part 1, and should not be stricken.

15 **D. The Stroshane Testimony is Directly Relevant to the Question of Whether**
16 **Approving the Diversion Points the Petition Requests Would Amount to a New**
Water Right.

17 As DWR itself acknowledges, the question whether the diversion points the Petition requests
18 would merely modify existing water rights or create a new water right is within the scope of Part 1.
19 (DWR Master Objections to Protestants’ Cases-in-Chief, p. 12.) Mr. Stroshane’s testimony, to
20 which DWR objects as purportedly outside the scope of the hearing, provides evidence directly
21 relevant to this question. The question of new versus changed water right is informed by evidence
22 he provides regarding time extension request petitions filed by both Petitioners in 2009 for the SWP
23 and CVP. In considering time extension requests, the Board is required by Water Code § 1398(a) to
24 consider whether such petitioners have shown good cause for the Board to approve such requests. A
25 Board water right order (Order WR 2009-0028-DWR at p. 3, points 15 through 20) considered
26 whether good cause existed, examining whether due diligence was exercised, whether previous time
27 requirements had been complied with, and whether satisfactory progress would be made if the
28 extension were granted.

1 Regarding each of these areas of inquiry concerning good cause as they would relate to the
2 Petition here, Mr. Stroshane has provided evidence relevant to the Board making determinations as
3 to: 1) whether the north Delta diversion locations have been diligently developed for applying water
4 to beneficial use; 2) whether development of any north Delta diversion point has timely complied
5 with deadlines for construction and application of water to beneficial use; and 3) whether, via
6 legislative authorization and/or various means of financing, the Petition Facilities have prospects for
7 making satisfactory progress even if the Board granted time extensions. Whatever the Board's
8 ultimate findings might be concerning these criteria for good cause, Mr. Stroshane's testimony and
9 exhibits address the question posed by the Board in its October 30, 2015 Notice of Petition and
10 Hearing of whether diversions by the Petition Facilities would in effect be a new water right or a
11 modification of an existing right. The testimony and exhibits are therefore well within the scope of
12 Part 1, and should not be stricken.

13 **II. RESPONSE TO OBJECTIONS FROM SACRAMENTO VALLEY WATER GROUP,
14 ET AL.**

15 Sacramento Valley Water Group, Tehama-Colusa Canal Authority, Reclamation District 108
16 et al., Glen Valley water District, and Myers-Marsh Mutual Water Company, joined by the City of
17 Folsom object in full to the testimony of Xiuly Lo, and join DWR in objecting to Tim Stroshane's
18 written testimony. These objections should be rejected by the Board for the same reasons described
19 above, in response to DWR's objections to Restore the Delta's environmental justice testimony, and
20 testimony relating to the Board's inquiry into whether the Petition creates a new water right, and
21 whether the project underlying the Petition complies with the Delta Reform Act. Accordingly, and
22 for the same reasons described above, these objections should be rejected.

23 **III. RESPONSE TO OBJECTIONS FROM SAN LUIS & DELTA MENDOTA WATER
24 AUTHORITY, ET AL.**

25 The San Luis Mendota Water Authority, joined by Westlands Water District, objects to the
26 testimony submitted by all six of Restore the Delta's environmental justice witnesses. As stated
27 above, Restore the Delta reserves the right to respond to these objections in so far as they raise issues
28 relating to foundation, personal knowledge, expert or lay opinion, and relevance in a later filing. To
the extent these objections are based on claims, similar to those raised by DWR, that the testimony


1 from Restore the Delta's six environmental justice witnesses falls outside the scope of Part 1B, these
2 objections should also be rejected by the Board.

3 **CONCLUSION**

4 For the aforementioned reasons, and because the Board has already made clear that it would
5 consider in Part 1 of this proceeding the issues addressed in Restore the Delta's written testimony,
6 the various objections to Restore the Delta's testimony that allege that its contents fall outside the
7 scope of Part 1B should be rejected.

8
9 Respectfully submitted,

10 Dated: September 30, 2016



11 Trent W. Orr, State Bar No. 77656
12 A. Yana Garcia, State Bar No. 282959
13 EARTHJUSTICE
14 50 California Street, Suite 500
15 San Francisco, CA 94111
16 torr@earthjustice.org
17 ygarcia@earthjustice.org
18 Tel: (415) 217-2000
19 Fax: (415) 217-2040

20
21
22
23
24
25
26
27
28
Attorneys for Protestant Restore the Delta

1 **STATEMENT OF SERVICE**

2 **CALIFORNIA WATERFIX PETITION HEARING**
3 **Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

4 I hereby certify that I have this day submitted to the State Water Resources Control Board
5 and caused a true and correct copy of the following document(s):

6 **PROTESTANT RESTORE THE DELTA’S RESPONSE TO EVIDENTIARY OBJECTIONS**
7 **REGARDING SCOPE OF WITNESS TESTIMONY IN PART 1B**

8 to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service**
9 **List** for the California WaterFix Petition Hearing, dated September 29, 2016, posted by the State
10 Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water_issues/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
11 [programs/bay_delta/california_waterfix/service_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

12 I certify that the foregoing is true and correct and that this document was executed on
13 September 30, 2016.

14 Signature: 

15 Name: John W. Wall

16 Title: Litigation Assistant/Office Manager

17 Party/Affiliation: Protestant, Restore the Delta

18 Address: Earthjustice
19 50 California Street, Suite 500
20 San Francisco, CA 94103