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13 BEFORE THE

14 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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16
17 HEARING ON THE MATTER OF
18 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
19 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF DIVERSION
20 FOR CALIFORNIA WATER FIX.

COUNTY OF SACRAMENTO ET AL.'S
MOTION TO STAY OR CONTINUE
WATERFIX PART 2 HEARING

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1 **I. INTRODUCTION**

2 County of Sacramento, Sacramento County Water Agency, County of San
3 Joaquin, City of Stockton, Sacramento Regional County Sanitation District, City of
4 Antioch, and Local Agencies of the North Delta (Protestants) hereby request a stay or
5 continuance of this hearing on Petitioners’ Petition for Change in order to afford the
6 opportunity to address serious rule violations resulting from substantive ex parte
7 communications between members of the Hearing Team and Petitioner, the Department
8 of Water Resources (DWR). As explained below, the ex parte communications that
9 already have been disclosed in response to a Public Records Act (PRA) request
10 establish that this proceeding is irrevocably tainted by misconduct on the part of certain
11 members of the Hearing Team and certain representatives of DWR. The full extent and
12 larger implications of that misconduct are the subject of ongoing investigative efforts,
13 including pending additional PRA requests. The stay or continuance should remain in
14 effect until the full extent and import of the unlawful ex parte communications have been
15 determined.

16 As demonstrated in “Table 1: Compilation of Ex Parte Contacts and Other Events
17 in the CWF Hearing Process” (Ex Parte Timeline Table), attached hereto as Exhibit A-
18 1,¹ the ex parte communications disclosed to date are, in themselves, extremely serious.
19 They concern substantive issues at the heart of the Petition on which the Hearing
20 Officers are expected to render a decision. These ex parte communications clearly
21 violate the parties’ constitutional due process rights, prohibitions set forth in the
22 California Government Code, and the State Water Resources Control Board’s (State
23 Water Board) own rules governing this proceeding. In themselves, these violations

24
25 ¹ See also Declaration of Osha R. Meserve in Support of County of Sacramento et al.’s
26 Motion to Stay or Continue WaterFix Part 2 Hearing for additional information about the
27 Ex Parte Timeline Table. The information in the table was developed based on
28 information obtained through the Porgans PRA request and subsequently produced
 emails. Email correspondence documenting the ex parte contacts is included as Exhibit
 A-2 and is also hyperlinked in the farthest right column of the Ex Parte Timeline Table.

1 warrant significant changes, which may include appointment of independent hearing
2 officers, dismissal of the Petition, and/or other substantial changes affecting the
3 decision-making process in this Hearing.

4 **II. FACTUAL BACKGROUND**

5 On December 28, 2017, Michael A. Brodsky, on behalf of Mr. Patrick Porgans and
6 Save the California Delta Alliance, sent a letter to Michael Lauffer, State Water Board
7 Chief Counsel, addressing an outstanding PRA request filed by Mr. Porgans on August
8 31, 2017, regarding ex parte communications involving WaterFix Hearing Team
9 members (Brodsky Letter, attached hereto as Exhibit B). The Brodsky Letter describes
10 in detail repeated communications between WaterFix Hearing Team members and DWR
11 representatives revealed by the State Water Board's partial disclosure of documents
12 responsive to Mr. Porgans' PRA request. Building upon the ex parte communication
13 documents already disclosed, Mr. Brodsky's letter seeks additional materials exchanged
14 between DWR and WaterFix Hearing Team members.

15 On January 8, 2018, Nicole L. Kuenzi, State Water Board attorney, responded to
16 the Brodsky Letter, acknowledging meetings between Board staff and DWR on factual
17 and legal matters related to the Environmental Impact Report (EIR) for the WaterFix
18 Project (Kuenzi Letter, attached hereto as Exhibit C). On January 10, 2018, Ms. Kuenzi
19 informed Mr. Brodsky that substantial materials were present and/or utilized during these
20 ex parte communications, and that DWR personnel collected all of these materials at the
21 conclusion of each meeting. Ms. Kuenzi also indicated that further documents would be
22 produced on a rolling basis. On January 10, 2018, Mr. Brodsky filed a PRA request with
23 DWR, asking for production of documents that will further elucidate the nature, content,
24 and extent of DWR's ex parte communications with the Hearing Team and other State
25 Water Board personnel after August 26, 2015. (DWR PRA Request, attached hereto as
26 Exhibit D.)

27 As explained below, the evidence of substantive ex parte communications
28 between Hearing Team members and DWR already disclosed warrants a stay or

1 continuance in order to ascertain the full extent of the ex parte communications and their
2 impact on this proceeding. In addition to full compliance with the pending PRA requests,
3 investigation into this misconduct will require formal discovery, most likely including
4 depositions of key personnel involved in – and witnesses to – the unlawful ex parte
5 communications. In his own motion for continuance filed herein, Mr. Brodsky has
6 proposed a 90-day continuance. Assuming that the responses to the further PRA
7 requests are timely and fully comply with requirements of the PRA, and that formal
8 discovery efforts are not delayed by obstructionist tactics, Protestants agree that 90 days
9 should be sufficient. Protestants also agree with Mr. Brodsky’s request that a hearing be
10 scheduled for the purpose of addressing the rule violations that have tarnished this
11 proceeding.²

12 III. LEGAL BACKGROUND

13 A. Due Process and Administrative Procedure Act Requirements

14 The California Constitution guarantees that “[a] person may not be deprived of
15 life, liberty, or property without due process of law.” (Cal. Const. art. I, §7, subd. (a).)
16 The constitutional guarantee of due process, including a fair tribunal, applies in
17 adjudicative proceedings conducted by an administrative agency. (*Morongo Band of*
18 *Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737-739
19 citing *Withrow v. Larkin* (1975) 421 U.S. 35, 46; accord, *Nightlife Partners, Ltd. v. City of*
20 *Beverly Hills* (2003) 108 Cal.App.4th 81, 90 [“Just as in a judicial proceeding, due
21 process in an administrative hearing also demands an appearance of fairness and the
22 absence of even a *probability* of outside influence on the adjudication.”].) The WaterFix
23 petition for change proceeding concerns injury to water rights, a form of property right.
24 (Wat. Code, § 102; *San Francisco v. County of Alameda* (1936) 5 Cal.2d 243, 246.)

25
26 ² Mr. Brodsky’s request, filed on January 12, 2018, is to “Schedule A Reformation
27 Hearing.” Irrespective of the title, the objective is the same: to determine, in light of the
28 evidence of unlawful ex parte communications, how this Hearing may be structured to
comply with the rule of law going forward.

1 Thus, the Constitution guarantees Protestants' due process rights in this proceeding.

2 Adjudicative proceedings before State Water Board hearing officers are governed
3 by chapter 4.5 of the Administrative Procedures Act (APA) (commencing with Section
4 11400 of the Government Code). (Cal. Code Regs., tit. 23, § 648, subd. (b).) The APA
5 ensures a fair tribunal by requiring that, “[w]hile the [adjudicative] proceeding is pending
6 there shall be no communication, direct or indirect, regarding any issue in the
7 proceeding, to the presiding officer from an employee or representative of an agency
8 that is a party or from an interested person outside the agency, without notice and
9 opportunity for all parties to participate in the communication.” (Gov. Code, § 11430.10
10 subd. (a).)

11 **B. California Supreme Court Interpretation and Application of the APA**

12 The APA’s prohibition against ex parte communications extends beyond the
13 agency decision makers. The California Supreme Court interprets “presiding officer” as
14 it is used in the APA to mean all decision makers, including “an officer who presides over
15 an evidentiary hearing,” “agency heads and their delegees, whether or not they preside
16 over an evidentiary hearing,” and, significantly, advisors to decision makers.
17 (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*
18 (2006) 40 Cal.4th 1, 9-10 (*Quintanar*); see also Gov. Code, § 11405.80.) On this point,
19 the Supreme Court explained:

20
21 The Court of Appeal drew no distinction between communications between
22 a prosecutor and a final agency decision maker on the one hand, and those
23 between a prosecutor and the decision maker’s advisor, on the other. Nor
24 do we. Each form of contact equally compromises the protections the
25 APA’s adjudicative bill of rights sought to adopt; nothing in the APA
26 contemplates permitting an agency to accomplish through secondhand
27 communications what is forbidden through firsthand communications.

28 (*Quintanar*, 40 Cal.4th at 10, fn. 8; see also, *Rondon v. Alcoholic Beverage Control*
Appeals Board (2007) 151 Cal.App.4th 1274, 1288-1289 (*Rondon*); *Chevron*
Stations, Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal.App.4th

1 116, 121.)

2
3 In *Quintanar*, the Court reasoned that interpreting the APA to more broadly
4 prohibit ex parte communications to a decision maker or a decision maker’s advisor from
5 a party furthers “two important procedural precepts: First, it promotes neutral decision-
6 making by requiring a limited internal separation of functions Second, the rule
7 preserves record exclusivity.” (*Quintanar, supra*, 40 Cal.4th at pp. 10-11.) These
8 precepts further the Constitutional guarantee of due process because “[t]he action of
9 such an administrative board exercising adjudicatory functions when based upon
10 information of which the parties were not apprised and which they had no opportunity to
11 controvert amounts to a denial of a hearing. [Citation omitted]” (*Rondon, supra*, 151
12 Cal.App.4th at p. 1289-1290.)

13 To succeed on a claim that an agency violated the APA’s ex parte rules, it is not
14 necessary that the evidentiary record contain proof that ex parte communications were
15 actually considered by decision makers or their advisors. As the California Supreme
16 Court has explained:

17 [P]erhaps because such proof is unattainable, the APA prophylactically outlaws
18 any substantive communications or advice from an agency prosecutor to an
19 agency decision maker. The party faced with such a communication need not
20 prove that it was considered; conversely, the agency engaging in ex parte
21 discussions cannot raise as a shield that the advice was not considered.

22 (*Quintanar, supra*, 40 Cal.4th at p. 16.) Similarly, a showing of prejudice is not required.
23 (See *Rondon, supra*, 151 Cal.App.4th at pp. 1289-1290.)

24 Unlawful ex parte communications cannot be cured merely by pointing to other,
25 properly introduced evidence that supports the decision maker’s ruling. (*Rondon, supra*,
26 151 Cal.App.4th at pp. 1289-1290.) The APA requires that a presiding officer make an
27 ex parte communication known by written publication and offer the parties an opportunity
28 to address the communication. (Gov. Code, § 11430.50 subds. (a)-(b).) Specifically, the
presiding officer may allow a party to present evidence concerning the subject of the

1 communication, and may even reopen a hearing that has been concluded. (*Id.* §
2 11430.50(c).) Significantly, receipt by a presiding officer of a communication in violation
3 of the APA may be grounds for disqualification of the presiding officer. (Gov. Code, §
4 11430.60.) **Due process violations that are not corrected in accordance with**
5 **Government Code section 11430.50 require reversal of the adjudicative agency’s**
6 **administrative orders.** (*Quintanar, supra*, 40 Cal.4th at p. 17; *Rondon, supra*, 151
7 Cal.App.4th at p. 1290; *Chevron, supra*, 149 Cal.App.4th at p. 134.)

8 **C. The Rules and Admonitions Governing this Proceeding Prohibit Substantive**
9 **Ex Parte Communications Between Hearing Team Members and DWR**
10 **Representatives.**

11 This Board’s October 30, 2015 Notice of Petition and Notice of Public Hearing
12 expressly and unambiguously reiterated the Board’s prohibition against substantive ex
13 parte communications between parties to this proceeding and hearing team staff:

14 **EX PARTE CONTACTS.** During the pendency of this proceeding,
15 commencing no later than the issuance of the Notice of Hearing, there
16 shall be no ex parte communications with State Water Board members or
17 State Water Board hearing team staff and supervisors, regarding
18 substantive or controversial procedural issues within the scope of the
19 proceeding. (Gov. Code, §§ 11430.10-11430.80.) **Any communications**
20 **regarding potentially substantive or controversial procedural matters,**
21 **including but not limited to evidence, briefs, and motions, must**
22 **demonstrate that all parties were served and the manner of service.**

23 (October 30, 2015 Notice of Petition for the California WaterFix Project and Notice of
24 Public Hearing and Pre-Hearing Conference to Consider the Petition (Hearing Notice), p.
25 36, emphasis in original; see also Exhibit A-1, Ex Parte Timeline Table, p. 3.) The
26 Hearing Officers have continued to reiterate this admonition against substantive ex parte
27 communications on multiple occasions during the WaterFix Hearing.

28 **D. The Board’s Rules Grant Discretion to Issue a Stay or Continuance**

The hearing rules grant the State Water Board discretion to stay or continue the
hearing. Hearings “shall be conducted in a manner as the Board deems most suitable to

1 the particular case ... without unnecessary ... expense to the parties and to the Board.”
2 (Cal. Code Regs., tit. 23, § 648.5.)

3 **IV. DISCUSSION**

4 **A. Communications Between Hearing Team Members and DWR** 5 **Representatives Were Unlawful Ex Parte Communications**

6 Despite the unambiguous prohibition on ex parte communications applicable to
7 this proceeding, the documents released to date by the State Water Board reveal that
8 numerous meetings, phone calls, and information exchanges occurred between DWR
9 and Hearing Team members after DWR filed its Petition. (See Exhibit A-1, Ex Parte
10 Timeline Table; see also Exhibit B, Brodsky Letter, pp. 2-10, see also Exhibit D, DWR
11 PRA request, pp. 2-11.) This evidence establishes two types of violations of the APA’s
12 prohibition against ex parte communications.

13 First, under the clear standard set by the California Supreme Court, the
14 communications, both oral and written, between DWR and State Water Board Hearing
15 Team members constitute unlawful ex parte communications between representatives of
16 an agency that is a party and advisors to the decision makers. DWR is a party to the
17 proceeding. The Hearing Team members “assist the hearing officers by providing legal
18 and technical advice.” (Hearing Notice, p. 12; linked at Exhibit A-1, Ex Parte Timeline
19 Table, p. 3.)

20 The documents disclosed pursuant to the PRA requests demonstrate that at least
21 some of those communications involved critical evidence before the State Water Board
22 in the WaterFix proceeding. Of note, DWR counsel Tripp Mizell and Hearing Team
23 member Dana Heinrich met on September 15, 2015, to discuss technical and procedural
24 deficiencies of a Petition Addendum that the State Water Board received from DWR on
25 September 16, 2015. They met again on October 28, 2015, to discuss similar issues,
26 and that time they were joined by DWR hearing counsel, Kenneth Bogdan. (See Exhibit
27 A-1, Ex Parte Timeline Table, p. 2.) Although the Hearing Notice was not issued until
28

1 October 30, 2015, Government Code section 11430.10, subdivision (a), prohibits ex
2 parte communications “while the proceeding is pending.” (Gov. Code, § 11430.10, subd.
3 (a).) In a water rights matter, a proceeding is typically pending once the State Water
4 Board issues a notice of hearing. (See Transmittal of Ex Parte Communications
5 Questions and Answers Document from Michael Lauffer to the State Water Resources
6 Control Board and Regional Water Quality Control Boards (April 25, 2013), p. 5.)³. The
7 State Water Board’s Chief Counsel, however, has warned that “[w]hen a proceeding is
8 clearly impending, water board members should consider ex parte communications to be
9 prohibited based on due process considerations.” (*Id.* at p. 6.) The Petition for Change
10 in Water Rights was submitted to the State Water Board by DWR and the Bureau of
11 Reclamation on August 26, 2015. Immediately, a flood of letters from interested parties
12 criticizing the petition began pouring in. At this point, there was no question that the
13 petition was headed for a contested evidentiary proceeding. Therefore, any
14 communications between DWR representatives and Hearing Team members after
15 August 26, 2015, concerning the WaterFix change petition constituted improper ex parte
16 communications.

17 Meetings, conference calls, and email conversations between DWR
18 representatives and State Water Board Hearing Team members repeatedly occurred
19 before and after the filing of the Hearing Notice on October 30, 2015. For instance, on
20 January 25, 2016, DWR representatives, Kenneth Bogdan, Cassandra Enos, Jennifer
21 Pierre, and Chandra Chilmakuri held an in-person and WebEx meeting with State Water
22 Board Hearing Team members Dana Heinrich, John Gerlach, and Rich Satkowski to
23 discuss “Preparation of the Final EIR/EIS.” (See Exhibit A-1, Ex Parte Timeline Table, p.
24 5.) On May 26, 2016, DWR representatives, Kenneth Bogdan, Jennifer Pierre, Chandra
25 Chilmakuri again met with State Water Board Hearing Team members Dana Heinrich,
26 Diane Riddle John Gerlach, and Kyle Ochendusko to discuss WaterFix Appendix 5E,

27 _____
28 ³ See Exhibit B, Brodsky Letter, Attachment 8.

1 regarding the Boundary 1–Boundary 2 analysis. (See Exhibit A-1, Ex Parte Timeline
2 Table, p. 9.) On June 10, 2016, in an email discussion between DWR representatives,
3 Kenneth Bogdan and Marcus Yee and State Water Board Hearing Team members,
4 Dianne Riddle, Dana Heinrich and Kyle Ochendusko, Hearing Team members were
5 provided information and, in return, offered direction about the content of DWR’s
6 Boundary 1 – Boundary 2 modeling analysis contained in the EIR. (See Exhibit A-1, Ex
7 Parte Timeline Table, p. 11.) These communications and others identified in the Ex
8 Parte Timeline Table, the Brodsky Letter, and the DWR PRA request constitute unlawful
9 ex parte communications between DWR and the Hearing Team. These communications
10 and any others between DWR representatives and Hearing Team members that may be
11 produced through responses to the pending PRA requests, are relevant to the
12 exploration of the extent and substance of any and all ex parte communications from
13 August 26, 2015, through the present.

14 Second, State Water Board staff who were part of the WaterFix Hearing Team
15 exceeded their authority as nonadversarial staff members when they participated in the
16 development of evidence after DWR filed its Petition. Although nonadversarial staff are
17 permitted to advise decision makers in a proceeding, they may not go so far as to
18 “furnish, augment, diminish, or modify the evidence in the record.” (See Gov. Code, §
19 11430.30 subd. (a).) The State Water Board Chief Counsel’s interpretation of the ex
20 parte rules is to this effect. (See Transmittal of Ex Parte Communications Questions and
21 Answers Document from Michael Lauffer to the State Water Resources Control Board
22 and Regional Water Quality Control Boards (April 25, 2013), p. 9.)⁴ The available
23 correspondence illustrates that Hearing Team members coordinated with DWR in
24 revising the EIR/EIS and modeling analysis intended for submission to the Board. (See
25 Exhibit B, Brodsky letter, pp. 2-3; see also June 10, 2016 entry in Exhibit A-1, Ex Parte
26 Timeline Table, p. 11.) This clearly constituted a violation, because staff overstepped

27 _____
28 ⁴ See Exhibit B, Brodsky Letter, Attachment 8.

1 their nonadversarial authority by shaping evidence in the record. (See Gov. Code, §
2 11430.30 subd. (a).)

3 The Kuenzi Letter states that State Water Board staff met with DWR staff or
4 consultants “solely related to the adequacy of the Environmental Impact Report (EIR) for
5 the WaterFix Project for which the State Water Board is a responsible agency”
6 (See Exhibit C, Kuenzi Letter, p. 4.) Ms. Kuenzi asserts that State Water Board staff
7 were not engaged in communications with DWR regarding matters at issue in the
8 proceeding and that “[t]he subject matter of these meetings was restricted to factual and
9 legal matters related to the EIR.” (*Ibid.*) However, California courts have interpreted the
10 prohibition against ex parte communications regarding “any issue in the proceeding” to
11 include “communication of information in which counsel [or a party] knows or should
12 know the opponents would be interested . . . [T]he standard generally bars any ex parte
13 communication by counsel [or a party] to the decisionmaker of information relevant to
14 issues in the adjudication.” (*Mathew Zaheri Corp. v. New Motor Vehicle Board* (1997)
15 55 Cal.4th 1305, 1317.) The underlying importance of the EIR/EIS and modeling to the
16 State Water Board’s review of the WaterFix Project, and the fact that DWR’s witnesses
17 and other parties have relied on the EIR/EIS and modeling in their testimony, logically
18 suggests that DWR and Hearing Team staff knew or should have known that the other
19 parties to the proceedings would have an interest in participating in discussions
20 regarding revisions to the scope and content of the CEQA effects analysis, including the
21 modeling that was the basis for both that analysis and DWR’s Petition for Change.

22 Additionally, the Kuenzi Letter states: “[t]o the extent that any underlying factual
23 information discussed during the meetings may be related to any controversial matter
24 within the scope of the hearing for the change petition for the WaterFix Project, State
25 Water Board staff did not share this information with any member of the State Water
26 Board.” (See Exhibit C Kuenzi Letter, pp. 4-5.) This statement ignores the Supreme
27 Court’s holding that due process rights may be violated regardless of whether the
28 ultimate decision maker is made aware of the content of ex parte communications or if

1 prejudice is shown. (See *Rondon, supra*, 151 Cal.App.4th at pp. 1289-1290.) Whether
2 or not the substance of the discussions was shared with the Hearing Officers (which,
3 Protestants assert, remains an unresolved question of fact subject to formal discovery,
4 including depositions), is irrelevant to a determination that unlawful ex parte
5 communications occurred.

6 Throughout the time that Hearing Team members and DWR representatives were
7 conducting ex parte communications, the Hearing Officers made several rulings in the
8 WaterFix hearing bearing on the role of CEQA and water modeling evidence in the
9 hearing. The topics of the admitted ex parte communications are within the scope of,
10 and indeed central to, the Hearing. Moreover, between January and October of 2016,
11 the Hearing Officers made nine rulings that explained the import of the CEQA process
12 within the context of the hearings or made a substantive decision regarding the rights of
13 the parties with respect to the modeling. (See Exhibit A-1, Ex Parte Timeline Table.)
14 The Hearing Officers acknowledged that the Final EIR/EIS would be submitted into
15 evidence in the hearing, and therefore, the parties would be able to “point to the analysis
16 contained in the CEQA document as evidence of the potential effects of the project on
17 legal users of water, or they may wish to refute that analysis.” (January 15, 2016,
18 *Service List of Participants, List of Other Interested Persons, and Pre Hearing*
19 *Conference Agenda in the Matter of Hearing on Petition Requesting Changes in Water*
20 *Rights of the Department of Water Resources and U.S. Bureau of Reclamation for the*
21 *California WaterFix Project*, pp. 5-6; see Exhibit A-1, Ex Parte Timeline Table, P. 4.) The
22 Hearing Officers have recognized the importance of the analysis contained in the CEQA
23 documents on the outcome of the hearing and whether Petitioners can demonstrate that
24 the WaterFix Project would not injure legal users of water. Likewise, the disclosed ex
25 parte communications relate to the WaterFix Project’s unreasonable effects on fish and
26 wildlife and the public interest.

27 On May 25, 2016, Petitioner DWR submitted modeling data in the change petition
28 proceeding that it used in the CEQA documents to evaluate the effects of the WaterFix

1 Project on water flows and water quality. Many parties requested an extension of time to
2 file procedural and evidentiary objections and additional time before the Hearing
3 commenced to evaluate this new data. On June 10, 2016, the Hearing Officers granted
4 a 27-day extension to file objections but denied the continuance to the Hearing
5 requested by the parties. (June 10, 2016, *Deadline Extension Requests, Policy*
6 *Statements, Format of Petitioners' Case-in-Chief, Parties' Participation, and Other*
7 *Procedural Matters*, pp. 1-2; see Exhibit A-1, Ex Parte Timeline Table, p.11.) The
8 Hearing Officers' ruling limiting the opportunity for protestants to review and object to
9 complex modeling data, and refusing to continue the hearing, all the while maintaining
10 ex parte communications with DWR about what would be included in the modeling
11 evidence, suggests bias by the Hearing Officers. (*Morongo, supra*, 45 Cal.4th at p. 741.)
12 The appearance of bias is particularly concerning because the modeling and EIR/EIS
13 are the primary evidence DWR has submitted on the question of whether the WaterFix
14 Project would injure Protestants' water rights and otherwise be contrary to the public
15 interest due to unreasonable effects on fish and wildlife and public trust resources.

16 The ex parte communications have the potential to result in an unfair
17 hearing. The same Hearing Team members who participated in shaping the modeling
18 and EIR/EIS with Petitioner DWR advised the Hearing Officers with respect to disputes
19 about the quality and import of key modeling and EIR evidence at the heart of the
20 protests. Numerous protestants have argued that the water modeling and EIR/EIS are
21 insufficient to answer questions about the key issues in this hearing, including the extent
22 to which the petition will injure legal users of water or public trust resources. The
23 Hearing Officers have overruled objections to the modeling on the theory that such
24 arguments will go to the weight of the evidence. Where members of the Hearing Team,
25 the key advisors to the Hearing Officers, have helped shape the water modeling and
26 EIR/EIS, it is foreseeable that they may advise the Hearing Officers and State Water
27 Board that the modeling, and EIR/EIS's impact conclusions should be given great
28

1 weight.⁵

2 Even in the absence of direct cause-and-effect evidence, however, the
3 information already disclosed establishes an appearance of pre-decisional bias and
4 collusion so compelling that this proceeding has been irrevocably tainted. Whether it
5 can be salvaged, in whole or in part, remains to be determined.

6 **B. A Stay or Continuance Would Allow the State Water Board and Parties the**
7 **Opportunity to Determine the Extent and Substance of Any and All Ex Parte**
8 **Communications**

9 As articulated by the Supreme Court, it is presumed that state administrative
10 adjudicators are impartial “when rules mandating an agency’s internal separation of
11 functions and prohibiting ex parte communications are observed.” (*Morongo Band of*
12 *Mission Indians v. State Water Resources Control Board*, 45 Cal.4th 731, 741.) This
13 presumption of impartiality “can be overcome only by specific evidence demonstrating
14 actual bias or a particular combination of circumstances creating an unacceptable risk of
15 bias.” (*Ibid.*) The documents disclosed to date by the State Water Board reveal that an
16 unacceptable risk of bias has resulted from a failure to maintain the necessary
17 separation of functions between State Water Board staff members performing duties of
18 the responsible agency and staff members assigned to the Hearing Team. The State
19 Water Board’s failure to maintain a separation of functions, as discussed above, cannot
20 be saved by a finding that ex parte communications were not shared with the decision
21 makers; the communications between DWR and the Hearing Team violate the APA.

22 If the ex parte communications are not corrected in accordance with
23 Government Code section 11430.50 prior to a final decision by the administrative
24 adjudicators, the administrative decision can be, and most likely will be, reversed.
25 Without full disclosure of the ex parte communications, and the opportunity to evaluate

26 ⁵ A State Water Board finding that the modeling and EIR/EIS are not adequate would be
27 tantamount to a finding that its staff (Hearing Team advisors) failed in their job to ensure
28 that the document was adequate under CEQA for the State Water Board’s responsible
agency role.

1 them, it is premature to determine the appropriate remedy. However, if these
2 proceedings are stayed or continued pursuant to section 648.5 of title 23 of the Code of
3 Regulations, there will be an opportunity to establish the extent of ex parte
4 communications between DWR and the Hearing Team, publish any extra-record
5 evidence, and determine the extent to which Hearing Team members and
6 nonadversarial advisors may have shaped evidence in the WaterFix record. The
7 possibility still exists, depending on the scope of the communications, that irreparable
8 damage to the proceeding, and the parties, may be avoided.

9 **C. Allowing the Hearing to Proceed Before Ex Parte Communication Issues Are
10 Resolved Will Result in Prejudice and Substantial Hardship to Protestants**

11 Protestants and all parties to this proceeding will be prejudiced if Protestants'
12 motion is not granted.⁶ The very same topics of the unlawful ex parte communications
13 revealed to date—water modeling and the EIR/EIS--are also the subject of testimony
14 and evidence submitted in Part 2. Without a stay, the parties and the State Water Board
15 will invest significant resources reviewing testimony and participating in the next part of
16 the hearing, currently scheduled to last 93 days. To ensure there is no prejudice, due
17 process requires that parties be informed of the full extent of ex parte communications
18 relating to Petitioners' evidence and anything else pertinent to the hearing, before the
19 hearing proceeds.

20 **V. CONCLUSION**

21 A stay or continuance is within the Board's discretion to conform the hearing as
22 necessary and ensure the continuity and efficiency of the hearing process. In addition,
23 neither the parties nor the State Water Board should incur the potentially unnecessary
24 expense of proceeding with Part 2 until a complete investigation results in a
25 determination regarding the scope and implications of the ex parte communications,
26 including whether they have irreparably compromised this Hearing. To ensure

27 _____
28 ⁶ Protestants need not show that the ex parte communications have or will result in
prejudice for there to be a violation of the APA.

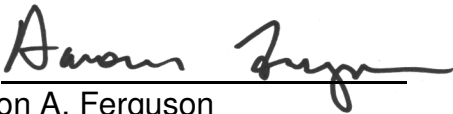
1 Protestants' due process rights are protected, the State Water Board should stay or
2 continue this hearing until the full extent and import of the unlawful ex parte
3 communications have been determined. That will require adequate time for compliance
4 with the pending PRA requests and the opportunity for protestants to identify, explore
5 and evaluate the significance of the evidence, and time for a hearing to determine how
6 to move forward in compliance with the rule of law.

7 Based on the foregoing, the Protestants respectfully request that the Hearing
8 Officers grant this motion for stay or continuance.

9 SOMACH SIMMONS & DUNN
A Professional Corporation

10

11 Dated: January 15, 2018

By: 
Aaron A. Ferguson
Attorney for County of Sacramento and
Sacramento County Water Agency

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13


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18 Dated: January 15, 2018

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Sacramento Regional County Sanitation
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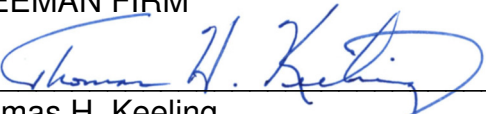
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FREEMAN FIRM

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23 Dated: January 15, 2018

By: 
Thomas H. Keeling
Attorney for County of San Joaquin

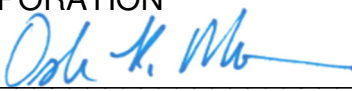
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SOLURI MESERVE, A LAW
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LAW OFFICES OF MATTHEW
EMRICK

Dated: January 15, 2018

By: Matthew L. Emrick / *ML*
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