
State Water Resources Control Board

March 27, 2026

Re: Ruling on DTEC’s Evidentiary Objections to DWR’s “Subpoena Panel” Exhibits and Related Testimony (Hearing on Proposed Delta Conveyance Project)

TO ALL PARTIES:

This procedural ruling responds to the Delta Tribal Environmental Coalition’s (DTEC) November 21, 2025 evidentiary objections to exhibits submitted by the Department of Water Resources (DWR) and related testimony by Anecita Agustinez, Kristina Reese, and Susan Lassell (DWR’s witnesses).¹ (2025-11-21 DTEC’s Evidentiary Objections.) The deadline for DWR to respond to DTEC’s objections was December 10, 2025. (See 2025-10-22 Eighth Amended Hearing Notice, p. 4 [setting December 1 deadline for replies to evidentiary objections to offer of exhibits]; modified by 2025-11-18 AHO email to service list [setting December 10 deadline for parties to respond to DWR’s evidentiary objections to case-in-chief evidence]; clarified by 2025-12-04 Ninth Amended Hearing Notice, p. 7 [describing December 10 as deadline for parties to respond to evidentiary objections to case-in-chief evidence].) DWR did not file a response to the evidentiary objections by the deadline, and apparently first became aware of the oversight based on DTEC’s request made during the hearing on February 20, 2026, that the hearing officer enter a ruling sustaining DTEC’s unopposed objections. DWR filed a response to DTEC’s evidentiary objections with an associated statement in support of the late filing on February 27, 2026. (2026-02-27 Ltr. to AHO with Ex. A.) DTEC responded to DWR’s request to late-file its response on March 6, 2026. (2026-03-06 DTEC’s Response to DWR’s Letter.)

DTEC objects that during examination by DTEC’s counsel, DWR’s witnesses asserted confidentiality of information obtained through Tribal consultation, but during cross-examination by DWR, DWR offered exhibits and sought testimony from the witnesses that allegedly violated these same confidentiality principles. (2025-11-21 DTEC’s Evidentiary Objections, p. 2.) DTEC does not assert that the information is confidential – rather, DTEC argues that the definition of confidential information applied by DWR’s

¹ The unusual procedural posture of the presentation of these witnesses is described in additional detail in the November 20, 2025 procedural ruling addressing the scope of rebuttal evidence.

witnesses should apply in the same manner to written exhibits and testimony submitted by DWR. (*Id.* at p. 3.) DWR responds that the offered exhibits and associated testimony do not include information provided by Tribes and, therefore, is not confidential. (2026-02-27 Ltr. to AHO, p. 5.)

There is no dispute that for purposes of this proceeding, the Tribes involved have not waived any privilege of confidentiality applicable to the Tribal consultation process. DWR also did not offer into the evidentiary record any written policy describing the scope of confidentiality that it recognizes as applicable to information arising from formal or informal Tribal consultation.

Both fairness and prudence weigh in favor of sustaining DTEC's objections at this time, while allowing the option for DWR to re-offer the exhibits in a manner that allows for fair and careful consideration of the underlying question of confidentiality. First, there is no dispute that DWR filed its response to the objections more than two months late. Although I initially ruled orally during the hearing that DWR may file a late response, I subsequently directed DWR to file with its response a justification for acceptance of that late-filed response as a matter of procedural fairness. I also allowed DTEC the opportunity to respond in writing to DWR's justification. Although there have been many deadlines in this proceeding, and those deadlines have, at times, shifted, DWR simply missed the deadline for filing a response to DTEC's objections. Because DWR will have the option to re-offer the exhibits, concern about developing a robust record on which the Board is ultimately to base its decision is not a sufficient basis in this instance to excuse DWR's oversight.

Second, to date in this proceeding, there is a lack of argument or evidence submitted by the parties about the scope of confidentiality applicable to the Tribal consultation process and associated information maintained by DWR arising from that process. Confidentiality is an essential element of meaningful Tribal consultation. Therefore, any procedural ruling implicating such a privilege should be carefully briefed and carefully considered by the hearing officer to avoid a chilling effect on consultation in this and other proceedings. Complicating the issue as presented here, DTEC neither affirmatively asserts nor denies that a privilege of confidentiality should apply to the exhibits and testimony at issue in its objection. Instead, DTEC argues that the scope of confidential information was inconsistently asserted by DWR's witnesses in their testimony and DWR's offer of exhibits into the evidentiary record.

Given the lack of a clear statement or assertion by the parties as to the scope of confidential information developed through Tribal consultation, the lack of an opportunity for the parties to raise the issue for resolution in a considered manner prior to testimony by DWR's witnesses, and considering DWR's untimely response to the evidentiary objections, I conclude that the evidence to which DTEC objects should be excluded without prejudice. The objections by DTEC are relatively narrow in context, affecting only exhibits and testimony elicited based on the exhibits introduced by DWR for purposes of cross-examination of its own employees and consultants. The introduction

of this surprise evidence, which is generally acceptable for purposes of cross-examination in AHO hearings, in this instance resulted in the presentation of a complex issue of confidentiality to be navigated in real time during the hearing. (See e.g., Reporter's Transcript, October 28, 2026, pp. 86-90.) I conclude that the significant and important question as to the confidentiality of categories of information developed through Tribal consultation is more appropriately addressed in advance of the presentation of testimony, absent the element of surprise, after the parties have met and conferred about the scope of any evidence to be offered.

Therefore, DTEC's evidentiary objections are sustained, but DWR may seek to offer surrebuttal evidence and testimony relevant to the Tribal consultation process if otherwise properly within the scope of surrebuttal evidence. Such evidence could be the same as that which is hereby excluded. If DWR seeks to present this type of evidence in surrebuttal, DWR shall meet and confer with DTEC in advance of submittal to clearly articulate the scope of confidentiality that applies to information developed through Tribal consultation and submit a statement of the agreed upon scope to the AHO. During any such meet and confer, DWR and DTEC shall also discuss the opportunity for DTEC to further examine DWR's witnesses based on the principles and scope of confidentiality so agreed upon. If agreement cannot be reached, the parties shall clearly articulate the asserted scope of confidentiality by each party, for resolution by the hearing officer through an appropriate motion. Furthermore, I direct the parties to meet and confer in advance of submitting any evidentiary objections based on confidentiality in the Tribal consultation process to attempt to resolve the disagreement, and if unresolved, to clearly describe the positions of each party.

Sincerely,



Nicole Kuenzi
Presiding Hearing Officer
Administrative Hearings Office
State Water Resources Control Board

Attachments:

- Attachment A – Rulings on DTEC Parties' Evidentiary Objections to DWR Subpoena Panel Exhibits
- Attachment B – Service List

ATTACHMENT A

**DELTA TRIBAL ENVIRONMENTAL COALITION PARTIES EVIDENTIARY
OBJECTIONS TO DEPARTMENT OF WATER RESOURCES’
SUBPOENA PANEL EXHIBITS**

MATERIAL OBJECTED TO:	 GROUNDS FOR OBJECTION:	 RESPONSE TO OBJECTION:	 RULING ON OBJECTION:
DWR-1200, p. 29, “Project Bus Tours . . . A presentation at the Intake Screens, Incorporated facility was included on the tour.”	DWR witnesses attested that the process by which a Tribe wishes to coordinate consultation with DWR is confidential. <i>See, supra</i> , at pp. 2–3.	The information sought to be stricken on PDF pg. 30 is factual in nature and what DWR offered. It does not contain confidential information provided by Tribes.	Sustained: x Overruled: <input type="checkbox"/> See attached ruling letter.
DWR-1200, pp. 29–30, “A. Project Updates . . . and mitigation for project impacts on known or potential Tribal cultural resources.”	DWR witnesses attested that communications by Tribes to DWR during the consultation process are confidential. <i>See, supra</i> , at pp. 2–3. DWR witnesses attested that the process by which a Tribe wishes to coordinate consultation with DWR is confidential. <i>Id.</i> DWR witnesses attested that communications by DWR to Tribes during the consultation process are confidential. <i>Id.</i>	The information sought to be stricken on PDF pg. 30-31 is factual in nature. It provides dates and general information requested as well as the dates that project updates were provided. It does not contain confidential information provided by Tribes. It appears that DTEC seeks to strike the following, which provides no detail, but rather what categories of information would be provided.	Sustained: x Overruled: <input type="checkbox"/> See attached ruling letter.

MATERIAL OBJECTED TO:	GROUNDS FOR OBJECTION:	RESPONSE TO OBJECTION:	RULING ON OBJECTION:
		<p>“Throughout the preparation of the EIR, DWR provided consulting Tribes with updates on the CEQA schedule to maintain transparency with Tribes regarding DWR’s goals for consultation, including the identification of Tribal cultural resources, the discussion of project impacts on known or potential Tribal cultural resources, and mitigation for project impacts on known or potential Tribal cultural resources.” DWR-1200 PDF p. 31.</p> <p>The language above was almost identical from what was in the FEIR. AHO-1200, PDF p. 12:25- 29.</p>	
<p>DWR-1200, pp. 32–33, “F. Formal Engagement Letters and Emails Sent During Consultation . . . and requested to schedule additional consultation meetings.” (Including Table 5)</p>	<p>DWR witnesses attested that the process by which a Tribe wishes to coordinate consultation with DWR is confidential. <i>See, supra</i>, at pp. 2–3. DWR witnesses attested that communications by DWR to Tribes during the consultation process are confidential. <i>Id.</i></p>	<p>The information on PDF pages 33-34 contains factual information, including dates. They do not contain confidential information provided by Tribes.</p>	<p>Sustained: x Overruled: <input type="checkbox"/> See attached ruling letter.</p>

MATERIAL OBJECTED TO:	 GROUNDS FOR OBJECTION:	 RESPONSE TO OBJECTION:	 RULING ON OBJECTION:
DWR-1200, p. 39, “During various stages of development . . . were provided to the Tribe on December 8, 2023, via email.”	DWR witnesses attested that communications by Tribes to DWR during the consultation process are confidential. <i>See, supra</i> , at pp. 2–3. DWR witnesses attested that the process by which a Tribe wishes to coordinate consultation with DWR is confidential. <i>Id.</i> DWR witnesses attested that communications by DWR to Tribes during the consultation process are confidential. <i>Id.</i>	The information on PDF pages 40 contains factual information regarding opportunities provided to comment on the TCRIR. Nothing in DWR-1200 PDF p. 40 contains confidential information provided by Tribes.	Sustained: x Overruled: <input type="checkbox"/> See attached ruling letter.
DWR-1201 10/28/2025 Zoom transcript, lines 1370–1424 (Video recording 04:13:10–04:22:50)	Shingle Springs did not submit a waiver of confidentiality to discuss or submit into the record details regarding Tribal consultation for the DCP during the October 28, 2025 panel. DWR witnesses attested that communications by Tribes to DWR during the consultation process are confidential. <i>See, supra</i> , at pp. 2–3. DWR witnesses attested that the process by which a Tribe wishes to coordinate consultation with DWR is confidential. <i>Id.</i> DWR witnesses attested that communications by DWR to Tribes during the consultation process are confidential. <i>Id.</i>	The information submitted in DWR-1201 and discussed in the cited transcript do not contain information provided by Shingle Springs Band of Miwok Indians. It contains a summary of dates of consultation and coordination. Acknowledging that consultation meetings happened and describing what information DWR provided is not confidential. DTEC witnesses challenged the adequacy of the consultation process and DWR-1201 provides	Sustained: x Overruled: <input type="checkbox"/> See attached ruling letter.

MATERIAL OBJECTED TO:	 GROUNDS FOR OBJECTION:	 RESPONSE TO OBJECTION:	 RULING ON OBJECTION:
		<p>factual information that summarizes the coordination and consultation dates. It does not contain confidential information provided by Tribes. See above DWR response. The information submitted in DWR-1202 and discussed in the cited transcript do not contain information provided by United Auburn Indian Community. It contains a summary of dates of consultation and coordination. Acknowledging that consultation meetings happened and describing what information DWR provided is not confidential. DTEC witnesses challenged the adequacy of the consultation process and DWR-1202 provides factual information that summarizes the coordination and consultation dates. It does</p>	

MATERIAL OBJECTED TO:	GROUNDS FOR OBJECTION:	RESPONSE TO OBJECTION:	RULING ON OBJECTION:
		not contain confidential information provided by Tribes.	
DWR-1202 10/28/2025 Zoom transcript, lines 1425–1434 (Video recording 04:22:51–04:24:03)	UAIC did not submit a waiver of confidentiality to discuss or submit into the record details regarding Tribal consultation for the DCP during the October 28, 2025 panel. DWR witnesses attested that communications by Tribes to DWR during the consultation process are confidential. <i>See, supra</i> , at pp. 2–3. DWR witnesses attested that the process by which a Tribe wishes to coordinate consultation with DWR is confidential. <i>Id.</i> DWR witnesses attested that communications by DWR to Tribes during the consultation process are confidential. <i>Id.</i>	The information submitted in DWR-1202 and discussed in the cited transcript do not contain information provided by United Auburn Indian Community. It contains a summary of dates of consultation and coordination. Acknowledging that consultation meetings happened and describing what information DWR provided is not confidential. DTEC witnesses challenged the adequacy of the consultation process and DWR-1202 provides factual information that summarizes the coordination and consultation dates. It does not contain confidential information provided by Tribes.	Sustained: x Overruled: <input type="checkbox"/> See attached ruling letter.

MATERIAL OBJECTED TO:	 GROUNDS FOR OBJECTION:	 RESPONSE TO OBJECTION:	 RULING ON OBJECTION:
<p>DWR-1203 10/28/2025 Zoom transcript, lines 1435–1439 (Video recording 04:24:04–04:24:49)</p>	<p>Winnemem Wintu did not submit a waiver of confidentiality to discuss or submit into the record details regarding Tribal consultation for the DCP during the October 28, 2025 panel. DWR witnesses attested that communications by Tribes to DWR during the consultation process are confidential. <i>See, supra</i>, at pp. 2–3. DWR witnesses attested that the process by which a Tribe wishes to coordinate consultation with DWR is confidential. <i>Id.</i> DWR witnesses attested that communications by DWR to Tribes during the consultation process are confidential. <i>Id.</i></p>	<p>The information submitted in DWR-1203 and discussed in the cited transcript do not contain information provided by Winnemem Wintu Tribe. It contains a summary of dates of consultation and coordination. Acknowledging that consultation meetings happened and describing what information DWR provided is not confidential. DTEC witnesses challenged the adequacy of the consultation process and DWR-1203 provides information that summarizes the coordination and consultation dates. It does not contain confidential information provided by Tribes.</p>	<p>Sustained: x Overruled: <input type="checkbox"/> See attached ruling letter.</p>

**ATTACHMENT B
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