

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. Box 2000, Sacramento, CA 95812-2000**  
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterboards.ca.gov/waterrights>

**COMMENTS BY FRIANT WATER AUTHORITY AND ITS  
PARTICIPATING MEMBERS  
IN ADVANCE OF JANUARY 28, 2016 PRE-HEARING  
CONFERENCE**

**CALIFORNIA WATERFIX HEARING**  
**California Department of Water Resources and U.S. Bureau of Reclamation**  
The Public Hearing scheduled to commence on **Thursday, April 7, 2016**

The State Water Resources Control Board, in its January 15, 2016 memorandum to participants (“January 15, 2016 memorandum”), invited input on various subjects. Friant Water Authority and its participating members (collectively, “Friant”) provide the following in response to that invitation. In the interest of conducting an efficient pre-hearing conference, Friant does not intend to repeat these comments during the conference but will respond to any questions the Board or its staff may have.

**A. Proposed Addition to Agenda for January 28, 2016 Pre-Hearing Conference**

**Friant requests clarification that Sub-issues 2(a) and (b) set forth in the Notice of Hearing do not constrain the bases for a claim of injury to a legal user of water, nor limit the evidence that may be submitted in support of such a claim.**

The January 15, 2016 memorandum (page 5) implies that evidence and argument may be submitted “to the extent that the evidence or argument relates to the key hearing issues provided in the Hearing Notice.” Those issues, as they pertain to Part I of the hearing, are:

1. Will the changes proposed in the Petition in effect initiate a new water right?
2. Will the proposed changes cause injury to any municipal, industrial or agricultural uses of water, including associated legal users of water?
  - a. Will the proposed changes in points of diversion alter water flows in a manner that causes injury to municipal, industrial, or agricultural uses of water?
  - b. Will the proposed changes in points of diversion alter water quality in a manner that causes injury to municipal, industrial, or agricultural uses of water?
  - c. If so, what specific conditions, if any, should the State Water Board include in any approval of the Petition to avoid injury to these uses?

Notice of Petition Requesting Changes in Water Rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix Project and Notice of Public Hearing and Pre-Hearing Conference To Consider the Above Petition (Oct. 30, 2015) at 11. The second issue is an appropriately broad statement of the injury inquiry. To the extent sub-issues 2(a) and (b) purport to constrain the bases for a claim of injury or the evidence submitted to support a claim of injury, however, they are improper. Compare the statement of key hearing issues in *In re Applications 31487 & 31488 Filed by U.S. Bureau of Reclamation, & Petitions to Change License 3723 (Application 5169) of Washoe County Water Conservation District, License 4196 (Application 9247) of Truckee Meadows Water Authority, & Permit 11605 (Application 15673) & License 10180 (Application 18006) of U.S. Bureau of Reclamation Truckee River Watershed*, Decision 1651, 2012 WL 5494093 \*7 (Cal. St. Wat. Res. Control Bd. Oct. 16, 2012).

The Legislature dictated the showing required of a proponent of a change in point of diversion, place of use or purpose of use: “Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it [the board] shall find, that the change will not operate to the injury of any legal user of the water involved.” CAL. WATER CODE § 1702. The content of a protest of such a change is mandated by CAL. WATER CODE § 1703.2. It is the protestant’s right and responsibility to identify and establish that injury to a legal user of water would be inflicted by a proposed change without constraint by the Board or its staff.

## **B. Timing of the Hearing in These Proceedings**

The scheduled hearing on the Petition is premature. First, selection of Alternative 4A as the preferred alternative is provisional and subject to change. Bay Delta Conservation Plan/ California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (“RDEIR/SDEIS”) at 1-6. Neither the Board nor the participants in the hearing can know whether Alternative 4A actually will be the petitioners’ final proposal. If a different alternative is selected, or if the environmental analysis of Alternative 4A contained in the final environmental impact report/environmental impact statement differs significantly from that found in the RDEIR/SDEIS, the Board and the participants will have wasted considerable time and resources.

Second, the Petitioners made no pretense of disclosing a plan of operation for use in assessing a claim of injury. Indeed, there is no plan of operation, because the Petitioners intend to develop one over time through adaptive management. “Alternative 4A starting operations will be determined through the continued coordination process as outlined in the Section 7 consultation process and 2081(b) permit prior to the start of construction. An adaptive management and monitoring program, as described below, will be implemented to develop additional science during the course of project construction and operation to inform and improve conveyance facility operational limits and criteria.” RDEIR/SDEIS at 4.1-5. Until the Petitioners develop and disclose a plan of operation, they cannot meet their statutory responsibility to prove “that the change will not operate to the injury of any legal user of the water involved.” CAL. WATER CODE § 1702. Significantly, it is the *Petitioners’* burden of proof

to establish that the proposed changes to the water rights permits will *not* injure any legal user of water; it is not the responsibility of the water users to establish the nature and extent to which they will be injured by an as-yet undefined project. The Petition lacks the information required to meet the Petitioners' burden of proof.

Third, the Bureau of Reclamation released its draft Biological Assessment for the California WaterFix on January 15, 2016, which is "to provide the basis for consultation with the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) to determine whether the proposed action (PA) is likely to: (1) adversely affect listed species or designated critical habitat; (2) jeopardize the continued existence of species that are proposed for listing; or (3) adversely modify designated critical habitat." *Id.* at 1-1. The Biological Assessment was submitted with a request for *initiation* of formal consultation that is expected to result in a biological opinion at some unknown future time. *Id.* at 1-2. The Board and participants in the hearing cannot know how long it will take to complete formal consultation and issue a biological opinion, or what (if any) additional restrictions or conditions may be imposed by a biological opinion. Petitioners' representations concerning the effect of the proposed project are speculative at this point.

#### **C. Presentation of Witnesses' Testimony**

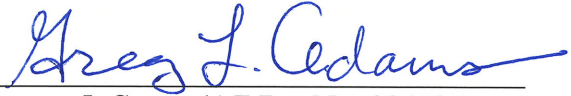
Friant does not object to a procedure by which its witnesses William Luce, Fergus A. Morrissey and Sean P. Geivet are cross-examined as a panel. All will address topics related to operation of the Friant Division. Please note that, due to pre-existing commitments that cannot be rescheduled, Mr. Luce will not be available to testify from April 9 through 19. Witness Walter Bourez, III is testifying on behalf of numerous protestants. Friant will cooperate and coordinate with those parties in scheduling and presentation of his testimony. To the extent their testimony is determined to be necessary, Friant witnesses Daniel B. Steiner and Dennis R. Keller will testify on topics distinct from the other Friant witnesses, making cross-examination of them as part of a panel potentially confusing and time-consuming.

#### **D. Opening Statements**

Opening statements could be limited to no more than 25 pages of double-spaced text and single-spaced footnotes (if any).

Dated: January 22, 2016

FENNEMORE CRAIG, P.C.



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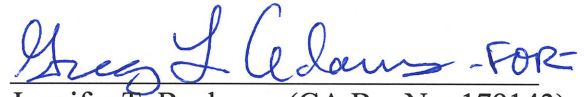
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**PROOF OF SERVICE**

STATE OF ARIZONA )  
 ) ss  
COUNTY OF MARICOPA )

I am employed in the aforesaid County, State of Arizona; I am over the age of 18 years and not a party to the within action; my business address is 2394 East Camelback Road, Suite 600, Phoenix, Arizona 85016-3429.

On January 22, 2016, I submitted the foregoing **COMMENTS BY FRIANT WATER AUTHORITY AND ITS PARTICIPATING MEMBERS IN ADVANCE OF JANUARY 28, 2016 PRE-HEARING CONFERENCE** to the State Water Resources Control Board via electronic mail to [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov), with the subject "California WaterFix Hearing," and served the interested parties in this action as follows.

X **BY ELECTRONIC SERVICE** to the authorized representative/attorney of each Party or Participant listed in Table 1 attached to the State Water Resources Control Board's memorandum dated January 22, 2016, with the exception of the authorized representative/attorney of the Party or Participant identified immediately below, who was served by First Class Mail.

X **BY FIRST CLASS MAIL.** I placed an envelope for deposit in the U.S. Mail for service by the United States Postal Service, with first-class postage thereon fully prepaid, addressed to Suzanne Womack & Sheldon Moore, 3619 Land Park Drive, Sacramento, California 95818, representing Clifton Court, L.P. I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

       **BY FEDERAL EXPRESS.** I placed such envelope for deposit in a Federal Express drop box for service by Federal Express delivery, with postage thereon fully prepaid.

       **BY FACSIMILE/ELECTRONIC TRANSMISSION.** I caused such document to be delivered by facsimile/electronic transmission to the addressee(s) on the service list.

       **BY PERSONAL SERVICE:**

       I delivered such envelope by hand to the offices of the addressee(s).

       I caused such envelope to be delivered by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the states of California and Arizona that the above is true and correct.

Executed on January 22, 2016 at Phoenix, Arizona.

  
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Gregory L. Adams