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BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES BUREAU OF RECLAMATION'S REQUEST FOR A CHANGE IN POINT OF DIVERSION FOR CALIFORNIA WATER FIX	**CALIFORNIA DEPARTMENT OF WATER RESOURCES' RESPONSE TO PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S MOTION TO BAR WITNESSES FROM CONSULTING WITH COUNSEL DURING CROSS EXAMINATION**

California Department of Water Resources ("DWR") provides this response to Protestant Save the California Delta Alliance's ("SCDA's") motion to bar witnesses from consulting with counsel during cross-examination. SCDA seeks to apply a rule of limited applicability in court proceedings that is, in fact, antithetical to the State Water Resources Control Board's ("Board's") goal of obtaining accurate information during evidentiary hearings. SCDA cites to no authority for the proposition that an administrative agency of the State has the power to prohibit dialogue between a witness and his or her counsel. But even assuming for the sake of argument that such power exists, SCDA offers no valid reason why such conversations would have any negative impact on the fact-finding process of this evidentiary hearing. While trial courts have the discretion to prohibit witnesses from consulting with counsel during cross examination in the context of surprise impeachment material, this discretion arises only in the adversarial system of justice found in the criminal and civil trial courts, which is not characteristic of a quasi-judicial hearing conducted by the Board.

The U.S. Supreme Court made this distinction in *Perry v. Leeke,* 488 U.S. 272 (1989), cited by SCDA at 1:21-1:22. In *Perry*, the Court rejected a criminal defendant's claim of a Sixth Amendment violation based on the trial court's refusal to allow him to consult with his lawyer before cross examination. The Court noted that effective cross examination was the hallmark of "our system of adversarial rather than inquisitorial justice," *Id.* at 282, and that the trial judge's exercise of discretion to prohibit discussions between the defendant and his lawyer did not run aground of the Sixth Amendment.

Here, however, the Board's evidentiary hearing is not the type of "adversarial" proceeding referenced by the Supreme Court – it is more akin to "inquisitive justice," with the Board playing an active role in bringing to the fore all relevant information. Specifically, "[t]he purpose of this [evidentiary] hearing is to receive evidence relevant to determining whether the State Water Board should approve, subject to terms and conditions, the aforementioned Petition." (October 30, 2015 Notice of Petition, p. 2.) This proceeding is not a civil or criminal trial, nor even a formal adjudicative hearing under Chapter 5 of the Administrative Procedures Act. The Board is not required to conduct adjudicative hearings according to the technical rules relating to evidence and witnesses in trial court. (See Cal. Gov. Code, § 11513, subd. (c).) Accordingly, there is no reason why a narrowly-applied "procedure" derived from civil and criminal trials should apply here.

It is clear that SCDA has a fundamental misunderstanding of the evidence gathering phase of the proceeding. The Board has made clear that it is seeking to gain accurate factual information (October 30, 2015 Notice of Petition, p. 2) and that the purpose of the panel approach is to assist in obtaining the relevant information. (July 22, 2016 Ruling, p. 2.) SCDA characterizes as a "lifeline" fellow panel members who can allegedly "rescue" the witness from what it characterizes might otherwise be effective cross examination. This is not an exercise in "gotcha" litigation, but rather to present the evidence as clearly, accurately, and concisely as possible.

SCDA quotes another U.S. Supreme Court criminal case (*California v. Green*, (1970) 399 U.S. 149, 158) as support for its assertion that, "[w]itnesses are supposed to know, and be able to defend, the content of their direct testimony unaided." (SCDA's motion at 2:1-2:2.) However, *Green* discussed the reasons that an accuser should be subject to cross examination in person to meet the requirements of the Confrontation Clause of the U.S. Constitution. (*Green*, *supra*, at pages 157-158.) In contrast, here the purpose of cross examination is to reach a fuller understanding of Petitioners' testimony and exhibits, not for "testing the recollection and sifting the conscience of the witness." (*Green*, *supra*, at pages 157-158.) A broad prohibition against a witness discussing with counsel while in recess, particularly where neither a question nor a line of questioning are pending, is simply not necessary in the context of this administrative hearing.

Finally, even when civil and criminal trial courts exercise discretion to bar counsel from talking to a witness, the purpose is to "preserve the element of surprise of potential impeachment material." (Cal. Prac. Guide Civ. Trials & Ev. (Rutter 2016) 10:177.)[1] Thus, in *Kadelbach v. Amaral* (1973) 31 Cal.App.3d 814, 822 (disapproved on other grounds by *Coito v. Superior Court* (2012) 54 Cal.4th 480), the Court of Appeal found no error when the trial court: (1) required a cross examiner to disclose the transcript of a tape recording to opposing counsel before it could be used to impeach a witness; and (2) prohibited opposing counsel from communicating with the witness until close of cross-examination. In *Kadelbach*, the cross-examiner offered the transcript and requested that opposing counsel be barred from consulting with its witness during the cross examination. These facts are different from the facts before the Board, in that here DWR has disclosed its materials, not SCDA, and yet SCDA is requesting to prevent communications between counsel and the witness.

SCDA presents no offer of proof that communications between counsel and a witness could undermine the "surprise" factor of impeachment evidence. But much more

[1] SCDA conveniently omits this language from its block quote from the Rutter treatise in its brief at 1:12-1:15.

importantly, as noted above, this element of surprise is antithetical to the fact finding mission of the Board in this evidentiary proceeding.

For these reasons, the Board should deny SCDA's motion.

Dated: August 2, 2016

CALIFORNIA DEPARTMENT OF WATER RESOURCES

Robin McGinnis
Office of the Chief Counsel

STATEMENT OF SERVICE

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

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

DWR's Response to Protestant SCDA's Motion to Bar Witnesses from Consulting with Counsel During Cross-Examination

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated August 2, 2016, posted by the State Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct **hard copy** of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818: **Method of Service:** U.S. Postal

I certify that the foregoing is true and correct and that this document was executed on August 2, 2016
Date

Signature: _____

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