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

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

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MOTION FOR
PROTECTIVE ORDER BASED ON
NORTH DELTA WATER AGENCY'S
NOTICE REQUESTING WITNESSES
AND PRODUCTION OF DOCUMENTS**

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15 California Department of Water Resources ("DWR") requests that the Hearing
16 Officers issue an order pursuant to Government Code section 11450.30, subdivision (b)
17 to protect it from the unreasonable and oppressive requests in the Notice Requesting
18 Witnesses and Production of Documents filed by North Delta Water Agency ("NDWA").

19 **I. STATEMENT OF FACTS**

20 On August 26, 2015, DWR and Reclamation filed a petition for a change to their
21 water rights necessary to allow for the implementation of key components of the State's
22 California Water Fix ("CWF") program. On October 30, 2015, the Board issued a Notice
23 of Petition and Notice of Public Hearing and Pre-Hearing Conference to consider the
24 petition.

25 NDWA submitted its Notice of Intent to Appear ("NOI") on January 5, 2016 listing
26 11 witnesses to testify on the following topics: review and critique of hydrologic modeling
27 supporting the BDCP/California WaterFix draft EIR/EIS; NDWA-DWR Contract
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1 requirements; Part I and II hearing issues; adverse impacts on flood control facilities; and
2 Reclamation District Numbers 999, 2060, and 2068 operations and water supplies.

3 On March 23, 2017, DWR served its rebuttal exhibits indicating that both Dr. Parviz
4 Nader-Tehrani and Ms. Maureen Sergent would present testimony during Part 1 rebuttal.
5 Further, on March 28, 2017, shortly before NDWA served its notice, NDWA's counsel
6 contacted DWR's counsel to inquire whether Dr. Nader-Tehrani would testify during
7 rebuttal. DWR confirmed that Dr. Nader-Tehrani would be present during the
8 presentation of DWR's Part 1 rebuttal and available for cross examination.

9 NDWA served the notice on March 28, 2017, 28 days before the rebuttal hearing
10 begins. The testimony and documents requested by NDWA fall into the following
11 categories, all of which are already available to NDWA:

12 (1) Testimony regarding modeling performed by or on behalf of DWR of water
13 quality- and water level-related impacts associated with the operation of the proposed
14 WaterFix project at the monitoring stations identified in the 1981 Contract and 1997
15 Amendment (NDWA notice, at p. 2);

16 (2) Modeling results relating to water quality and water levels associated with the
17 operation of the proposed WaterFix project at the monitoring stations Sacramento River
18 at Three Mile Slough, Sacramento River at Rio Vista, Sacramento River at Walnut
19 Grove, North Fork Mokelumne River near Walnut Grove, Mokelumne River at Terminus,
20 San Joaquin River at San Andreas Landing, and Steamboat Slough at Sutter Slough
21 (*ibid.*);

22 (3) Graphical representations thereof (*ibid.*);

23 (4) Modeling results, graphical representations, or other materials that were relied
24 upon by Maureen Sergent in coming to the conclusion that there would be no increase in
25 exceedance of the water quality objectives set out by the criteria of the 1981 Contract
26 (*ibid.*); and

27 (5) Modeling results or analyses related to the future compliance with the 1981
28 Contract under the proposed California WaterFix operations (*id.* at pp. 2-3).

1 **II. ARGUMENT**

2 NDWA's notice has the legal effect as a subpoena issued under Government
3 Code section 11450.010. (Gov. Code, § 11450.10.) A person served with a subpoena,
4 or, as in this case, a written notice requesting attendance of a witness and documents,
5 may object to the terms of the subpoena or notice by a motion for a protective order.
6 (Gov. Code, § 11450.30, subd. (a).) The hearing officers may issue any order that is
7 appropriate to protect the parties or the witness from unreasonable or oppressive
8 demands. (Gov. Code § 11450.30, subd. (b).)

9 **A. NDWA did not address the propriety of its request.**

10 NDWA's notice is unreasonable and oppressive because it provides no
11 justification other than a mere restatement of code language for its proposal to use
12 DWR's experts as rebuttal witnesses when DWR's experts will already be available for
13 cross-examination after they present their rebuttal testimony. NDWA does not explain
14 why none of the 11 witnesses listed on its own NOI can testify on the topics requested in
15 the notice even though the subject of those 11 witnesses' proposed testimony in the NOI
16 is broad enough to include the topics in the notice.

17 Considering that NDWA had months to review DWR's case-in-chief materials in
18 order to produce its own case-in-chief and the opportunity to conduct broad cross-
19 examination of Dr. Nader-Tehrani and Ms. Sergent, this request appears to be an
20 unreasonable abuse of the administrative hearing process and an attempt to expand the
21 scope of permissible cross-examination of rebuttal witnesses. The purpose of NDWA's
22 request appears to be to try and further cross-examine the experts on the very material
23 presented in the DWR case-in-chief and rebuttal and thereby attempt to impeach their
24 prior statements. This is cumbersome, inefficient and unreasonable.

1 **B. The information NDWA seeks to obtain is or was available from more**
2 **convenient, less burdensome sources.**

3 NDWA's notice is unreasonable and oppressive because the testimony regarding
4 modeling, modeling results, graphical representations thereof, and other materials it
5 seeks are or were obtainable through alternative sources, including NDWA's own expert
6 witnesses, publicly available documents, and through cross-examination of DWR's
7 witnesses both during the case-in-chief and during rebuttal. As discussed above, NDWA
8 has not explained why none of the 11 witnesses listed on its NOI can testify on the
9 topics requested in the notice.

10 The documents NDWA seeks are publicly available. Indeed, DWR has responded
11 to requests from members of the public for modeling data related to California Water Fix
12 and its predecessors, the Delta Habitat Conservation and Conveyance Program and the
13 Bay Delta Conservation Plan, since it began working on these projects, including six
14 requests from NDWA's consultants MBK Engineers between 2012 and 2016. In a May
15 16, 2016 letter, DWR and Reclamation explained how to request the updated modeling
16 related to the Part 1 testimony. On May 25, 2016, DWR delivered a copy of the updated
17 model study package regarding the CWF project, which the Board posted on its website
18 and is still available.¹

19 DWR's experts, including Dr. Nader-Tehrani and Ms. Sergent, were available for
20 cross-examination where parties used that opportunity to establish testimony for the
21 record. It appears that NDWA failed to explore the topics on which it now seeks
22 information. It is unreasonable for NDWA to now demand that DWR witnesses present
23 NDWA's rebuttal evidence, because it missed its opportunity to question the right
24 witnesses on cross examination.

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26 _____
27 ¹ See
28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/water_right_petition.shtml under the May 25, 2016 entry.

1 The topics in NDWA's notice include modeling and operations, topics on which
2 DWR provided panels of witnesses to testify.² Also, NDWA cross examined Ms. Sergent
3 during Part 1A of the hearing.³ Therefore, NDWA's request for the materials that Ms.
4 Sergent relied on in coming to conclusions in her Part 1 testimony is also unreasonable
5 and oppressive. NDWA already had the opportunity to ask DWR witnesses about these
6 topics, and it is therefore unreasonable to have DWR witnesses testify on these topics
7 during presentation of NDWA's rebuttal evidence.

8 DWR's rebuttal exhibits include testimony by Dr. Nader-Tehrani and Ms. Sergent,
9 which indicates that these witnesses will be present at the rebuttal hearing and available
10 for cross examination. In response to an inquiry by NDWA, DWR confirmed that Dr.
11 Nader-Tehrani and Ms. Sergent would be present during the presentation of DWR's Part
12 1 rebuttal and available for cross examination.

13 The information NDWA seeks to obtain by examining DWR's employees during
14 presentation of Group 9's rebuttal evidence is or was obtainable from more convenient,
15 less burdensome sources.

16 **C. Request Represents an Abuse of Process and is Inequitable**

17 NDWA cites Government Code section 11450.50 and Code of Civil Procedure
18 section 1987(b) as the grounds for compelling DWR witnesses to appear on behalf of
19 NDWA. What NDWA fails to explain is why it was unable to produce the information it
20 seeks during its case-in-chief or through cross-examination of Dr. Nader-Tehrani and
21 Ms. Sergent. This is of particular importance in a process that has permitted NDWA
22 tremendous time to examine the initial case-in-chief of DWR and from that examination

23 ² The Operations panel testified on direct and was cross examined on August 10-12 and 18-19,
24 2016. The Modeling panel testified on direct and was cross examined on August 23-26. Transcripts of the
25 hearing are available here:
[http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcript
s.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcript_s.shtml).

26 ³ Counsel for NDWA cross examined Ms. Sergent on August 22-23, 2016. Transcripts of the
27 hearing are available here:
[http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcript
s.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcript_s.shtml).

1 prepare its own case-in-chief testimony, which essentially was an opportunity for NDWA
2 to conduct unbounded rebuttal, and an opportunity to broadly cross-examine all the
3 DWR witnesses with expansive limits as to relevance and scope. Any information
4 NDWA wished to extract from DWR witnesses, including Dr. Nader-Tehrani and Ms.
5 Sergent, was available during the case-in-chief. NDWA's attempt to call DWR's
6 witnesses, who have already twice produced testimony, have previously appeared, and
7 will again appear to be cross-examined on their rebuttal testimony, appears to be an
8 attempt to impeach the information presented by DWR and is an attempt to abuse the
9 processes established by the Hearing Officers. Requests such as NDWA's should be
10 broadly disallowed as unreasonable.

11 **III. CONCLUSION**

12 NDWA's rebuttal testimony does not require participation from a DWR witness and
13 requiring a DWR witness to testify on these topics would be unreasonable and
14 oppressive. DWR therefore requests that the Hearing Officers vacate NDWA's notice.

15 Dated: April 12, 2017

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