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**BEFORE THE**

**CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

<b>HEARING IN THE MATTER OF CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES BUREAU OF RECLAMATION REQUEST FOR A CHANGE IN POINT OF DIVERSION FOR CALIFORNIA WATERFIX</b>	<b>PREPARED DIRECT TESTIMONY OF SHERRI NORRIS ON BEHALF OF THE ENVIRONMENTAL JUSTICE COALITION FOR WATER</b>
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TESTIMONY OF SHERRI NORRIS

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I, Sherri Norris, Executive Director of the California Indian Environmental Alliance, do hereby declare:

## I. INTRODUCTION

1. The purpose of my prepared direct testimony is to render an opinion on the environmental justice impacts and impact to California Tribal way of life and cultural continuance that the WaterFix change petition would have, if granted.
2. I have reviewed and will be referring to the Draft Environmental Impact Report and Final Environmental Impact Report (FEIR) as approved by the Petitioners California Department of Water Resources and United States Bureau of Reclamation:
3. I am the Executive Director of the CALIFORNIA INDIAN ENVIRONMENTAL ALLIANCE (“CIEA”), a non-profit serving Native American Tribes and tribal members throughout California. Our mission is “to protect and restore California Indian Peoples' cultural traditions, ancestral territories, means of subsistence and environmental health.” Since 2003, I have provided California Tribes and low-income families with information on which fish can be safely eaten to avoid mercury and other toxins found in store-bought and wild-caught California fish, and to preserve and restore natural and cultural aquatic resources for current and future use. In in partnership with California Tribes, I have worked to reduce exposure to toxins though consensus-building and increasing Tribal participation in agency decision-making bodies and workgroups.
4. I serve as the Tribal Engagement Coordinator for the North Coast Resource Partnership (NCRP), which is the North Coast Integrated Regional Water Management group. My responsibilities include communicating opportunities to participate in regional water management to thirty-four (34) North Coast Tribes and to coordinate the activities of the Tribally-elected North Coast Representatives, who are members of the decision-making body of the NCRP alongside local county representatives. Please see *Statement of Qualifications* below for more information.
5. I have personally examined the “Final Environmental Impact Report/Environmental Impact Statement” of the WaterFix ([http://baydeltaconservationplan.com/EnvironmentalReview/EnvironmentalReview/2013-2014PublicReview/2013\\_DEIRDEIS\\_Comments\\_AppendixA1.aspx](http://baydeltaconservationplan.com/EnvironmentalReview/EnvironmentalReview/2013-2014PublicReview/2013_DEIRDEIS_Comments_AppendixA1.aspx)), the DWR Bay Delta Conservation Plan Tribal Engagement Website (<http://baydeltaconservationplan.com/EnvironmentalReview/Tribal.aspx>), and the “california water fix (alternative 4a) public review & comment” ([https://www.californiawaterfix.com/wp-content/uploads/2017/10/bpkz5\\_FIX\\_eBlast\\_7915.pdf](https://www.californiawaterfix.com/wp-content/uploads/2017/10/bpkz5_FIX_eBlast_7915.pdf)) on which I base the following observations and opinions.

## II. SUMMARY OF TESTIMONY

6. In my testimony, I first summarize my understanding of the relation of the public trust doctrine as it relates to the Bay Delta Conservation Plan / California WaterFix Project as stated in the Final Environmental Impact Report (FEIR) prepared jointly by Lead Agencies: the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation), the state of the Delta and the connectivity to California Tribes in the upper watersheds of the Sacramento River from which water is diverted and to those California Tribes in the receiving waters through the San Francisco Bay.

7. I then proceed to describe how the WaterFix project and resulting FEIR was prepared and approved without proper Consultation with all California Indian Tribes who will be affected. I will then continue to state that the operations of the resulting WaterFix diversions would substantially and irreparable harm the aquatic ecosystems of the Sacramento River, the upstream watersheds from which water is diverted from, and those in receiving waters through the San Francisco Bay. The WaterFix as it is designed and evaluated within the FEIR would further pose a threat to human health of California Indian Tribal members and Tribal communities. This environmental degradation will result in irreparable harm to the ability of Northern California Tribes to practice their subsistence fishing and cultural beneficial uses, will prohibit cultural and spiritual continuance of their People and prohibits California Tribes from restoring and maintaining critical habitat for traditional food and cultural resources. Finally, I provide information on beneficial uses and water rights related to California Indian Tribes that is missing from the FEIR considerations. The Project as stated in the FEIR needlessly harms public trust resources and does not consider alternatives that would “*restore the Delta ecosystem, including fisheries and wildlife,*” and “*reduce reliance on the Delta while still meeting California’s future water supply needs*”. (Delta Reform Act, Water Code § 85020.)

## III. Public Trust

8. While the **Public Trust Doctrine** allows the states to retain continuing jurisdiction over the allocation of their water supplies<sup>1</sup> it has been affirmed that the state has a responsibility to the public to protect their right to fish, hunt and swim.<sup>2</sup> DWRs proposed options presented in the EIR should have reasonably balanced the public benefits of the project and the FEIR should reflect that balance. It seems unreasonable to set up any water system without strong environmental protections when that water system will have the capacity and potentially in the future could be operated in such a way that it could destroy the Delta ecosystem and pull from multiple watersheds threatening the beneficial uses of those upper watershed users. Users outside of the Delta will be impacted through existing or planned diversions that will supply the water for the BDCP/WaterFix project. According to the FEIR the WaterFix and/or its operations

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<sup>1</sup> California v. Superior Court (Lyon).

<sup>2</sup>City of Berkeley v. Superior Court, 26 Cal. 3d at 521, 606 P.2d at 368, 162 Cal. Rptr. at 329; Marks v. Whitney, 6 Cal. 3d at 259, 491 P.2d at 379, 98 Cal. Rptr. at 799.

will result in unavoidable risk to the ecosystem. In comparing the capacity of the proposed WaterFix tunnels it is clear that these will foster a growth in water use, and that fish and other aquatic resources may be irrevocably harmed removing the main source of cultural and religious benefits to thousands of people in Northern California. Conversely, it was the intent of the [BD] and the public that the pressure of export should be removed from the Bay Delta and that the watershed should be enhanced for the benefit of future generations. In reading the FEIR it is clear that the DWR and BOR split the environmental mitigation into a separate program and then pressed forward the EIR without first confirming that the environment would be protected. It is the intent of an EIR to ensure that the environmental impacts are addressed for the balance and benefit of all uses. In splitting environmental concerns and mitigation BOR and DWR have ensured that the BDCP/WaterFix and environmental impacts could not be properly addressed before the Project is approved. I'm alarmed that an EIR would be submitted, let alone allowed to proceed without such environmental protections in place. This violates the public trust doctrine and the rights of impacted Tribes.

9. The appropriation doctrine, which authorizes the diversion and use of water, when evaluated for reasonableness and in consideration of beneficial uses should place priority on the chronological sequence of appropriations that would be competing to exercise uses. This is the "first in time" consideration which is clearly applicable to the continuance of fishing and the uses of the environmental functions of the Sacramento River the Bay Delta, as well as the rivers and watersheds that feed into it by natural function or by diversion.

10. While a constitutional amendment enacted in 1928 states that California's water resources shall "be put to beneficial use to the fullest extent of which they are capable," that amendment also states "that the waste or unreasonable use or unreasonable method of use of water [shall] be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."<sup>3</sup> The WaterFix and FEIR fails to ensure that conservation will be achieved and instead increases the capacity in the amount of water that can be exported from the Sacramento River and other river systems through diversions up river.

11. Under Public Resources Code §§ 21000-21176 the agency is required to consider various environmental needs including "clean air and water." Under the California Water Code §§ 10505 the agency is also required to give a preference to watersheds, which are the source of a particular water supply. We are concerned that the Sacramento River watershed sources were not properly engaged in the creation of the WaterFix Plan and that in particular Tribes up river have not been included as the BDCP transitioned into the WaterFix. We are concerned about the vagueness of the WaterPlan when it comes to environmental protections and the protection of public and Tribal beneficial uses.

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<sup>3</sup> 48. Id. 49. Id. See generally *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 136-39, 429 P.2d 889, 891-94, 60 Cal. Rptr. 377, 379-82 (1967); *Peabody v. City of Vallejo*,

12. The identification of alternatives to the WaterFix should have been discussed in roundtable meetings with Tribes, community members and local leadership of the source and receiving waters. The FEIR does not go far enough in its evaluation of alternatives including conservation, reuse of water, creating a more dynamic system where water can be moved north into the Central Valley when reservoirs are full in the south and when those in the source areas of the Delta are dry as was evidenced in the final most dire years of our states' recent drought. It is nonsensical to create a system in which wild-caught fish are not protected and it is unreasonable to sacrifice the ecosystem of the SF Bay, Bay Delta. Again, it makes no sense to build a conveyance system that has the potential of draining the Sacramento River, their tributaries and the sources of the Russian, Eel, Trinity Rivers and others through existing conveyance systems. Instead these funds should be used towards building sustainable water delivery solutions such as desalination of salt water, using recycled water, building grey water systems and moving water from southern storage locations to the central valley when water in the north is too low to support fish habitat.

#### **IV. Consultation with all California Indian Tribes who will be affected**

13. In my review of activities of Tribal Engagement regarding consultation with California Native American Tribes, and review of the pattern and method of outreach, engagement and consultation with California Indian Tribes, that DWR and the Bureau of Reclamation did not satisfy the requirement to consult with Tribes that may be impacted by the BDCP/WaterFix project and future operations.

14. State and federal agencies have a responsibility to protect the resources and continuance of California Indian Tribes as directed by the fiduciary trust obligation to Tribes, the Presidential Executive Order 13175, the Governor's Executive Order B-10-11, and original intent of the California Natural Resources Agencies Consultation policy.

15. In addition to the public trust, the federal agency the Bureau of Reclamation in partnership with DWR has a trust responsibility to Tribes with the requirement that the federal government, all of its agencies and any projects that receives funding from federal sources directly or indirectly, will support and encourage tribal self-governance and prosperity. This federal government's trust duty is "owed to all Indian tribes," even to those who did not enter into treaties with the United State."<sup>4</sup> This federal trust obligation "transcends specific treaty promises and embodies a clear duty to protect the native land base and the ability of tribes to continue their way of life."<sup>5</sup>

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<sup>4</sup> U.S. v. Sandoval, 231 U.S. 28, 48 (1913) (established trust relationship exists with the Pueblos of New Mexico regardless of whether or not a treaty had been signed)

<sup>5</sup> M.C. Woods, "Indian Land and the Promise of Native Sovereignty. The Trust Doctrine Revisited," Utah L. Rev. 1471, 1496-1497 (1994)

16. Presidential Executive Order 13175 signed in 2000 established that state agencies need to include and consult with tribal governments “in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian Tribes, and to reduce the imposition of unfunded mandates upon Indian Tribes;” (President Clinton, 2000, p. 2806).

17. Following in 2011, Gov. Brown released Executive Order B-10-11 outlining the ways in which the State of California and the organizations within California will be expected to consult and communicate with Tribes about new developments the environmental impact along with them. Specifically stating that “Agencies and departments shall permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.” Executive Order B-10-11 declares that “the State is committed to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.” The Executive Order directs state executive agencies and departments to “encourage communication and consultation with California Indian Tribes.” It further directs state agencies and departments “to permit elected officials and other representatives of tribal governments to provide meaningful input into the development of policies, projects or activities that may affect their resources or people.”<sup>6</sup>

18. It is my opinion, based on the foregoing, that BOR has a federal responsibility to uphold the subsistence and cultural resource of water of California Tribes for the protection of a continued “way of life,” and that both DWR and BOR had a responsibility to outreach, gain information and consult with Tribes for the development of the BDCP/WaterFix, and as it progressed to continuously engage and meaningfully consult with all impacted California Tribes.

#### **A. How Consultation was Carried out with Tribes**

19. It is my understanding that consultation was not consistently applied to Tribes within the foot print area of the WaterFix Project, those in the upriver and/or diverted source watersheds and those in the receiving waters through the San Francisco Bay. Therefore, not all impacted or potentially impacted Tribes had the same opportunity to provide their recommendations as the project progressed from conceptual to the now preferred and promulgated option 4a WaterFix Project.

While DWR initiated statewide consultation in the beginning they did not maintain this engagement with all potentially impacted California Tribes as the project evolved. While initially

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<sup>6</sup> Executive Order B-10-11 issued by Governor Edmund G. Brown, Jr. on September 19, 2011).

DWR advised all Tribes to reach out to them if they wanted to be stay engaged in the development of the plan there was not enough information provided for Tribes to determine whether or not the plan would affect them or not. It wasn't until after the comment period closed and the FEIR was approved that the plan was clear enough to make that determination but by then consultation had changed to informational meetings.

20. It is further my understanding that the DWR Bay Delta Conservation Plan Tribal Engagement web page lists Tribal Engagement meetings with Tribes and Tribal entities that took place from December 10, 2013 to January 12, 2016. According to this site "the Department of Water Resources is conducting government-to-government consultation on the EIR/EIS for the BDCP/California WaterFix. Regional meetings were held across the state as a means to provide information and solicit input on the project."  
(<http://baydeltaconservationplan.com/EnvironmentalReview/Tribal.aspx>)

21. However, these statewide information and consultation meetings were only held while the project was named the Bay Delta Conservation Plan [BDCP] from 2013-2014. At that time it was not clear when the many options would be distilled into a final plan to review and the details of the preferred WaterFix (Alternative 4A) was not yet identified. It was therefore not possible for Tribes to comprehensively evaluate or provide meaningful feedback regarding the potential environmental, subsistence or cultural impacts. Furthermore it was impossible for Tribes to provide specific feedback on whether or not the mitigation measures would satisfy the needs of Tribes in the project footprint area, watersheds where the water would be sourced, or those down-stream where the Sacramento and San Joaquin Rivers meet the Bay.

22. The final environmental analysis for California WaterFix (Alternative 4A) was available for Tribes and the public to review from July 10, 2015 through October 30, 2015. During this time DWR's efforts to re-engage Tribes was limited to only those Tribes in the Project construction footprint area. According to the Tribal Engagement webpage only the following four Tribes met with DWR during the open comment period:

- July 24, 2015 - Tribal Monitor Workshop/Tribal Informational Update Meeting to United Auburn Indian Colony for Tribal Historic Preservation Officers
- July 30, 2015 - Tribal Government Meeting with Wilton Rancheria
- July 31, 2015 - Tribal Government Meeting with Shingle Springs Band of Miwoks
- August 5, 2015 - Tribal Informational Meeting with California Indian Water Commission and Bureau of Indian Affairs
- August 18, 2015 - Tribal Government Meeting with Yocha Dehe Wintun Nation

23. In our capacity as the Tribal Engagement Coordinator of the North Coast IRWMs, I have interviewed environmental department staff and tribal councilmembers of four tribes in the source waters from which Sacramento River is derived through existing diversions. Of these, none of them received information regarding the BDCP/WaterFix initial outreach efforts before



the plan became clear as the WaterFix. This was corroborated in interviews with Anecita Augustinez, Tribal Policy Advisor of DWR, who confirmed on November 14, 2017, and again on November 27, 2017, that after the release of the public comment Draft EIR on July 10, 2015, continued efforts to outreach for consultation and to hold meetings with Tribes was limited to only those Tribes in the WaterFix Project footprint area. There, potentially impacted tribes above and below the Project construction locations from proper consultation and the ability to comment and provide meaningful information on how their water will be impacted. This is in violation of the Federal Trust responsibility that BOR as a federal agency and any federal funds that will be used to develop or operate this facility and others which will be operated in coordination with this new facility. It is also in violation of the spirit of federal and state consultation policies. Water is vital to Tribal cultural and fishing continuance.

### **B. Interbasin Transfers & Tribal Consultation**

24. As part of the need for Tribal Consultation it is important to understand that Tribes outside of the project footprint area were not re-engaged after the release of the Draft EIR when the document was available for review, but, the Waterfix will impact tribes up and down and across the state of California. This means that those Tribes in the source water area were denied the ability to meaningfully participate. According to Tribal Treasurer Brandi Brown of Redwood Valley in an interview on November 28, 2017:

“the impact of drought and water “diversion” are damaging to the ecosystems vital to salmon, native plants and cultural traditions of Native people. The continued taking of water to ... may bring real harm from this program in the future. A large part of the tribal water needs are for in stream flows and other water bodies that support environmental and cultural needs for fishing, hunting, and trapping”

25. The following two interbasin transfers are examples of such water sources:
- a) From Klamath and Trinity Rivers to get the water to the Central Valley, Clear Creek Tunnel transports water 11 miles from Lewiston Reservoir through the Trinity Mountains to Whiskeytown Reservoir, 10 miles southwest of Shasta Dam. Trinity River water is then transported through a 3-mile tunnel to Clear Creek, into the Keswick Reservoir and into the Sacramento River.
  - b) The Potter Valley Project is similarly is an interbasin water transfer which delivers water from the Eel River basin to the headwaters of the Russian River through a diversion tunnel, Grindstone and Stony creeks. This system like many in Northern California is precipitation reliant.

26. It is my opinion, based on the foregoing, that ALL potentially impacted Tribes should have been continuously advised as the BDCP developed into the WaterFix so that the FEIR would have been reflective of tribal considerations. This should have been completed

continuously as the project advanced. In my review of activities of Tribal Engagement regarding consultation with California Native American Tribes, and review of the pattern and method of outreach, engagement and consultation with California Indian Tribes, it is clear that DWR and the Bureau of Reclamation did not satisfy the requirement to consult with Tribes that may be impacted by the BDCP/WaterFix project and future operations.

### **C. Traditional Ecological Knowledge**

27. It is my understanding that without proper consultation with all affected Tribes, many Tribes were unable to provide or apply their understanding of the needed function of their rivers and wider watersheds for their continued beneficial uses.

28. Traditional Ecological Knowledge, also called by other names including Indigenous Knowledge or Native Science, (hereafter, TEK) refers to the evolving knowledge acquired by indigenous and local peoples over hundreds or thousands of years through direct contact with the environment. This knowledge is specific to a location and includes the relationships between plants, animals, natural phenomena, landscapes and timing of events that are used for lifeways, including but not limited to hunting, fishing, trapping, agriculture, and forestry. TEK is an accumulating body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (human and non-human) with one another and with the environment. It encompasses the worldview of indigenous people which includes ecology, spirituality, human and animal relationships and more. California Tribes cannot move to another location in order to practice traditional subsistence or cultural practices. Culture, religion and food sources are tied to specific.

29. Each impacted Tribe must be allowed to meaningfully provide their own information for this or any other project affecting tribal cultural or environmental resources. Traditional ecological knowledge (TEK) provides a basis from which DWR can gain insight when developing sustainable water management policies. As such, the tribes must be part of the decision making process regarding the management of water resources in that they provide the TEK. (U.S. Fish and Game)

30. “Many traditional indigenous communities throughout the world have given a special status to natural sites such as mountains, volcanoes, rivers, lakes, springs, caves, forest groves, ponds, coastal waters and entire islands. Many of these have been set aside as sacred places. The reasons for their sacredness are diverse. They may be perceived as abodes of deities and ancestral spirits; as sources of healing water and medicinal plants; places of contact with the spiritual realm, or communication with a “more than-human” reality; and sites of revelation and transformation. They are sometimes the burial grounds of ancestors, places of pilgrimage, the locale of a temple, shrine or church, or sites associated with special events, saints and spiritual

leaders.” (from Sacred Natural Sites: Guidelines for Protected Area Managers, Robert Wild and Christopher McLeod, Editors, 2008)

31. It is my opinion, based on the foregoing, that Tribes we unable to contribute their Tribal Scientific knowledge and Traditional Ecological Knowledge and that this contributed as a source of the unsustainable and environmentally unacceptable WaterFix plan and resulting FEIR.

#### **IV. Irreparable harm to the Environment**

32. It is my understanding that the Water Fix as in the FEIR will not protect endangered fish and wildlife from the natural or diverted source waters or those in the receiving waters in the San Francisco Bay

33. It is further my understanding that the WaterFix includes three new intakes along the Sacramento River and dual-bore tunnels to provide water to the existing state and federal pumping facilities, and habitat restoration measures and environmental commitments necessary to mitigate impacts in compliance with State and Federal environmental laws. However, rather than preparing a long-term conservation plan that was originally part of the BDCP, the California WaterFix (Alternative 4A) contains an alternative implementation strategy to secure necessary permits and authorizations for implementation under the California Endangered Species Act and Federal Endangered Species A. this sidesteps the purpose to balance the benefits and evaluate environmental considerations that should be in an EIR.

34. However, in the WaterFix the plan is to allow diversions of 9,000 cubic feet per second, or 15 mission acre feet of water annually from the Sacramento River upstream from the delta and export it to parties in interest. This would deprive the Sacramento River, Delta, San Francisco Bay and upstream water sources from needed cold water habitat for fish passage, spawning and for Tribal cultural uses. There were other alternatives that could have been considered including removing salt from ocean in Central and Southern California, robust conservation measure, systems installation that reuse or recycle water, the possibility of allowing water to be transported north. During the recent drought we were clearly able to see full reservoirs in southern California while those in the north were at record lows and the rivers from which water is diverted were besieged with harmful algal blooms threatening the health of humans, animals and aquatic life. The capacity to remove more water from these already taxed systems is not a sustainable answer.

35. Northern California communities, agencies, non-governmental organizations and Tribes are working to prevent the collapse of our aquatic system including imperiled fish species of salmon, steelhead, sturgeon, lamprey and many other species. Removing large quantities of water from the rivers that we are actively trying to maintain without the proper protections that a proper Plan and Resulting EIR would entail threatens the livelihood, way of live and food source for millions of Californians in the delta and removes vital public resources.

36. Wild-caught salmon are the best source of omega-3 fatty acids and they cannot be supplemented by other food sources. Their natural lifecycle wherein they are small when leaving a river system and wherein they do not eat while spawning also means they are the only fish that can safely avoid mercury found in California's rivers lakes and streams. Farmed salmon do not provide this benefit to consumers and families who eat fish. Omega-3 fatty acids are vital to the development and mental growth of a developing fetus, and to small children offering a multitude of health benefits including increase cognition and a healthy heart. These benefits extend from birth through the person's life. To many Tribes in California Salmon is sacred and is the connectivity to their cultural and spiritual connection to the land, their community and to a wider set of Tribes in California through trade and inter-Tribal gatherings. Responsibility to protect and care for the land and water translates into fishing, harvesting, preparation, ceremony, family and community. Water quality harmful algal blooms, mercury methylation are all dependent on water quality and water conveyance is one of the largest underpinnings that affect the health of water and of the ability for Tribes to each practice culture in their own homelands. This place based cultural connectivity cannot be transferred to other locations and the lack of protections in the WaterFix as found in the FEIR is likely to be detrimental to the cultural continuance and health of California Indian Peoples.

37. In recognition that Bay Delta was on the brink of collapse the California Legislature enacted the Delta Reform Act in 2009 to address the Delta policies that were "not sustainable." The Delta Reform Act was meant to advance "coequal" goals of restoring the Delta ecosystem and ensuring water supply reliability.<sup>7</sup> **The Delta Reform Act** requires that DWR file a finding of consistency with the Delta Plan be filed with the Delta Stewardship Council.<sup>8</sup> Since the Delta Plan has not yet been adopted by the DSC, DWR's final EIR is in violation of the Delta Reform Act.

38. Eight objectives were identified, of which were the goals to:

- a) *Protect and enhance the unique, cultural, recreational, and agricultural values of the California Delta as an evolving place.*
- b) *Restore the Delta ecosystem, including fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem,*
- c) *Promote statewide water conservation, water use efficiency and sustainable water use,*
- d) *Improve the water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta.<sup>9</sup>*

39. It further declares:

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<sup>7</sup> Water Code ss 85054.

<sup>8</sup> Delta Reform Act [year] SS 85225-85225.25

<sup>9</sup> Water Code ss 85020

The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through and investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

40. The California Department of Water Resources and Bureau of Reclamation completed their FEIS proposing California WaterFix (Alternative 4A) as the preferred alternative to update California's primary water delivery system. Of the goals in summary sentence on the WaterFix website only one is directly related to enhancement of the Delta's ecosystem. It states that alternative 4a was chosen to "help native fish species navigate to and from the ocean during critical migration periods." This leaves future operation of the tunnels open to increasing [take] except when anadromous fish are migrating. There are other critical periods that water needs to be maintained in the Sacramento River including but not limited to [protecting the system against harmful algal blooms, subsidence, methylation due to wet/dry, maintaining flow to protect against salinity, migrations of birds and animals, and the multitude of human beneficial uses including the year-round aquatic foods, and the cultural (ceremonial and religious) needs of California Tribes and tribal communities. A significant increased capacity of these new diversionary tunnels are contrary to the declaration to reduce reliance on Delta water in each region that relies on Delta water, and is contrary to the goal of enhancing the watershed. Because Tribes were not properly consulted cultural uses of water and year-round flow considerations are not included sufficiently in the WaterFix Project and are not reflected in the beneficial use needs in the FEIS.

41. Because the environmental program and the WaterFix Project was divided and because of the vagueness of language in the FEIR is unclear if 4a will avoid significant environmental harm and the FEIR should not have been approved. The Water Fix project develops the capacity to increase Delta exports that will harm public trust resources needlessly and does not consider alternatives and mitigation measures that are feasible and preferable to causing significant and irreversible harm to Delta Fish and to fish in the watersheds that provide water to the Sacramento River and that are each beneficial to the public and to California Tribes.

#### **V. Clean Water Act & Tribal Water Rights Consideration**

42. It is my understanding that there are significant considerations that are lacking in the WaterFix FEIR and that without these the EIR should not have been approved. This missing information could weigh heavily against the approval of a Water Rights change petition before the State Water Resource Control Board.

##### **A. Beneficial Uses**

43. An essential part of a water quality control plan is an assessment of the beneficial uses, which are to be designated and protected as per Section 13050(f) of the California's Porter-Cologne Water Quality Control Act. Such "beneficial uses" of the waters of the state that may be protected against water quality degradation include the preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. Water quality standards are adopted to protect public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act (as defined in Sections 101(a)(2), and 303(c) of the Act).

44. In 2009 the North Coast Regional Water Quality Control Board adopted Subsistence Fishing and Cultural beneficial uses. These considerations are not found in the Water Fix EIR despite Klamath water being diverted into the Sacramento River above the diversion point of the Water Fix project. In 2009 Clean Water Action, the Karuk Tribe and the California Indian Environmental Alliance (CIEA) formally asked the State Water Control Board to work towards adoption Subsistence Fishing, Tribal Subsistence Fishing and Tribal Cultural beneficial uses. CIEA coordinated a multi-year process of which DWR was aware to identify consensus for the most applicable language for statewide adoption and reaffirm the cultural and subsistence fishing definition and designation of these uses in the Klamath River through the North Coast Regional Water Quality Control Board.

45. On May 2, 2017, the State Water Resources Control Board adopted Resolution No. 2017-0027, Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California including Tribal Cultural and Tribal Subsistence Fishing beneficial uses and mercury provisions. On July 14, 2017 the U.S. Environmental Protection Agency approved this resolution pursuant to section 303(c) of the Clean Water Act and 40 Code of Federal Regulations Part 131 and within the approval letter stated that the approved standards were to "take place immediately for Clean Water Act purposes.

46. The WaterFix EIR should have included these statewide beneficial use considerations, and at minimum should have included the considerations of the North Coast Regional Water Quality Control Board to protect those uses.

### **B. Federal Indian Water Rights**

47. The underpinnings of federal Indian water rights are based on *Winters v. United States*, 207 U.S. 564 (1908) ("Winters"). This case is often referred to as the Winters Doctrine which is based on the agreement between the federal government and tribes in the creation of Indian Reservations, or in California, Rancherias. When tribes agreed to vast land cessions they received in return guarantees that specific lands would be permanently reserved for Indian use and occupation. Tribal sovereignty was expressly not relinquished to the federal government or indisputably abrogated by the federal government.<sup>1</sup> In *Winters*, the Supreme Court held that when Indian reservations were established sufficient water was also reserved to fulfill the purposes of the reservations. Through the Winters Doctrine, of the 1908 the U.S. Supreme Court

decision affirmed that the federal government's rights to reserve water also applied to Indian reservations.

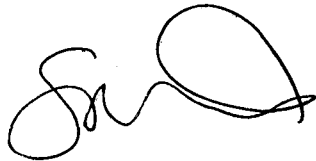
48. More recently in the case *Agua Caliente Band v. Coachella Valley Water District*, March 7, 2017, the appeals court ruled in favor of the Agua Caliente Band of Cahuilla Indians reaffirming that the tribe's water rights include a pristine aquifer. "The United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe's reservation in California's arid Coachella Valley," the three-judge panel ruled. In this decision, the Ninth Circuit determined that the Winters Doctrine does not distinguish between surface water and groundwater.

## VI. CONCLUSION

49. In conclusion, should the WaterFix be allowed to proceed as approved in the FEIR it is against the public interest and is contrary to federal Indian law. No monetary damages could adequately compensate Tribes to the harm to their benefits, to the environment future or to the future of their watersheds, subsistence fishing or cultural resources. Tribes in the water source areas have not been consulted with and due to federal water rights designation as affirmed by the Winters Doctrine and more recently in the Agua Caliente ninth circuit court and the confirmation by the appeals court the State Water Resource. Therefore, I recommend that the Control Board should not approve the change permit requested by the Department of Water Resources and the Bureau of Reclamation.

I declare that the foregoing is true and correct. Thank you for the opportunity to present this testimony.

Signature:



Printed name:

Sherri Norris

Date:

11/29/17

## VII. STATEMENT OF QUALIFICATIONS

50. Sherri Norris is a member of the Osage Nation and is the Executive Director of the California Indian Environmental Alliance (CIEA) a California Indian environmental health organization that provides California Tribes, Tribal members and health care providers with trainings and decision making tools to address water quality and to avoid toxins including mercury, PCBs and cyanobacteria in fish. She co-authored the peer reviewed Mercury Health Toolkit (*see attached*) and joined OEHHA and CDPH in advisory bodies to since 2003 has provided trainings to American Indian Health clinics, community clinics for Continuing Medical Education Credits, to Women, Infant and Children's clinics, and directly to community members. She has joined OEHHA and CDPH in an advisory capacity to develop fish consumption educational materials with clear messaging. In 2014, Sherri and CIEA staff worked in collaboration with CDPH and the Oakland Native American Health – Women, Infants, and Children (WIC) clinic to develop and pilot the first WIC curriculum in the nation to address mercury in local-caught fish with the goal of promoting fish consumption while assisting clients in avoiding those fish high in mercury. In 2014, Sherri, CIEA staff and the Karuk Tribe piloted the curriculum in the Klamath River watershed and with the Sierra Fund CIEA provided trainings to clinics in the Sierra Nevada's to show that it was applicable in rural communities. From 2015-2017 Sherri and CIEA staff conducted trainings for healthcare providers in Solano, Contra Costa, Alameda and San Francisco Counties both WIC and community clinics.

51. CIEA's Tribal Self-Advocacy Program promotes increased water quality in partnership with California Tribes for the advancement of safe subsistence food security. As part of this program, Sherri is the lead Tribal Engagement Coordinator for the North Coast and the Upper Feather River Integrated Regional Water Management (IRWM) Program and as part of the Disadvantaged Communities IRWM Program she works in collaboration with CIEA staff and regional Tribal members on increasing outreach to Tribes in the San Francisco Bay Area, Sacramento River and Mountain Counties IRWM funding areas. From 2009 to date, Sherri and CIEA staff worked to increase Tribal participation in the creation of regional Total Maximum Daily Loads for mercury, in Basin Plan Amendments and in coordinated Tribal consensus-building to develop the Tribal Cultural (CUL) and Tribal Subsistence Fishing (T-SUB) beneficial uses and mercury provisions adopted on May 2, 2017, by the State Water Resources Control Board adopted Resolution No. 2017-0027, and approved on July 14, 2017 the U.S. Environmental Protection Agency. CIEA was a contributor to the "Tribal Collaboration in IRWM: Challenges, Solutions and Recommendations" study <https://ccrec.ucsc.edu/sites/default/files/CCREC%20Research%20Report%2020%20Tribal%20Collab%20in%20IRWM.pdf> and was an active participant in of DWR's Stakeholder Engagement and Advisory Committee (SEAC) to address barrier to Tribal participation in IRWMs statewide. Sherri is a member of the Sierra Fund's Blue Ribbon Panel of mercury experts, a recipient of the



Sierra Crest Award and the Mills College Brave Hearted Women Award. coordinating Tribal Technical Assistance and Capacity-Building Trainings.

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<sup>1</sup> United States v. Winans, 198 U.S. 371, 381 (1905).