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EXEMPT FROM FILING FEES PURSUANT
 TO GOVERNMENT CODE SECTION 6103

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SACRAMENTO

Coordinated Proceeding Special Title
 (Rule 3.550),

Coordinated Proceeding JCCP 4974
 Assigned for All Purposes to Honorable
 Judge James E. McFetridge, Dept. 30

OROVILLE DAM CASES

**STATE WATER CONTRACTORS',
 THE METROPOLITAN WATER
 DISTRICT OF SOUTHERN
 CALIFORNIA'S, SANTA CLARA
 VALLEY WATER DISTRICT'S,
 MOJAVE WATER AGENCY'S AND
 KERN COUNTY WATER AGENCY'S
 RESPONSE BRIEF TO PEOPLE'S
 SUPPLEMENTAL BRIEF IN SUPPORT
 OF ITS OPPOSITION TO MOTION TO
 INTERVENE**

Date: December 4, 2020
 Time: 9:00 a.m.
 Dept.: 30

Action Filed: February 7, 2018

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1 **I. INTRODUCTION**

2 The Court asked the District Attorney to address in its supplemental brief whether
3 Contractors' interests in the outcome of a potentially \$50 billion judgment against DWR are
4 direct or otherwise sufficient to warrant Contractors intervening in this litigation. The District
5 Attorney, apparently viewing the Court's ask as an opportunity to reargue its opposition to
6 Contractors' Motion to Intervene, provides little additional argument that warrants a response. To
7 the extent the District Attorney does address the Court's question about Contractors' interests, it
8 relies on rank speculation and a fundamental misunderstanding of the SWP and Contractors'
9 relationship to the SWP. In their supplemental brief, Contractors forewarned that a judgment
10 against DWR would create significant uncertainty about how DWR would continue to operate the
11 SWP. DWR's supplemental brief underscores that uncertainty. The District Attorney offers no
12 evidence contradicting the impact of a judgment on DWR and its ability to operate the SWP, and
13 instead speculates that a new agency will be formed to overtake DWR's operation of the SWP if a
14 judgment against DWR renders it unable to do so. There is no basis for the District Attorney's
15 conjectures.

16 The remainder of the District Attorney's arguments—such as the timeliness of
17 Contractors' proposed intervention and whether DWR adequately represents Contractors'
18 interests in the litigation—were not invited by the Court, lack merit, and have been previously
19 addressed by Contractors' Motion to Intervene, Reply, and Supplemental briefs.

20 Contractors reiterate that the standard for granting leave to intervene is liberal, not
21 narrowly focused as suggested by the District Attorney. As Contractors' prior briefing
22 abundantly demonstrates, Contractors have very clear interests that will be directly affected by
23 the outcome of this litigation, and they should be able to participate in this case.

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1 **II. LEGAL ARGUMENT**

2 **A. DWR's Supplemental Brief Supports Contractors' Concerns that a Judgment**
3 **Will Impair DWR's Ability to Meet its SWP Obligations.**

4 DWR's supplemental brief flatly contradicts the District Attorney's argument that impacts
5 to the SWP due to an award of civil penalties are "sheer speculation." (Pl.'s Supp. Br. at 1:11.)
6 To the contrary, DWR's supplemental brief underscores the very real threat that a multi-billion
7 dollar judgment poses to the financial and operational stability of the SWP.

8 DWR states plainly in its briefing that "a judgment amounting to \$51 billion, or even one-
9 tenth of that amount, would prevent DWR from maintaining the SWP and would eliminate
10 DWR's ability to meet its obligations related to the SWP." (Def.'s Supp. Br. at 4:4.) This
11 argument appears hyperbolic, but it confirms Contractors' argument that DWR has no present
12 plan to absorb the judgment sought in this action while preserving Contractors' interests in
13 imported water supplies, managing complex water portfolios, meeting water supply and
14 management obligations, and gaining the benefit of Contractors' respective, significant financial
15 investments in the SWP over the past 60 years. Importantly, the District Attorney concedes in its
16 own supplemental brief that if DWR is "no longer able to function" as a result of a judgment
17 against it, Contractors could be "directed [*sic*] affected." (Pl.'s Supp. Br. at 8:2-3.) There is,
18 therefore, no question that the penalties sought against DWR could directly impair the interests of
19 Contractors.

20 Additionally, a judgment against DWR would imperil Contractors' interests regardless of
21 whether DWR is able to pass off the costs of a judgment to Contractors. DWR's Enterprise
22 Accounting Branch Chief, Lisa Toms, states that "DWR relies upon an operating account and
23 operating reserves of approximately \$300 million, as of August 2020, to fund SWP costs pending
24 reimbursement by the 29 public water agencies. A large judgment of several hundred million
25 dollars, not to mention a billion dollars or more, would deplete those operating funds and reserves
26 and have a substantial negative impact on the SWP by absorbing essentially all of the financial
27 resources that DWR uses to fund capital, operation, maintenance and replacement costs." In

1 other words, DWR would pay for the civil penalties up front and then seek reimbursement from
2 Contractors as part of the reimbursement mechanism for costs associated with the SWP.¹
3 However, DWR would not have sufficient operating funds or reserves to continue operating the
4 SWP prior to obtaining reimbursement from Contractors. In addition, it could take years to fully
5 recover the costs of a judgment from Contractors. As stated in Contractors' supplemental brief,
6 the fiscal impacts of a judgment against DWR, if allocated to Contractors, would greatly exceed
7 each individual Contractors' existing sources of revenue, thus requiring reimbursement over
8 many years at potentially great detriment to the Contractors, their other projects and
9 responsibilities, and their water users. In the meantime, DWR's cash flow problems will persist.
10 Thus, DWR's supplemental brief discloses that it has no present plan to operate the SWP if a
11 billion, let alone multi-billion dollar, penalty is awarded regardless of who pays the ultimate cost.

12 In sum, and by the District Attorney's own admission, Contractors will be directly
13 affected by a judgment against DWR for all of the reasons set forth in Contractors' and DWR's
14 supplemental briefs. This is so regardless of whether DWR is able to pass off the costs of a
15 judgment to Contractors.

16 **B. The District Attorney Baselessly Speculates that a New Agency Could Be**
17 **Created to Fill DWR's Role in Operating the SWP.**

18 The District Attorney argues that if DWR is unable to operate the SWP as a result of a
19 judgment against it, a new agency would "almost certainly" be formed to take its place. This
20 argument is baseless.

21 In particular, the District Attorney asserts that "[i]f DWR is not able to perform precisely
22 its same role in the future, some other entity will almost certainly be established to do so, and it
23 will not affect Contractors' rights to obtain water under its ongoing agreements." (Pl.'s Supp. Br.
24 at 8:21.) It is entirely unclear on what basis the District Attorney makes this assertion. There is
25 simply no basis to imagine, let alone assume, that the Legislature would plan, create, and fund a
26 new public agency to take DWR's place in operating the SWP if DWR is unable to do so. Again,

27 ¹ Contractors do not believe that DWR may recover the costs of a judgment against it from
28 Contractors, as stated in Contractors' supplemental brief.

1 DWR has told the Court that the operation of the SWP will be impacted by a judgment, and this
2 will inevitably and directly impact Contractors' water supply contracts and Contractors' various
3 interests in the SWP and the people they serve.

4 **C. Only Contractors Have Allocations of Water Supplies from the SWP, and**
5 **their Interests Are Different from End Users of SWP Water.**

6 The District Attorney argues that any user of SWP water might intervene in the instant
7 action if Contractors are permitted to do so. This slippery slope argument is unpersuasive. The
8 District Attorney asserts that “[t]o the extent Contractors suggest that the State Water Project will
9 somehow be unable to provide water at all if civil penalties are assessed against DWR, then it is
10 difficult to see why all individual customers of water delivered through the State Water Project
11 would not also be able to intervene, based upon a reasonable fear of some potential disruption in
12 water delivery.” (Pl.’s Supp. Br. at 8:25-26.) The only “customers” of the SWP are the 29 public
13 agencies holding long-term water supply contracts with DWR—including Contractors. Indeed,
14 Contractors have exclusive water supply contracts with DWR, which holds them responsible for
15 financing the SWP regardless of whether they receive water. Moreover, when Contractors do
16 receive water, they are obligated to pay certain variable charges associated with those deliveries.
17 These costs are recovered through Contractors’ rates and taxes.

18 End users of SWP water, on the other hand, have no contractual arrangements with DWR,
19 and therefore have no right to water deliveries, nor any of the attendant obligations assumed by
20 Contractors through their water supply contracts with DWR. Thus, Contractors and their
21 customers are in fundamentally different positions with respect to rights and obligations related to
22 the SWP. The District Attorney’s argument that if Contractors are permitted to intervene, then
23 individual water uses may also intervene, should be dismissed out of hand.

24 **D. The Subject of this Action Is the SWP, and the Action Will Not Be Enlarged**
25 **by Contractors’ Participation.**

26 The District Attorney makes several additional specious—and unsolicited—arguments
27 related to the legal standard for intervention. In particular, the District Attorney argues that

1 Contractors do not have an interest in the “property or transaction” subject to the action because
2 the civil penalties sought against DWR are the only “transaction” that is the subject of the
3 litigation. The District Attorney argues further that Contractors can seek to avoid liability for any
4 civil penalties imposed on DWR through declaratory relief or some other legal remedy that
5 prevents DWR from allocating the costs of a judgment to Contractors. This argument ignores the
6 fact that the District Attorney is seeking civil penalties against DWR for allegedly depositing
7 deleterious materials in the Feather River as a consequence of its construction, operation, and
8 maintenance of Oroville Dam, i.e. the head of the SWP. Thus, DWR’s alleged violation of Fish
9 and Game Code section 5650 resulting from its management of the Oroville Dam is the subject of
10 this action. Because Contractors have clear and direct interests in how DWR operates Oroville
11 Dam (and the SWP more broadly), Contractors have an interest in the property that is the subject
12 of this action, Oroville Dam. And in any event, Contractors have very clear interests in the
13 imposition of civil penalties against DWR for all of the reasons set forth in Contractors’
14 intervention briefing.

15 The District Attorney also argues that Contractors’ presence in the lawsuit will greatly
16 complicate the case, by requiring substantial additional discovery and adding claims against
17 DWR related to whether DWR can pass off the costs of a judgment to Contractors, among other
18 things. Neither of these arguments have merit.

19 Contractors have already expressly stated that they are only seeking to intervene to defeat
20 the claims made by the District Attorney. While Contractors have not yet had the opportunity to
21 review the substantial discovery already conducted in this case, and reserve their right to
22 supplement that material if necessary, it is likely that the body of evidence already amassed will
23 be wholly or substantially sufficient for purposes of resolving this case. Similarly, the District
24 Attorney will not be significantly burdened by the presence of Contractors in the lawsuit. The
25 gravamen of the action is whether DWR violated the Fish and Game Code, and Contractors’
26 presence in the lawsuit does not change that. The District Attorney’s interests in resolving the
27 litigation thus do not outweigh Contractors’ interests in intervening in it.

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1 **III. CONCLUSION**

2 Contractors respectfully request that the Court grant their Motion to Intervene.
3 Contractors have demonstrated clear interests that will be directly affected by the outcome of this
4 litigation, which more than satisfy the liberal standards for intervening.

5 Dated: November 13, 2020

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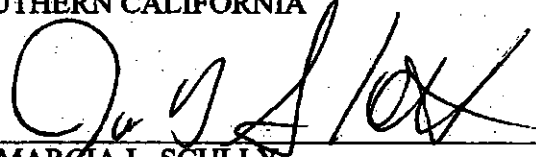
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1 **PROOF OF SERVICE**

2 At the time of service I was over 18 years of age and not a party to this action. My
3 business address is 300 South Grand Avenue, 25th Floor, Los Angeles, California 90071. On
4 November 13, 2020, I served the following document(s):

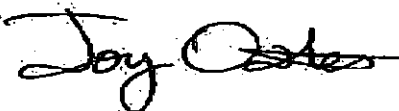
5 **STATE WATER CONTRACTORS', THE METROPOLITAN WATER DISTRICT OF**
6 **SOUTHERN CALIFORNIA'S, SANTA CLARA VALLEY WATER DISTRICT'S,**
7 **MOJAVE WATER AGENCY'S AND KERN COUNTY WATER AGENCY'S**
8 **RESPONSE BRIEF TO PEOPLE'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS**
9 **OPPOSITION TO MOTION TO INTERVENE**

10 on the interested parties in this action pursuant to the Services List.

11 **BY CASEHOMEPAGE:** Pursuant to Code of Civil Procedure section 1010.6,
12 California Rules of Court, rule 2.260, and the parties' agreement to accept service by e-
13 mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the
14 e-mail address listed by submitting a PDF format copy of such document via file transfer
15 protocol (FTP) to CaseHomePage through the upload feature at www.casehomepage.com
16 on November 13, 2020. The document(s) was transmitted by file transfer protocol (FTP)
17 without error.

18 I declare under penalty of perjury under the laws of the State of California that the above
19 is true and correct.

20 Executed on November 13, 2020, at Los Angeles, California.

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By: 
Joy Oates

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