

June 6, 2007

**BY HAND DELIVERY**

Jane Farwell  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000

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STATE WATER RESOURCES CONTROL BOARD  
P.O. BOX 2000  
SACRAMENTO, CA 95812-2000

Re: Santa Ana River Water Right Hearing: Closing Brief of San Bernardino Valley  
Municipal Water District and Western Municipal Water District of Riverside County


Dear Ms. Farwell:

Pursuant to your electronic mail message dated May 23, 2007, enclosed is the closing brief of San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County related to the Hearing on Water Right Applications 31165, 31370, 31174, 31369, and 31372 and Wastewater Change Petition WW-0045.

Please feel free to call with any questions.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien

856252.1

1 DOWNEY BRAND LLP  
2 KEVIN M. O'BRIEN (Bar No. 122713)  
3 DAVID R.E. ALADJEM (Bar No. 152203)  
4 ANDREA P. CLARK (Bar No. 226310)  
5 555 Capitol Mall, Tenth Floor  
6 Sacramento, CA 95814-4686  
7 Telephone: (916) 444-1000  
8 Facsimile: (916) 444-2100

9 Attorneys for Applicants  
10 San Bernardino Valley Municipal Water District and  
11 Western Municipal Water District of Riverside County

12 BEFORE THE  
13 STATE WATER RESOURCES CONTROL BOARD

14 IN THE MATTER OF:

15 Water Right Applications 31165 and 31370  
16 of San Bernardino Valley Municipal Water  
17 District and Western Municipal Water  
18 District of Riverside County, Application  
19 31174 of Orange County Water District,  
20 Application 31369 of Chino Basin  
21 Watermaster and Application 31372 and  
22 Wastewater Change Petition WW-0045 of  
23 the City of Riverside.

24 **CLOSING BRIEF OF APPLICANTS SAN**  
25 **BERNARDINO VALLEY MUNICIPAL**  
26 **WATER DISTRICT AND WESTERN**  
27 **MUNICIPAL WATER DISTRICT OF**  
28 **RIVERSIDE COUNTY**

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**I.**  
**INTRODUCTION AND SUMMARY OF ARGUMENT**

Last week, for perhaps the first time in history, the California Department of Water Resources completely shut down the Harvey O. Banks Pumping Plant in order to avoid entraining delta smelt. The shut-down of State Water Project pumping graphically illustrates a critical fact for water agencies in Southern California – they must develop local water supplies to meet future needs rather than merely relying on imported water supplies from Northern California or the Colorado River.

San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County (collectively, “Muni/Western”) filed Water Right Application Nos. 31165 and 31370 (the “Applications”) with the State Water Resources Control Board (the “State Board” or the “SWRCB”) in order to develop a local, high-quality water supply that would improve water supply reliability for their customers. The project based on the Applications (the “Project”) has several key elements:

- Muni/Western are seeking to divert and store up to 200,000 afy from a river system that, until 2000, was deemed fully appropriated and *no legal user of water objects to the grant of the Applications*. In comparison to decades of litigation on some river systems, the consensus and cooperation of water users on the Santa Ana River since the 1969 settlements is remarkable.
- The Applications make use of an existing facility – Seven Oaks Dam, a flood control feature of the U.S. Army Corps of Engineers Santa Ana Mainstem Project – to regulate flows on the Santa Ana River.
- The Project assumes an increase in water conservation of 10% of total demand *before* looking to the Santa Ana River or additional imported water to meet future demands. This assumption is consistent with the state-of-the-art thinking in California on water conservation in the urban setting.
- The Project will reduce the increasing demands of the Muni/Western service area for imported water from Northern California and the Colorado River. Given that



1 population in the Muni/Western service areas is estimated to increase by 64.5% by 2025  
2 (Muni/Western Ex. 4-3, Table 4.1-5), Muni/Western's total demand for imported water  
3 will also grow. However, for each newly conserved acre-foot of water developed by the  
4 Project, there will be an acre-foot reduction in imports.

5 ➤ The Project will have a number of benefits for the Santa Ana River watershed  
6 (e.g., improved water quality to support water recycling projects, improved clean-up of  
7 groundwater contamination, reducing the risk of liquefaction during an earthquake) other  
8 than water supply reliability that advance the public interest. In providing these benefits,  
9 it has been demonstrated that the Project will have only minimal (i.e., less than significant  
10 after mitigation) impacts on public trust resources.

11 ➤ The Project, as modified during the last day of the water right hearing (reducing  
12 Muni/Western's peak diversion rate from 1,500 cfs to 1,250 cfs), will not interfere with  
13 the peak flood flows that play an important role in the geomorphology of the Santa Ana  
14 River system. Even though Muni/Western's contribution to the reduction of peak flows is  
15 very small (only 2%), the reduced peak diversion rate will assist in efforts to mimic  
16 historical hydrology during wet years.

17 ➤ The Project will not interfere with water releases called for by the Multi-Species  
18 Habitat Management Plan, pursuant to the U.S. Fish and Wildlife Service's 2002  
19 Biological Opinion, which could amount to as much as 7,000 cfs and which have the  
20 express objective of mimicking historic conditions in the Santa Ana River.

21 In short, the Project represents smart water development of the type that California needs to meet  
22 its future water demands and of the type that will play an ever-increasing role as the reliability of  
23 imported State Water Project water continues to be reduced.

24 The State Board organized the water right hearing around six key issues. Muni/Western's  
25 responses to each of these key issues are summarized in the table below:

26 ///

27 ///

28 ///

Key Issue	Summary of Muni/Western Response	Section in Closing Brief Discussing the Key Issue
1. Is there unappropriated water in the Santa Ana River?	Yes. Muni/Western could divert and place to reasonable and beneficial use up to 200,000 af in a single year.	Section III.B
2. What is the effect of the Project on public trust resources?	The Project will have minimal (i.e., less-than-significant after mitigation) impacts on public trust resources.	Section III.C.7
3. Would approving the Project be in the public interest?	Yes. The Project will have beneficial effects by facilitating water recycling, improving water supply reliability, and reducing the risk of liquefaction.	Section III.C
4. Would the Project cause injury to legal users of water?	No. All legal users of water are parties to the legal judgments summarized in the Stipulation of Applicants dated April 5, 2007 on file with the SWRCB.	Section III.B.2(b)
5. What should be the priority assigned to any permits?	The Applications should be given the priority described in the Stipulation of Applicants dated April 5, 2007 on file with the SWRCB.	Section III.B.2(c)
6. What effect would the Project have on groundwater contamination plumes?	The Project would generally assist in cleaning up groundwater contaminant plumes more quickly than would be the case without the Project.	Section III.C.5

The SWRCB should grant the Applications at the earliest possible date, based on the proposed findings set forth in Attachment 1 and on the terms and conditions proposed in Attachment 2.

**II.  
FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

**A. *The Orange County and Western Judgments Established a Cooperative Framework for Water Management on the Santa Ana River System***

For almost forty years, water users in the Santa Ana River watershed have cooperatively managed water use and resources in the watershed. These collaborative efforts are the result of two superior court judgments that adjudicated the surface water rights and the groundwater rights.

///

1 The *Orange County*<sup>1</sup> and *Western*<sup>2</sup> Judgments, both issued on April 17, 1969, resulted in an  
2 adjudication of the water rights of substantially all water in the Santa Ana River watershed.  
3 (Muni/Western Ex. 3-1, ¶ 11).<sup>3</sup> The two judgments form the framework for water management in  
4 the Santa Ana River watershed: the *Orange County* Judgment allocates the flows of the Santa  
5 Ana River among the parties upstream of Prado Dam and parties downstream of Prado Dam; and  
6 the *Western* Judgment provides for the management of groundwater in the groundwater basins in  
7 the upper Santa Ana River area, i.e., the San Bernardino Basin Area, the Colton Basin Area, the  
8 Riverside Basin Area in San Bernardino County, and the Riverside Basin Area in Riverside  
9 County. [Muni/Western Ex. 3-1, ¶¶ 13-20; see Stipulation of Applicants dated April 5, 2007 (on  
10 file with the SWRCB), ¶¶ 2, 4, 8, 9]. As evidenced in the testimony of Bill Dendy and Robert  
11 Reiter, the two judgments were the foundation for the Santa Ana Watershed Planning Agency  
12 (now the Santa Ana Watershed Project Authority) (SAWPA) and for regionally cooperative water  
13 management. (Muni/Western Ex. 3-1, ¶ 20; Exhibit Joint 1-1, ¶¶ 11-17).

14 Both the *Orange County* and *Western* Judgments expressly contemplated that the parties  
15 would engage in water conservation projects like the Project proposed by Muni/Western. The  
16 *Orange County* Judgment expressly provides: “Insofar as Lower Area claimants [i.e., those  
17 parties located downstream from Prado] are concerned, Upper Area water users [i.e., those  
18 located upstream from Prado] and other entities may engage in unlimited water conservation  
19 activities, including spreading, impounding and other methods, in the area above Prado Reservoir,  
20 so long as Lower Area receives the water to which is it entitled under the Judgment and there is  
21 compliance with all of its provisions.” [Joint Ex. 2-1, ¶ 5(a)]. In other words, “[i]n exchange for  
22 meeting this guaranteed flow at Prado, the upper area entities are entitled to engage in unlimited  
23 water conservation in the upper area above Prado Reservoir.” [Hearing Transcript (“HT”) May 2,

24  
25 <sup>1</sup> *Orange County Water District v. City of Chino et al.*, Superior Court of Orange County, Case No. 117628  
(Joint Ex. 2-1).

26 <sup>2</sup> *Western Municipal Water District of Riverside County et al. v. East San Bernardino County Water District*  
27 *et al.*, Superior Court of Riverside County, Case No. 78426 (Joint Ex. 2-7).

28 <sup>3</sup> The *Orange County* litigation alone involved more than 4,000 parties and the water supply of an entire  
stream system covering more than 2,450 square miles and reaching into four counties. (Muni/Western Ex. 3-1, ¶ 11).

1 p. 78: 13-16].

2 Like the *Orange County* Judgment, the *Western* Judgment “provides the parties with an  
3 opportunity to participate in new conservation of native water, which will augment the natural  
4 supply of the San Bernardino Basin area just below the mouth of the upper Santa Ana Canyon in  
5 proportion to their respective shares of the natural safe yield.” [HT May 2, 79: 25 – 80:5;  
6 Muni/Western Ex. 3-1, ¶ 19; Joint Ex. 2-7 ¶¶ IV(i), VI(b)1., VI(b)2, and VI(c)]. In order to  
7 manage water conservation activities, the *Western* Judgment established limits on the rights of  
8 parties producing groundwater from the named basins for use elsewhere, and established the  
9 rights and responsibilities of Muni to manage recharge of the Basins. (Joint Ex. 1-1, ¶ 13). The  
10 judgment also created a Watermaster to monitor compliance with the physical solution and to  
11 report annually to the Court. (Joint Ex. 1-1, ¶ 13).

12 **B. *Seven Oaks Dam Provides an Opportunity for Water Conservation***

13 **1. *Existing Flood Control Operations Allow for the Diversion of Peak Flows***

14 The existing flood control operations of Seven Oaks Dam have modified the flow regime  
15 of the Santa Ana River. As the State Board recognized in WR Order 2000-12: “the construction  
16 of the Seven Oaks Dam is a significant change in conditions that will affect the pattern of flows  
17 below the dam following storm events and make it feasible to divert more water.” (SWRCB  
18 Order 2000-12, p.13). Because Seven Oaks Dam impounds Santa Ana River flow for flood  
19 control from October through February, it “provides an excellent opportunity to augment local  
20 water supply by conserving runoff slowed by the dam.” (Muni/Western Ex. 3-1, p. 7: 23-24).  
21 Such regulatory storage makes it possible for Muni/Western to divert the maximum amount of  
22 water under the Applications with or without the conservation storage Muni/Western intends to  
23 implement at the Dam. (Muni/Western Ex. 4-3, Table 3.0-3; Muni/Western Ex. 4-4, p. 3-98). As  
24 Robert Reiter, former General Manager of Muni and a long-time member of both the Santa Ana  
25 River and Western-San Bernardino Watermaster Committees,<sup>4</sup> testified: “The very presence of

26 <sup>4</sup> The Santa Ana River Watermaster Committee is the committee appointed by Orange County Superior Court  
27 to administer the *Orange County* Judgment. (Joint Ex. 2-1, pp. 15-17). The Western-San Bernardino Watermaster  
28 Committee is the committee appointed by Riverside County Superior Court to administer the *Western* Judgment.  
(Joint Ex. 2-7, pp. 25-27). Mr. Reiter has served on both committees for more than 20 years. (Muni/Western Ex. 3-  
1, ¶¶ 2,3).

1 Seven Oaks Dam regulates flows in the Santa Ana River and so, with the construction of a 1,500  
2 cfs pipeline intake at the Cuttle Weir, Muni/Western would be able to divert the same quantity of  
3 water as with the use of conservation storage at Seven Oaks.” (Muni/Western Ex. 3-1, p. 10: 9-  
4 12).

5 **2. Conservation Storage Would, If Approved, Provide Operational Flexibility**

6 There are substantial benefits to Muni/Western from Seven Oaks Dam being operated to  
7 provide both regulatory flood control storage and seasonal or conservation storage.  
8 (Muni/Western Ex. 3-1, ¶ 30). Under regulatory storage (i.e., currently authorized flood control  
9 operations at Seven Oaks Dam), water is stored only for short periods of time. By contrast, under  
10 a seasonal or conservation storage program, “water would be impounded during the flood  
11 transition period from the beginning of March to the end of May. During the dry months of June  
12 through September, the stored water would be released to users downstream to meet their  
13 diversion and recharge requirements.” (Muni/Western Ex. 3-1, p. 7: 24-27). For example, during  
14 a maximum water year such as water year (“WY”) 1969 in which up to 198,300 af of water  
15 would be available for diversion, Muni/Western would use almost 45,000 af of conservation  
16 storage in Seven Oaks. (Muni/Western Ex. 7-1, ¶¶ 6-9). Use of Seven Oaks for longer-term  
17 storage of this water,<sup>5</sup> as opposed to immediately conveying it to other locations after temporary  
18 storage, “provides Muni/Western with substantial flexibility to deliver water to virtually any  
19 location within our combined service areas.” (Muni/Western Ex. 3-1, p. 10: 20-22;  
20 Muni/Western Ex. 3-1, ¶¶ 21, 27-38).

21 **3. Water Conservation is Feasible and Can Be Implemented Without Adversely**  
22 **Affecting Flood Protection**

23 Although Seven Oaks Dam is currently only a flood control facility, the U.S. Army Corps  
24 of Engineers (“Corps”) has determined that its use for conservation storage is feasible. The Corps  
25 conducted a reconnaissance study in 1986 regarding the possibility of seasonal water  
26

27 <sup>5</sup> It is important to note that the Water Control Manual for Seven Oaks requires that Seven Oaks Reservoir be  
28 emptied at the end of each water year. The operation of Seven Oaks for seasonal or conservation storage would not  
change that requirement. (Local Sponsors Ex.1-6, p. 6-1).

1 conservation storage at the dam. (Muni/Western Ex. 3-1 ¶ 22; HT May 4, 46:15-19). As Vana  
2 Olson, Director of the Department of Public Works for San Bernardino County, testified at the  
3 hearing, the Corps completed a feasibility study in 1997 and prepared a Final EIS/EIR for the  
4 feasibility report. (HT May 4, 47: 9-15). “The study concluded that water conservation at Seven  
5 Oaks Dam was technically and economically feasible.” (HT May 4, 49: 14-16). The study also  
6 concluded that water conservation could be implemented at Seven Oaks without interfering with  
7 the flood protection for which the dam was constructed. (Local Sponsors Ex. 1-13, p. 6-1;  
8 Muni/Western Ex. 4-4, pp. 3-17, 3-151 through 3-153). The Corps is currently initiating a  
9 supplemental study to the 1997 feasibility study, which will lead to a record of decision  
10 approving use of the Dam for conservation storage. (Muni/Western Ex. 3-1 ¶ 26).  
11 “Muni/Western believe that, based on the results from the 1997 feasibility study and the analysis  
12 included in the Draft and Final EIRs, the supplemental study will show that water conservation  
13 can occur without interfering with flood control operations; that determination, however,  
14 ultimately belongs to the Corps.” (Muni/Western Ex. 3-1, p. 10: 4-7).

15 **C. *The Muni/Western Project***

16 **1. *History of the Applications***

17 In order to diversify its sources of water supply and to take advantage of the regulatory  
18 and seasonal water conservation storage potential created by the construction of the Seven Oaks  
19 Dam, Muni/Western have filed Application Nos. 31165 and 31370 to divert up to 200,000 acre-  
20 feet of unappropriated water from the Santa Ana River. (Muni/Western Ex. 4-1, ¶ 6; Staff  
21 Exhibits SWRCB-1 and SWRCB-2). The history of Muni/Western’s Application Nos. 31165 and  
22 31370 is summarized in SWRCB Order 2000-12 and in Muni/Western’s written testimony.  
23 (SWRCB Order 89-25; Muni/Western Ex. 5-1, ¶ 2; Muni/Western Ex. 4-3, Ch. 2).

24 **2. *Description of the Project***

25 The Project is fully described both in Chapter 2 of the Draft EIR (Muni/Western Ex. 4-3)  
26 and in the testimony submitted to the State Board by Robert Thomson (Muni/Western Ex. 4-1, ¶¶  
27 6-10). In essence, the Project proposes to divert water from the Santa Ana River for delivery  
28 within the Muni/Western service areas. Under the Project, water captured from the Santa Ana

1 River would be put to beneficial use in the Muni/Western service areas through direct use,  
2 groundwater recharge, or exchange.<sup>6</sup> (HT May 2, 211: 18 – 212:21; Muni/Western Ex. 4-3,  
3 Ch.2). The Project “takes advantage of the existing infrastructure and management facilities to  
4 capture and re-regulate and convey the infrequent floodwaters for the main stem of the Santa Ana  
5 River.” (HT May 2, 115: 15-20). Although existing facilities would be used to the extent  
6 possible, construction of new facilities “is needed to connect the existing regulation, diversion,  
7 and conveyance facilities and spreading facilities in order to capture up to 200,000 acre-feet of  
8 water in very wet years for local use.” (HT May 2, 115:24 – 116:2; Muni/Western Ex. 4-3, Ch.  
9 2). Specifically, Muni/Western would need to construct modifications to water intake facilities at  
10 Seven Oaks Dam; diversion facilities at either the Cuttle Weir or the Plunge Pool; and new  
11 pipelines to connect the points of diversion with regional water distribution pipelines (e.g.,  
12 Metropolitan’s Inland Feeder) or groundwater spreading basins. (Muni/Western Ex. 4-3, Ch. 2;  
13 Muni/Western Exs. 4-8 to 4-13).

14 **3. *Modifications to the Project to Mimic the Natural Hydrology of the Santa Ana***  
15 ***River***

16 At several points during the water right hearing, Hearing Officer Arthur G. Baggett, Jr.  
17 expressed concerns related to the “flashy” nature of the Santa Ana River and to the SWRCB’s  
18 interest in mimicking, to an extent, the natural hydrology of the Santa Ana River. (HT May 2,  
19 160: 25 – 162:15; HT May 4, 125: 11-20). In response to these concerns, Muni/Western  
20 proposed modifications to the Project that would allow the River to more closely mimic its  
21 natural hydrology.<sup>7</sup> First, Muni/Western stated – again – that the Project would not interfere with

22 <sup>6</sup> The Draft and Final EIRs included as an element of the Project the exchange of SAR water with The  
23 Metropolitan Water District of Southern California. In response to concerns raised by SWRCB staff in a letter from  
24 Dan Frink to Andrea Clark and David Aladjem dated January 23, 2007, Muni/Western have set aside the possibility  
25 of an exchange with Metropolitan. (HT May 2, 27:20 to 28:2). If the SWRCB grants permits corresponding to  
Application Nos. 31165 and 31370 and it becomes desirable to enter into an exchange with Metropolitan,  
Muni/Western would only implement such an exchange in full compliance with all applicable laws.

26 <sup>7</sup> There is no need for either Muni/Western or the State Board to analyze the impacts of this modification of  
27 the Project on the environment because the reduction in peak diversion rate from 1,500 cfs to 1,250 cfs is within the  
28 range of diversion rates (0 to 1500 cfs) analyzed in the Muni/Western EIR. (Muni/Western Ex. 4-3, pp. 3.0-2 and  
3.0-3). Consequently, the impacts of this measure have already been analyzed in the Muni/Western EIR and any  
adverse impacts on the environment have been mitigated to a less-than-significant level.

1 water releases called for by the Multi-Species Habitat Management Plan, pursuant to the U.S.  
2 Fish and Wildlife Service's 2002 Biological Opinion, which could amount to as much as 7,000  
3 cfs (Local Sponsors Ex. 1-6, Plate 7-01) and which have the express objective of mimicking  
4 historic conditions in the Santa Ana River. (Muni/Western Ex. 11-5, p. 7; HT May 8, 10:2-12).  
5 Second, Muni/Western will limit its instantaneous diversion rate from 1,500 cfs to 1,250 cfs,  
6 thereby reducing its proposed instantaneous diversion rate by 1/6th. [HT May 8 12:11-14,  
7 Muni/Western Proposed Permit Terms dated May 8, 2007 (on file with the SWRCB)]. Bypassing  
8 such high flows would – within the limits imposed by the construction and operation of Seven  
9 Oaks Dam for flood protection – help to mimic high historical flows on the Santa Ana River.

#### 10 4. CEQA Compliance

11 Muni/Western released a Draft Environmental Impact Report ("Draft EIR") in October  
12 2004 evaluating impacts associated with the Project, in compliance with the California  
13 Environmental Quality Act, Pub. Res. Code §§ 21000 *et seq.* (Muni/Western Ex. 4-3).  
14 Muni/Western received comments from interested agencies and non-governmental organizations,  
15 and responded to those comments in a Final Environmental Impact Report ("Final EIR") released  
16 in January 2007. (Muni/Western Ex. 4-4). The Muni and Western Boards of Directors certified  
17 the Final EIR and approved the Project, and Notices of Determination were filed with the  
18 appropriate County Clerks, in March 2007. (Muni/Western Exs. 4-5, 4-6). The statute of  
19 limitations has now run and there have been no actions filed to challenge the environmental  
20 analysis performed by Muni/Western.

### 21 III. 22 ARGUMENT

23 In order to determine whether to grant the Applications, the SWRCB must address two  
24 sets of issues. First, the State Board must consider whether there is unappropriated water in the  
25 Santa Ana River, and whether Muni/Western could divert that water for reasonable and beneficial  
26 use in a manner that is consistent with existing water rights. [Water Code §§ 1253, 1375(d)].

27 ///

28 ///



1 These questions were the basis for Key Issues 1, 4 and 5.<sup>8</sup> As summarized in section III.B below,  
2 the evidence presented during the hearing established – without controversy – that Muni/Western  
3 can divert and store up to 200,000 af of unappropriated water during a repetition of water year  
4 1968/1969 hydrology and place that water to reasonable and beneficial use without interfering  
5 with valid senior rights or causing injury to legal users of water. A proposed finding that  
6 summarizes this evidence is attached for the SWRCB’s reference as Attachment 1. Proposed  
7 permit terms that are based on this evidence are attached for the SWRCB’s reference as  
8 Attachment 2.

9 Second, the State Board must consider whether issuing permits for the Applications would  
10 serve the public interest. (Water Code §§ 1253-1259). This question was the basis for Key Issues  
11 2, 3 and 6.<sup>9</sup> As summarized in section III.C below, the only credible and competent evidence  
12 presented during the hearing showed that granting the Applications would serve the public  
13 interest in a variety of ways:

- 14 ➤ Reducing demands within Muni/Western’s service area for imported water from  
15 the Sacramento/San Joaquin Delta and the Colorado River [section III.C.1]
- 16 ➤ Promoting water recycling [section III.C.2]
- 17 ➤ Complementing existing and future water conservation efforts [section III.C.3]
- 18 ➤ Reducing the risk of liquefaction during an earthquake [section III.C.4]
- 19 ➤ Enhancing the clean-up of groundwater contamination [section III.C.5]

21 <sup>8</sup> Key Issue 1 stated: “Is there water available for appropriation by each of the applicants? If so, when is  
22 water available and under what circumstances?” Key Issue 4 stated: “Will any of the proposed appropriations by the  
23 applicants and/or the proposed change in treated wastewater discharge by the petitioner cause injury to the prior  
rights of other legal users of water?” Key Issue 5 stated: “What should be the relative priority of right assigned to  
any permits that may be issued on the pending applications?”

24 <sup>9</sup> Key Issue 2 stated: “Will approval of any of the applications or the petition result in any significant adverse  
25 impacts to water quality, the environment or public trust resources? If so, what adverse impact or impacts could  
26 result from the project or projects? Can these impacts be avoided or mitigated to a level of non-significance? If so,  
27 how? What conditions, if any, should the State Water Board adopt to avoid or mitigate any potential adverse impacts  
28 on fish, wildlife, or other public trust resources that would otherwise occur as a result of the approval of the  
applications and petition?” Key Issue 3 stated: “Is each of the proposed projects in the public interest? If so, what  
conditions, if any, should the State Water Board adopt in any permits that may be issued on the pending applications,  
or in any order that may be issued on the wastewater change petition, to best serve the public interest?” Key Issue 6  
stated: “What effect, if any, will the projects have on groundwater and/or movement of any contaminated  
groundwater plumes? Can the effects be mitigated? If so, how?”

1 > Mimicking the natural hydrology of the Santa Ana River during high flow periods  
2 [section III.C.6]

3 The evidence also showed that granting the Applications would have these beneficial  
4 effects while only having minimal (i.e., less-than-significant after mitigation) impacts on  
5 biological resources [section III.C.7]. A proposed finding that summarizes the evidence relating  
6 to whether the Project would serve the public interest is attached for the SWRCB's reference as  
7 Attachment 1. Proposed permit terms that are based on this evidence are attached for the  
8 SWRCB's reference as Attachment 2.

9 For these reasons, the SWRCB should grant the Applications based on the findings set  
10 forth in Attachment 1 and on the terms and conditions proposed in Attachment 2.

11 **A. SWRCB Standards for the Issuance of a Water Right Permit**

12 **1. The SWRCB Must Determine Whether Unappropriated Water Is Available and**  
13 **Whether Allowing the Diversion of that Water Would Serve the Public Interest**

14 Water Code section 1253 requires that the State Board: "shall allow the appropriation for  
15 beneficial purposes of unappropriated water under such terms and conditions as in its judgment  
16 will best develop, conserve and utilize in the public interest the water sought to be appropriated."  
17 [See Water Code § 1375(d) (stating that a prerequisite to the issuance of a permit is that "[t]here  
18 must be unappropriated water available to supply the applicant.")] Water Code section 1253  
19 contains within it two important requirements: (i) there must be unappropriated water available  
20 for appropriation and (ii) the State Board is to allow an appropriation of water when it is in the  
21 public interest.<sup>10</sup> As explained in below, the issuance of water right permits to Muni/Western  
22 meets both standards.

23 ///

24  
25 <sup>10</sup> The public interest standard is more fully set forth in Water Code sections 1254 to 1259. It is important to  
26 note that the "public interest" standard applies to both consumptive uses of water and the use of water to benefit  
27 public trust resources. The Court of Appeal for the Third Appellate District recently construed the public trust  
28 doctrine in the context of water right appropriations and stated: "in determining whether it is feasible to protect  
public trust values like fish and wildlife in a particular instance, the [State Water Resources Control] Board must  
determine whether protection of those values, or what level of protection, is consistent with the public interest."  
[State Water Resources Control Bd. Cases, (2006) 136 Cal.App.4th 674, 778 (internal quotation marks omitted)].

1           **2.        *The SWRCB's Findings Must Be Supported by Substantial Evidence***

2           It is well-settled that the State Board performs an adjudicatory function in allocating water  
3 rights. [*State Water Resources Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 720-21 (citing  
4 *United States v. State Water Resources Control Board* (1986) 182 Cal. App. 3d 82, 113)].

5           Accordingly, findings by the SWRCB must be supported by substantial evidence. If findings are  
6 not supported by substantial evidence in the light of the whole record, an abuse of discretion is  
7 established. [*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11  
8 Cal. 3d 506, 514-15; *Bank of America v. State Water Resources Control Board* (1974) 42 Cal.  
9 App. 3d 198, 205-208]. The opinion testimony of expert witnesses does not constitute substantial  
10 evidence when it is based upon conclusions or assumptions not supported by evidence in the  
11 record. [*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62  
12 Cal. App. 4th 1123, 1137; *Maples v. Kern County Assessment Appeals Bd.* (2002) 103 Cal. App.  
13 4th 172, 198].

14       **B.        *The Record Shows that Muni/Western Can Place up to 200,000 afy of Unappropriated***  
15       ***Water to Reasonable and Beneficial Use***

16           **1.        *The Record Shows There Are Approximately 200,000 afy of Unappropriated***  
17           ***Water in the Santa Ana River at Seven Oaks Dam During a Repeat of***  
18           ***WY1968/1969***

18           Muni/Western presented uncontroverted evidence that there are approximately 200,000 af  
19 of unappropriated water available for appropriation at Seven Oaks Dam during a repeat of WY  
20 1968/1969. Specifically, Muni/Western determined that a total of 198,319 acre-feet of water  
21 would be available for diversion by Muni/Western assuming a repeat of Water Year 1968/1969  
22 (the largest water year during the 39-year base period<sup>11</sup>). (Muni/Western Ex. 5-1 ¶ 217; HT May  
23 2, 215: 6 - 216: 21; Muni/Western Ex. 5-71).

24           Muni/Western's expert witness, Robert Beeby, reached this conclusion after conducting  
25 an extensive analysis of the hydrology of the Santa Ana River, which utilized computer models to  
26 simulate a repetition of the hydrologic base period. (Muni/Western Exhibit 5-1, ¶ 217).

27 \_\_\_\_\_  
28 <sup>11</sup> A hydrologic base period is the period of time over which a water balance (hydrologic budget) is evaluated. A base period represents long-term hydrologic conditions. (Muni/Western Ex. 5-1, ¶ 45).

1 Computer models developed by Science Applications International Corporation (SAIC) and  
2 GEOSCIENCE Support Services, Inc. were used to estimate the amount of potential capture by  
3 Muni/Western of unappropriated water from the Santa Ana River for a range of scenarios.  
4 (Muni/Western Ex. 5-1, ¶ 5).

5 **2. *The Record Shows that Muni/Western Could Place up to 200,000 af of Water***  
6 ***From the Santa Ana River to Reasonable and Beneficial Use During a Single***  
7 ***Year***

8 **(a) *Muni/Western Could Deliver up to 200,000 af to Reasonable and***  
9 ***Beneficial Uses Within a Single Year***

10 The record shows that Muni/Western could place approximately 200,000 acre-feet to  
11 reasonable and beneficial use. Specifically, assuming a repetition of WY 1968/1969,  
12 Muni/Western would be able to place all of the water that could be diverted from the Santa Ana  
13 River (as described above, 198,319 acre-feet) to reasonable and beneficial use within a 12-month  
14 period. (Muni/Western Ex. 7-1, ¶ 1).

15 Jack Safely, Water Resources Manager for Western, described in his testimony how Muni  
16 and Western would put water to beneficial use. Mr. Safely indicated that the “[w]ater diverted  
17 from the Santa Ana River would be delivered to Muni/Western through a combination of direct  
18 delivery to water treatment facilities, spreading to recharge groundwater basins, and conservation  
19 storage in surface reservoirs that serve the Muni/Western service area.” (Muni/Western Ex. 7-1,  
20 p. 5:7-10; HT May 2, 211:18 – 212: 22). Specifically, the water would be delivered according to  
21 the following four priorities: (i) direct use by Muni, through a combination of conveyance  
22 facilities, water treatment facilities, and surface storage facilities; (ii) San Bernardino Basin Area  
23 [“SBBA”] spreading, for storage in the groundwater basins and pumping by retail agencies, as  
24 well as through the proposed Riverside-Corona Feeder, which would move water from the  
25 Bunker Hill Basin within the SBBA directly to Western’s service area; (iii) spreading outside of  
26 the SBBA but within the Muni/Western service areas; and (iv) deliveries to Western for both  
27 direct use and groundwater basin recharge. (Muni/Western Ex. 7-1, ¶ 7; HT May 2, 243: 19 –  
28 245: 21). All water delivered through the various facilities would be directly used by  
Muni/Western within 12 months of when the water was delivered. (Muni/Western Ex. 7-1, ¶ 8;

1 HT May 2, 242: 9-11).

2 Mr. Safely's testimony also described where water diverted and stored by the Project  
3 would be delivered. Muni/Western would be able to put about 174,000 af of the 198,000 af of  
4 water available from the Project during a repetition of WY 1968/1969 hydrology to reasonable  
5 and beneficial use using existing facilities within the same water year. (Muni/Western Ex. 7-4).

6 Muni/Western could place the remaining approximately 24,000 acre-feet to reasonable  
7 and beneficial use in any one of three ways. First, Muni/Western could construct one or more  
8 additional spreading basins that would increase the amount of water recharged into the SBBA.  
9 (HT May 2, 247:11-16).

10 Second, the State Board could allow Muni/Western to deliver water stored in either  
11 Diamond Valley Lake or Lake Mathews to customers within the Muni/Western service areas  
12 within a 12-month period from the diversion of this water. (HT May 2, 247:17-21). Table 9 of  
13 Muni/Western Exhibit 7-1 shows that, due to the precipitation pattern of WY 1968/1969,  
14 Muni/Western can only begin diverting water in January. Because the water year for the  
15 Applications begins on October 1 and ends on September 30, requiring Muni/Western to place all  
16 198,000 af of water to reasonable and beneficial use within the water year really requires  
17 Muni/Western to use water within a 9-month period. If the State Board were to allow  
18 Muni/Western, upon consent from Metropolitan, to carry-over water in either or both Diamond  
19 Valley Lake or Lake Mathews for an additional 3 months (so that Muni/Western would have a  
20 full 12-month period from the date on which water is diverted to place that water to use), there  
21 would be ample demand within the Western service area to permit the delivery of the additional  
22 24,000 af. (Muni/Western Ex. 7-1, Table 9, p. 2 of 3).

23 Third, Muni/Western could enter into an exchange agreement with Metropolitan or  
24 another water agency that would allow for the use of the remaining 24,000 af within the same  
25 water year. (HT May 2, 247:22-25). As noted by Muni/Western during their opening statement,  
26 due to concerns posed by the State Board's staff counsel, Dan Frink, Muni/Western are not  
27 pursuing such an exchange at the present time. (HT May 2, 27:20 -28:2). If such an exchange  
28 were to be pursued, it would be accomplished in full compliance with all applicable laws. In

1 order to preserve this option to place water to reasonable and beneficial use, as suggested by the  
2 SWRCB's counsel, Muni/Western would request that the State Board grant permits for the full  
3 200,000 afy.<sup>12</sup>

4 (b) *The Project Will Not Injure Any Legal User of Water*

5 Muni/Western can divert and place almost 200,000 af to reasonable and beneficial use  
6 without injuring any legal user of water. As discussed in Mr. Beeby's testimony, the  
7 Muni/Western hydrologic models gave first priority to diversions by the Senior Water Rights  
8 Claimants, second priority to diversions by the San Bernardino Valley Water Conservation  
9 District (the "Conservation District") pursuant to Water Right Licenses 2831 and 2832, and third  
10 priority to the environmental mitigation flows required to mitigate for the effects of flood control  
11 operations of Seven Oaks Dam. (HT May 2, 207:3 – 208:10). Only after all of these valid senior  
12 rights were satisfied do the Muni/Western hydrologic models allow Muni/Western to divert any  
13 water. (Muni/Western Ex. 5-1, ¶ 162-167; Muni/Western Ex. 4-3, Table 3.0-3; Muni/Western  
14 Ex. 404, p. 3-98). In essence, the Muni/Western modeling gives Muni/Western the most junior  
15 priority to divert water from the upper Santa Ana River. Under these circumstances, the diversion  
16 of water as contemplated by the Project will not – indeed cannot – injure any legal user of water.

17 The Stipulation of Applicants dated April 5, 2007 and on file with the SWRCB confirms  
18 Muni/Western's conclusion that the Project will not injure any legal user of water. The  
19 signatories to that Stipulation are collectively responsible for implementing the *Orange County*  
20 and *Western* Judgments, together with the other agreements and judgments that constitute the  
21 "Law of the Santa Ana River." Paragraph 17 of the Stipulation states the belief of these parties  
22 that the terms of the Stipulation, which will govern the diversion of water by Muni/Western, are  
23 "fully protective of other legal users of water." That conclusion was not challenged by any party

24 ///

25  
26 <sup>12</sup> Mr. Frink's letter, dated January 23, 2007, is on file with the SWRCB. That letter states, in part: "If  
27 Muni/Western receives permits on the pending applications as requested, the long-term transfer approach appears to  
28 be best suited to Muni/Western's planned operations because it implicitly recognizes that the water will pass from the  
control of a permittee to the control of a transferee for use in a different place of use than that specified in the  
permits."

1 to the water right hearing.<sup>13</sup>

2 (c) ***The Project Should Be Given A Priority Ensuring that the Project Will***  
3 ***Not Interfere with Flood Control Operations, Valid Senior Rights or***  
4 ***Environmental Mitigation Releases***

5 Muni/Western have consistently stated that the Project should have a priority that reflects  
6 all valid senior water rights, respects the environmental mitigation flows required by the 2002  
7 Biological Opinion for the operation of Seven Oaks Dam for flood control, and does not  
8 otherwise interfere with flood protection. (HT May 2, 207:3 – 208:10). The hydrologic models  
9 that Mr. Beeby developed for Muni/Western give priority to valid senior water rights (both those  
10 of the Senior Water Right Claimants and the Conservation District). (Muni/Western Ex. 5-1, ¶  
11 87; HT May 2, 207: 3-17). Those hydrologic models also have incorporated the need for and  
12 magnitude of environmental mitigation flows of the type called for in the Biological Opinion.  
13 (Muni/Western Ex. 5-1, ¶ 167; HT May 2, 208: 2-10; Muni/Western Ex. 11-5, p. 7). Lastly,  
14 Muni/Western have incorporated the terms of the Corps' Water Control Manual (Local Sponsors  
15 Ex. 1-6) into the model that determines that amount of water available for diversion and so have  
16 developed estimates of water availability that fully include flood control operations.  
17 (Muni/Western Ex. 5-1, ¶ 90; HT May 2, 204: 24 – 205: 1).

18 The Stipulation of Applicants dated April 5, 2007 confirms Muni/Western's conclusion  
19 that they should be granted the most junior priority for diversions from the Santa Ana River in the  
20 Upper Area near the mouth of the upper Santa Ana River Canyon. Paragraph 15 of that  
21 Stipulation, corrected for the withdrawal by the Conservation District of Water Right Application  
22 No. 31371, sets forth the priorities to the use of water from the Santa Ana River in the Upper  
23 Area: (i) the City of Redlands, East Valley Water District, Bear Valley Mutual Water Company,  
24 Lugonia Water Company, North Fork Water Company and Redlands Water Company's  
25 diversions; (ii) the Conservation District's diversions under Water Right Licenses 2831 and 2832;

26 <sup>13</sup> To illustrate this point, after the applicants filed the Stipulation of Applicants with the State Board, Southern  
27 California Edison expressed concerns that the Applications might in some way interfere with Edison's diversions.  
28 Muni/Western were able, within a week of the April 5 Pre-Hearing Conference, to reach agreement on the language  
of a permit term that confirmed that the Applications would not interfere with Edison's operations. [Stipulation  
Regarding Water Right Application Nos. 31165 and 31370, dated April 11, 2007 (copy on file with the SWRCB)].

1 and (iii) Muni/Western's diversions under the Applications. In this way, all parties known to  
2 have rights to divert water below Seven Oaks have been protected in order of priority.

3 **C. *Issuing Permits to Muni/Western for the Diversion and Storage of up to 200,000 afy***  
4 ***Serves the Public Interest***

5 **1. *The Project Will Reduce Muni/Western's Demands from the Sacramento/San***  
6 ***Joaquin Delta and the Colorado River***

7 Particularly in light of the Department of Water Resources' decision to shut down the  
8 Harvey O. Banks Pumping Plant, it is crucial for California to reduce the need for water exported  
9 from the Sacramento/San Joaquin Delta. Because the Project will reduce the demands for water  
10 from the Delta on an acre-foot for acre-foot basis for all newly captured water and will diversify  
11 Muni/Western's sources of supply, granting permits to Muni/Western serves the public interest.

12 The Project will reduce demands for water exported from the Delta and the Colorado  
13 River in two different ways. First, and most obvious, by providing a local source of water to the  
14 region, the Project reduces the Muni/Western service area's need for imported water. The  
15 amount of imported water needed to meet projected demands in the Muni/Western service areas,  
16 without the Project, is estimated to increase from about 175,000 afy in 2010 to about 277,000 afy  
17 at ultimate demand, or an increase of about 102,000 afy. (Muni/Western Ex. 7-1, ¶ 4). With the  
18 Project, the amount of imported water needed to meet projected demands within the  
19 Muni/Western service area only climbs to about 250,000 afy, or an increase of only 75,000 afy.  
20 In this way, the Project will not reduce ultimate total demand for water within the Muni/Western  
21 service area, but it will slow the rate by which that demand increases by reducing demands for  
22 water exported from the Delta and from the Colorado River on an acre-foot for acre-foot basis.

23 Second, and less obvious, by reducing reliance on water from Northern California,  
24 Muni/Western have significantly improved their water supply reliability. Muni/Western Exhibits  
25 5-86, 5-87 and 5-88 compare runoff in the Sacramento Valley with runoff in the Santa Ana River  
26 watershed. These exhibits show that the correlation coefficient between Sacramento Valley  
27 Rivers runoff and Santa Ana River runoff near Mentone is 0.235, indicating that "the hydrology  
28 of the Sacramento Valley Rivers (the source of SWP supplies) and the hydrology of the Santa  
Ana River near Mentone are largely independent. Obtaining the ability to take water from both



1 sources, as would be the result of granting the Applications, would therefore improve water  
2 supply reliability for Muni/Western.” (Muni/Western Ex. 5-1, p. 61:30-33).

3 By reducing the anticipated growth in the demand for water from the Delta and the  
4 Colorado River and diversifying potential sources of supply, Muni/Western are engaging in state-  
5 of-the-art water management. Steve Macaulay testified as to the importance of a diverse portfolio  
6 of future water resources, one that “would place less emphasis on imported supplies of decreasing  
7 reliability and poorer quality, and more emphasis on local resources – increased natural  
8 infiltration, heightened water recycling, integration with regional salinity management, and  
9 improved end use efficiency.” (Muni/Western Ex. 10-1, p. 21: 26-29). With the reliability and  
10 quality issues associated with both State Water Project and Colorado River water, the  
11 Muni/Western Project’s facilitation of increased use of local supplies and less dependence on  
12 SWP water increases reliability, reduces risks and improves water quality. (Muni/Western Ex.  
13 10-1, ¶ 58). Muni/Western’s Project fits into the regional efforts to improve self-sufficiency and  
14 water supply reliability, an important part of which is diversifying sources of water for the region.  
15 (Muni/Western Ex. 10-1, ¶ 54). In all of these ways, the Project serves the public interest.

## 16 2. *The Project Will Facilitate Water Recycling*

17 Needless to say, water recycling is an important aspect of California’s water future.  
18 (Muni/Western Ex. 10-18, p. 16-1). Particularly in the Santa Ana River watershed, where water  
19 is used and re-used until it is “worn-out,” (Joint Ex. 1-1, 7:7) it is in the public interest for the  
20 SWRCB to grant applications that will provide a high-quality source water alternative to water  
21 delivered from the State Water Project.

22 Bill Dendy testified that water in the Santa Ana River watershed is already used and re-  
23 used as it flows towards the ocean. He testified: “I don’t know of any other place where there’s  
24 so much emphasis on multiple reuses of water to squeeze out the maximum beneficial use. And  
25 parallel to that there’s a very strong emphasis on management of water quality as reuse occurs.”  
26 (HT May 2, 91:11-15). Mr. Dendy then described the Santa Ana River as follows:

27 So what you have is a predominance of the flow reaching Prado in most of  
28 the year is municipal waste water. And in order to have that happen and still have  
the water be reusable with people who run the water system, you’d have to start

1 out at the upper end of the watershed with the best quality they can get. They need  
2 to have really low TDS water. And then they use it. There's a natural increment  
3 of accrual of salinity. It goes out a waste water treatment plant into the next  
groundwater basin, joins other water there. It's pumped out, reused, another  
increment of salt is added and it goes on downstream.

4 And by the time it gets to Prado it's got about one more use left in it before  
5 it gets too salty. (HT May 2, 94:17 -95:5).

6 Because of this extensive use and re-use of water in the Santa Ana River watershed, it is very  
7 important that source water be of the highest possible quality.

8 The Project will provide such high quality source water and so facilitate water recycling in  
9 the Santa Ana River watershed. Mr. Macaulay testified that the Project "provides the opportunity  
10 to improve quality, that is to reduce salt. The salinity of the Santa Ana River at Seven Oaks Dam  
11 is substantially better than imported water quality, and my testimony provides data and analysis  
12 directly to this point." (HT May 4, 9: 8-12). Specifically, Mr. Macaulay's written testimony  
13 states that the available data: "clearly show that Santa Ana River water is substantially lower in  
14 salinity than water imported by the SWP. This should come as no surprise since Seven Oaks  
15 Dam is relatively high in the Santa Ana River watershed, upstream of factors that increase  
16 salinity. SWP water is also affected at times by ocean salinity, since the point of diversion in the  
17 Delta is in a tidal estuary." (Muni/Western Ex. 10-1, ¶44). Particularly in times of severe  
18 drought, the quality differential between Santa Ana River water and water from the State Water  
19 Project is likely to be greater than normal. (Muni/Western Ex. 10-1, ¶45). Thus, because the  
20 Project will provide a source of high quality water of the type necessary for recycling downstream  
21 in the Santa Ana River watershed, the Project serves to advance the public interest.

22 **3. *The Project Contemplates and Complements Existing and Future Water***  
23 ***Conservation Measures***

24 Water conservation is another integral part of California's water management strategy.  
25 (Muni/Western Ex. 10-18, Ch. 22). The Project incorporates state-of-the-art water conservation  
26 measures – specifically an assumption that water conservation efforts will reduce demands by  
27 10% – into its analytic baseline. By incorporating the best current thinking on the role that water  
28 conservation efforts can play in water management, the Project serves to advance the public

1 interest.

2 Mr. Macaulay testified that “Muni and Western are involved directly and indirectly in a  
3 number of water conservation efforts and programs,” demonstrating a “strong commitment within  
4 the Santa Ana River watershed to efficient and effective water use.” (Muni/Western Ex. 10-1, p.  
5 6: 12-16). John Rossi, Western’s General Manager, testified that Western has implemented the  
6 full range of water management best management practices recommended by the California  
7 Urban Water Council, and budgets over \$100,000 annually for water use efficiency programs to  
8 coordinate rebates and incentives through Metropolitan Water District. (Muni/Western Ex. 2-1,  
9 ¶ 12). Western pioneered water efficient landscaping in 1989 with the introduction of  
10 “Landscapes Southern California Style,” a water conservation garden praised as the “garden of  
11 the future” by SUNSET magazine, and a model since emulated by other water agencies statewide.  
12 (Muni/Western Ex. 2-1, ¶ 12). Similarly, Randy Van Gelder, Muni’s General Manager, testified  
13 that Muni has also committed significant time and energy into conserving water from the Santa  
14 Ana River. (Muni/Western Ex. 1-1, ¶ 17). Although Muni is not required to prepare an urban  
15 water management plan, retail water suppliers in the Muni service area have submitted such  
16 plans. (Muni/Western Ex. 10-1, ¶ 15). The City of San Bernardino, for instance, has  
17 implemented successful programs in the areas of water survey and audit program, leak detection  
18 and repair, public information and school education programs. (Muni/Western Ex. 10-1, ¶ 15).

19 Muni/Western based the Project on the assumption that existing and planned conservation  
20 actions implemented by retail water suppliers and end users would increase conservation savings  
21 over existing levels by ten percent. (Muni/Western Ex. 10-1, ¶37). As Mr. Macaulay stated  
22 during his rebuttal testimony: “The project has had at the outset a built-in assumption of 10  
23 percent of conservation savings over existing levels. This assumption was clear in the EIR, both  
24 in the draft and final. . . . [¶] Muni and Western believe this additional degree of additional  
25 conservation above current levels is reasonable and appropriate.” (HT May 4, 15:2-10). In light  
26 of the high degree of uncertainty relating to the implementation of water conservation, Mr.  
27 Macaulay stated: “It is prudent to assume greater urban water conservation in the future, just as it  
28 may be prudent to assume improvements in water quality and groundwater storage. The key is

1 how to get there. While additional urban water conservation, even beyond the additional ten  
2 percent assumed by Muni and Western, may occur, the pathway for getting there is not clear.”  
3 (Muni/Western Ex. 10-1, ¶¶ 35, 40).

4 Thus, by incorporating a progressive assumption regarding future water conservation and  
5 in light of “a number of future uncertainties including SWP delivery reliability and climate  
6 change, the Project’s inclusion of additional conservation beyond current levels is appropriate and  
7 necessary – from both a supply reliability and water quality standpoint.” (Muni/Western Ex. 10-  
8 1, p. 15: 3-6). In reinforcing the importance of water conservation as part of a water supply  
9 portfolio, the Project serves the public interest. (See Muni/Western Ex. 10-1, ¶¶ 57-58).

10 **4. The Project Reduces the Risk of Liquefaction During an Earthquake**

11 Dr. Williams’ testimony demonstrates that the Project will have beneficial impacts on the  
12 risk of liquefaction in San Bernardino. Because the Project will substantially reduce the potential  
13 risk to human life and likely damage to property resulting from soil liquefaction during an  
14 earthquake, the Project is in the public interest.

15 Dr. Williams found that the most likely Project scenario<sup>14</sup> reduces the area of potential  
16 liquefaction in the Pressure Zone of the San Bernardino Basin Area by 21,456 acres, or 67%, over  
17 the No Project scenario.<sup>15</sup> In addition, the most likely Project scenario increases the number of  
18 years where there is no risk of liquefaction in the so-called Pressure Zone in downtown San  
19 Bernardino. (Muni/Western Ex. 6-1, ¶¶ 292-293). Dr. Williams summarized his testimony on the  
20 potential impacts of the Project on liquefaction by noting that “we added up all of these areas in  
21 the pressure zone that had potential for liquefaction over the 39-year base period, and we came up  
22 with the fact that under the maximum capture scenario we would have almost four times less  
23 [1/4] area exposed to that. Even under the minimum capture the potential area for liquefaction  
24 would be reduced by half.” (HT May 2, 236: 14-20). No party contested Dr. Williams’  
25 testimony on the potential beneficial impacts of the Project on liquefaction.

26 \_\_\_\_\_  
27 <sup>14</sup> Under the “most likely” Project scenario, modeling assumed a diversion rate of 1,500 cfs and takes into  
account the Seven Oaks Accord and settlement with the Conservation District.

28 <sup>15</sup> Table 41 of Dr. Williams’ written testimony summarizes his major findings. (Muni/Western Ex. 6-1, ¶297).

1           **5.     *The Project Enhances the Clean-Up of Groundwater Contamination and***  
2           ***Improves Groundwater Salinity***

3           Dr. Williams’ testimony also demonstrated that the Project will accelerate the clean-up of  
4 the major groundwater contamination plumes that are located in the San Bernardino Valley and  
5 improve the salinity of groundwater in the SBBA. Because these effects make the SBBA aquifer  
6 fully useable for conjunctive use more quickly than would be the case without the Project,  
7 granting permits to Muni/Western for the Project serves the public interest.

8           Dr. Williams testified at the hearing that the Newmark and Muscoy perchloroethylene  
9 plumes will dissipate more quickly (by three years) under Scenario A compared to the No Project  
10 scenario. (Muni/Western Ex. 6-247 animation; HT May 2 237:25 – 238:21; Muni/Western Ex. 6-  
11 1 ¶¶ 219, 220).<sup>16</sup> Likewise, Dr. Williams testified that the Norton and Redlands-Crafton  
12 trichloroethylene plumes will dissipate more quickly (by five years) under Scenario A compared  
13 to the No Project scenario. (Muni/Western Ex. 6-251; HT May 2 239: 1 – 12; Muni/Western Ex.  
14 6-1 ¶¶ 221-222). Consequently, the Project will “assist in improving the water quality of the  
15 SBBA by accelerating clean up of the contaminant plumes.” (Muni/Western Ex. 6-1, p. 1: 24-  
16 25). The Project will have similar effects on total dissolved solids (TDS) and nitrates. (HT May  
17 2, 237: 21-23; Muni/Western Ex. 6-1, ¶¶ 228, 237, Table 30, Table 33).

18           As with soil liquefaction, no party contested Dr. Williams’ testimony on the potential  
19 beneficial water quality effects of the Project. Because those effects would accelerate the clean-  
20 up of groundwater contamination plumes and would make the SBBA more useful for conjunctive  
21 use and water reuse (by having a less-than-significant effect or beneficial impact on TDS and  
22 nitrate concentrations in groundwater), the Project is in the public interest.

23           **6.     *The Project Mimics the Natural Hydrology of the Santa Ana River to the Extent***  
24           ***Feasible***

25           The Project will, to the extent feasible, allow for peak flows to pass through the Santa Ana  
26 River watershed and so mimic the natural hydrology of the Santa Ana River. Specifically, within

27 \_\_\_\_\_  
28 <sup>16</sup> As with liquefaction, Table 41 of Dr. Williams’ written testimony summarizes his major findings.  
(Muni/Western Ex. 6-1, ¶297).

1 the limits imposed by the construction and operation of Seven Oaks Dam for flood control, the  
2 Project is designed to (i) bypass peak flows released to mitigate for the environmental effects of  
3 the construction of Seven Oaks Dam, (ii) bypass the largest flows that Muni/Western proposed to  
4 divert in the EIR, and (iii) not interfere with flood flows that cause hundreds of thousands of acre-  
5 feet to flow to the Pacific Ocean during wet years. In these ways, the State Board can grant all of  
6 the applications currently pending and still ensure that there are, to the extent possible, peak flows  
7 in the Santa Ana River and water flowing through the Santa Ana River system to the Pacific  
8 Ocean. It is in the public interest to grant applications that foster multiple beneficial uses of  
9 water.

10 The construction and operation of Seven Oaks Dam for flood control had a substantial  
11 impact on the hydrology of the Santa Ana River. (HT May 3, 222: 13-20). The Dam reduced the  
12 peak flows from a 100-year flood event at Seven Oaks from 58,000 cfs to 5,000 cfs, a reduction  
13 of over 90% and reduced the peak flows from a 100-year flood event downstream of the  
14 confluence of the Santa Ana River and Mill Creek from 75,000 cfs to 25,000 cfs, a reduction of  
15 67%. [Muni/Western Ex. 4-3, p. 3.1-8 (Table 3.1-5)]. By comparison, the Project would further  
16 reduce flows at the Cuttle Weir and Mill Creek by up to an additional 1,500 cfs or an additional  
17 2.6% at the Cuttle Weir and 2% at Mill Creek. [Muni/Western Ex. 4-4, p. 2-38 (Table 2.3-4)].

18 In recognition of these facts, the Biological Opinion for the operation of Seven Oaks calls  
19 for the development of a Multi-Species Habitat Management Plan (MSHMP), which will include  
20 controlled releases whose “objective would be to mimic historic conditions without  
21 compromising public safety or dam integrity.” (Muni/Western Ex. 11-5, pp. 7-8). Muni/Western  
22 reiterated on the last day of the water right hearing that they will not interfere with any releases  
23 made from Seven Oaks Dam and so will bypass whatever releases are deemed appropriate by the  
24 expert agencies.<sup>17</sup> (HT May 8, 10:2-12). A proposed permit term to this effect is included in  
25 Attachment 2. (HT May 8 10:2-12).

26 Muni/Western decided, moreover, that even though their contribution to the reduction of

27 <sup>17</sup> The Water Control Manual for Seven Oaks Dam allows for an increase in releases of up to 1,000 cfs per  
28 hour. Muni/Western will not interfere with this increased release rate. (Local Sponsors Ex. 1-6, Plate 7-01).

1 peak flows is very small (approximately 2%), it would be appropriate for them to reduce their  
2 peak diversion rate to assist in the efforts to mimic historical hydrology during wet years. To that  
3 end, Muni/Western propose not only that they will bypass peak flows released pursuant to the  
4 MSHMP process, but also that they will limit their peak diversion rate to 1,250 cfs, thereby  
5 foregoing one-sixth of the diversion rate requested by the Applications. (HT May 8, 10:2-12). A  
6 permit term to this effect is included in Attachment 2. Particularly in light of the Project's very  
7 small effect on the reduction of peak flood flows, this contribution is more than reasonable. [See  
8 *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, 883-85].

9 Finally, one of the characteristics of wet years on the Santa Ana River system is that there  
10 are hundreds of thousands of acre-feet of water that flow to the Pacific Ocean without being put  
11 to beneficial use. Even if the State Board were to grant all of the applications currently pending,  
12 this phenomenon will continue during wet years. Mr. Beeby analyzed the effects of granting all  
13 of the applications currently pending on the Santa Ana River system on whether water would  
14 continue to flow to the Pacific Ocean during a repetition of WY 1992/1993, the third wettest year  
15 during the base period. (Muni/Western Ex. 5-85, slide 57; HT May 2 220:15 – 222:21). He found  
16 that, without any of the projects, 443,000 af would flow to the Pacific Ocean. (HT May 2, 221: 2-  
17 5). Mr. Beeby continued: "if we superimpose our project and all the other projects on this  
18 system, ... we increase our diversions, City of Riverside diverts, other people do their diversions  
19 in accordance with the application, again based on the assumption that you will grant their full  
20 permit – or a permit for their full application amount, and the [443,000 acre-feet] becomes  
21 [220,000 acre-feet]. So, again, it illustrates that what we're trying to do is pick up these flashy  
22 flood events, and even in spite of that water's still going to the ocean simply because of the lack  
23 of absorptive capacity and the intensity of a storm in a year like 1992-93." (HT 222: 8-21).

24 ///

25 ///

26 ///

27 ///

28 ///

1           7.     ***The Project Has Minimal (i.e. Less-Than-Significant After Mitigation) Adverse***  
2                     ***Impacts on Fish and Wildlife***

3                     (a)    ***The Record Shows that the Project Will Not Have a Significant Adverse***  
4                                ***Impact on Public Trust Resources***

5                                (1)   ***The Parties Agree that the Project Will Not Have A Significant***  
6                                        ***Adverse Impact on Public Trust Resources in Segments A, B, and***  
7                                        ***C; the upper portion of Segment D, and Segment E***

8           Muni/Western presented extensive testimony to the SWRCB showing that the Project  
9           would not have a significant adverse impact on public trust resources on the Santa Ana River. As  
10           described below, the Center for Biological Diversity did not dispute the Muni/Western testimony  
11           as to Segments A, B, and C; the upper portion of Segment D, and Segment E. Consequently, the  
12           record is clear that the Project will not have a significant adverse effect on public trust resources  
13           in these segments of the Santa Ana River.

14                     Segment A

15           Roy Leidy, Muni/Western's expert on aquatic resources in the Santa Ana River, testified  
16           that the Project would not have adverse effects on public trust resources in Segment A, largely  
17           because the construction and operation of Seven Oaks Dam for flood control purposes has already  
18           destroyed the public trust resources that once populated this segment.

19           Segment A is the section of the Santa Ana River between the confluence with Bear Creek  
20           (RM 78.0) and the Seven Oaks Dam plunge pool (RM 70.93). (Muni/Western Ex. 9-0, ¶ 9;  
21           Muni/Western Ex. 9-6). Segment A is shown in Mr. Leidy's flyover movie between minute 0:00  
22           and minute 1:20. (Muni/Western Ex. 9-125). Mr. Leidy testified that the flood control operations  
23           of the Seven Oaks Dam have "resulted in a substantial impact on aquatic and riparian resources,  
24           particularly in the Warm Springs Cienega, just as predicted by the Corps in its [Feasibility Study  
25           Environmental Impact Study]." (Muni/Western Ex. 9-0, p. 13: 21-23). For example, in water  
26           years 2005 and 2006, "we had a series of flood events that literally destroyed the rest of the Warm  
27           Springs Cienega due to sedimentation and subsequent scour." (HT May 3, 38: 3-6).

28           Mr. Leidy also testified that he would not expect to see any impacts from the construction  
          or operation of Project facilities on public trust resources in Segment A. He stated that, in  
          Segment A, "[n]o adverse impacts to aquatic resources are anticipated upstream of Seven Oaks



1 Dam under Project construction” because construction activities “would occur in areas that are  
2 already heavily disturbed and do not currently support aquatic habitats.” (Muni/Western Ex. 9-0,  
3 p. 43: 8-11). Mr. Leidy further described the operational impacts of the Project on Segment A as  
4 follows: “[W]ith the Project the daily storage [behind Seven Oaks Dam] is anticipated to exceed  
5 the daily storage that would occur under the No Project alternative on approximately 4.8 percent  
6 of days and storage would never exceed the highest volume of storage that would occur under No  
7 Project. This incremental increase in retention time is not expected to significantly impact any of  
8 the designated beneficial uses for Segment A, given implementation of mitigation measure MM  
9 SW-1. Impairments to beneficial uses are the result of: 1) flood events that are non-controllable  
10 events; 2) the physical impact of the initial flooding on aquatic resources and their habitats; and  
11 3) the prolonged inundation of aquatic habitat not adversely impacted by 2) above. The Corps  
12 has already mitigated 100 percent of these impacts to beneficial uses within the reservoir  
13 elevation that would be impacted by the proposed Project.” (Muni/Western Ex. 9-0, p. 42:26 – p.  
14 43: 6).

15 The testimony of Ileene Anderson, expert for the Center for Biological Diversity, did not  
16 specifically address the potential impacts of the Project on public trust resources in Segment A.  
17 Consequently, there is no dispute between her testimony and that of Mr. Leidy on the Project’s  
18 lack of impacts on public trust resources in Segment A.

#### 19 Segment B

20 Mr. Leidy testified that the Project would not have a significant adverse impact on public  
21 trust resources in Segment B because the construction of the Project would be fully mitigated and  
22 the operation of the Project would not interfere with the minimum flow release that supports  
23 riparian vegetation. Indeed, the operation of the Project “would actually enhance the survival of  
24 aquatic resources in Segment B by reducing the frequency of potentially damaging high flow  
25 releases.” (Muni/Western Ex. 9-0, ¶ 86).

26 Segment B is the short reach of less than a half-mile between the plunge pool and Cuttle  
27 Weir. (HT May 3, 38: 20-24; Ex 9-0 ¶ 84; Muni/Western Ex. 9-38 through 9-46). Segment B is  
28 shown in Mr. Leidy’s flyover movie between minute 1:27 and minute 1:45. (Muni/Western Ex.

1 9-125). For Segment B, Mr. Leidy testified that the only potential impacts of the Project would  
2 be construction effects associated with Phase III of the Plunge Pool Pipeline. (Muni/Western Ex.  
3 9-0, ¶ 104). He stated that “the Project would have a less than significant effect on [the] riparian  
4 vegetation due to the [construction] mitigation measures that were identified in the EIR.” (HT  
5 May 3, 39:8-11; Muni/Western Ex. 9-0, ¶ 106). Mr. Leidy further opined that the Project would  
6 not have a significant impact on obligate aquatic or semi-aquatic resources in Segment B, and the  
7 Project would in fact reduce the frequency of potentially destructive high flows to the long-term  
8 benefit of existing aquatic resources in this segment. (Muni/Western Ex. 9-0, ¶ 106).

9       Upon cross-examination, Ms. Anderson agreed with Mr. Leidy’s testimony that “there are  
10 no fish living in Segment B” and that the “overall aquatic habitat in this segment is poor due to  
11 the engineered characteristics of the channel and stream flow fluctuations that routinely disrupt  
12 aquatic species.” (HT May 3, 233: 20 – 234: 5). She did not provide any contrary evidence in  
13 her written or oral testimony. Consequently, there is no dispute between the testimony of Ms.  
14 Anderson and Mr. Leidy on the Project’s lack of impacts on public trust resources in Segment B.

### 15       Segment C

16       Mr. Leidy testified that the Project would not have an impact on public trust resources in  
17 Segment C because those resources do not exist in Segment C.

18       Segment C extends downstream from the Cuttle Weir to just upstream of the Mill Creek  
19 confluence with the SAR. (Muni/Western Ex. 9-0, ¶ 107; HT May 3, 39: 16-18). Segment C is  
20 shown in Mr. Leidy’s flyover movie between minute 1:45 and minute 2:25. (Muni/Western Ex.  
21 9-125). For Segment C, Mr. Leidy testified that the Project “would not have a significant impact  
22 on obligate aquatic and semi-aquatic resources in Segment C primarily because those aquatic  
23 resources do not persist in Segment C under existing conditions (No Project). There are no  
24 sustainable aquatic resources to impact.” (Muni/Western Ex. 9-0, p. 62: 7-11). During the  
25 hearing, Mr. Leidy elaborated on this point:

26               This part of the channel is incised due to the 2005 flood events when the  
27 Corps was trying to release a lot of water and check their outlet when they broke it.

28               It has riprap on both sides to the Green Spot Road bridge, which is this  
bridge right here. There’s riprap with big, big boulders, large cobbles, boulders,

1 dry, seventy-five percent of the days of record, its dry. Every year it dries up at  
2 some point even in the wettest years.

3 Consequently, there are no fish. There are no obligate riparian resources, a  
4 couple scattered willows here and there, but they operate independent of the river.  
5 There's no aquatic macroinvertebrates that persist in this reach. They're simply  
6 not there. Consequently, the project operations aren't going to have any effect on  
7 something that doesn't exist." (HT May 3, 40:2-17).

8 Upon cross-examination, Ms. Anderson agreed with Mr. Leidy's testimony that Segment  
9 C "is usually completely dry during the summer through fall or most years, and that therefore  
10 there are no fish or obligate aquatic amphibians or reptiles present" and that to her knowledge  
11 there are no special status aquatic species existing in Segment C. (HT May 3, 234: 12-24). Ms.  
12 Anderson did not provide any information in her written or oral testimony that would otherwise  
13 disagree with Mr. Leidy's testimony. Consequently, there is no dispute between the testimony of  
14 Ms. Anderson and Mr. Leidy on the Project's lack of impacts on public trust resources in  
15 Segment C.

#### 16 Segment D – Upper Portion

17 Mr. Leidy testified that the upper portion of Segment D is essentially a continuation of the  
18 conditions in Segment C. Thus, the Project would not have a significant adverse impact on public  
19 trust resources in this reach because public trust resources do not exist in this reach.

20 Segment D starts at Mill Creek and extends ten miles to "E" Street. (Muni/Western Ex. 9-  
21 0, ¶ 128; HT May 3, 41:5-8). Segment D is shown in Mr. Leidy's flyover movie between minute  
22 2:25 and minute 4:16, and the upper portion of the reach from Mill Creek to South Tippecanoe  
23 Avenue is shown between minute 2:25 and 3:32 (Muni/Western Ex. 9-125). For Segment D as a  
24 whole, Mr. Leidy testified that "the implementation of the proposed Project would have no  
25 significant impacts to aquatic and semi-aquatic species or aquatic and riparian habitats."  
26 (Muni/Western Ex. 9-0, p. 68: 1-3).

27 Mr. Leidy described the upper eight miles of Segment D as being quite similar to Segment  
28 C. These upper eight miles of Segment D are characterized by a broad, braided channel that is  
rocky and sandy with intermittent flows, with "[n]o significant riparian vegetation, no fish, no  
aquatic macroinvertebrates, no known aquatic reptiles and amphibians in this reach." (HT May 3,

1 41: 6-13). Upon cross-examination, Ms. Anderson did not disagree with Mr. Leidy's testimony  
2 that "about 56.3 percent of the total days of record had zero flow in this reach at the upstream  
3 reach boundary," and that "there are no fish in the upper 8 miles of this intermittent reach." (HT  
4 May 3, 238: 8-20). Ms. Anderson did not provide any information in her written or oral  
5 testimony that would otherwise disagree with Mr. Leidy's testimony. Consequently, there is no  
6 dispute between the testimony of Ms. Anderson and Mr. Leidy on the Project's lack of impacts on  
7 public trust resources in upper portion of Segment D.

#### 8 Segment E

9 Mr. Leidy testified that the Project would not have a significant adverse impact on public  
10 trust resources in this reach because the intermittent flows in this segment of the Santa Ana River  
11 do not support such resources.

12 Segment E begins at "E" Street and ends just upstream of the RIX-Rialto outfalls.  
13 (Muni/Western Ex. 9-0, ¶ 152; HT May 3, 45: 6 – 48: 6). Segment E is shown in Mr. Leidy's  
14 flyover movie between minute 4:17 and minute 5:55. (Muni/Western Ex. 9-125). Mr. Leidy  
15 described Segment E in his oral testimony as follows: "Segment E is interesting, because even in  
16 wet years absent a flood the water disappears into the sand. As you will see, it's very broad,  
17 braided, sandy substrate. I've stood there and watched the water flowing downstream and just  
18 disappear. It never makes a connection at normal flows, unless there's a flood event. We've  
19 walked this area. We've found dead Bull Frog juveniles just laying in the channel on the sand  
20 baking there. The water disappeared." (HT May 3, 46:5-13). Because of these intermittent flows,  
21 which would be virtually unaffected by the Project (Muni/Western Ex. 9-0, ¶ 152), the Project  
22 would not have a significant adverse effect on amphibians, benthic macroinvertebrates, riparian  
23 vegetation, or special status species in Segment E. (Muni/Western Ex. 9-0, ¶¶ 158-161).  
24 Consequently, the "implementation of the Project would have a less than significant impact on  
25 aquatic and semi-aquatic species and aquatic and riparian habitats in Segment E when compared  
26 to the No Project alternative." (Muni/Western Ex. 9-0, p. 71: 19-21).

27 Upon cross examination, Ms. Anderson agreed with Mr. Leidy's testimony that "even in  
28 wet years absent a flood event, water disappears in this reach of the river," stating "it's

1 intermittent.” (HT May 3, 239: 11-14). She agreed with Mr. Leidy’s description of the channel in  
2 Segment E as a “sandy, broad and typically dry channel.” (HT May 3, 239: 15-18). Finally, Ms.  
3 Anderson did not provide any information in her written or oral testimony that would otherwise  
4 disagree with Mr. Leidy’s testimony. Consequently, there is no dispute between the testimony of  
5 Ms. Anderson and Mr. Leidy on the Project’s lack of impacts on public trust resources in  
6 Segment E.

7                                   (2)     ***The Evidence Presented to the SWRCB Indicates that the Project***  
8   ***Will Not Have A Significant Adverse Effect on Public Trust***  
9   ***Resources in the Lower Portion of Segment D***

10           The lower portion of Segment D between Tippecanoe Avenue and “E” Street (the lower  
11 two miles of Segment D), is shown in Mr. Leidy’s flyover movie between minute 3:32 and  
12 minute 4:16. Mr. Leidy described a gradual accretion of water to the surface and denser riparian  
13 vegetation, and stated that this segment of the river is the first segment below Cuttle Weir where  
14 fish are present. (HT May 3, 43: 2-10; 44:1; Muni/Western Ex. 9-125). Specifically, Mr. Leidy  
15 described this lower portion of Segment D as follows:

16                           As we move downstream, I want you to note that riparian vegetation,  
17 which begins to occur here, gets denser and denser and denser due to the presence  
18 of water near the surface or on the surface. This is the second area that supports  
19 obligate aquatic species that I spoke about earlier.

20                           So what we have in this area is particularly downstream of San Timoteo  
21 Creek all the way to E Street is perennial surface flow, a mature riparian  
22 vegetation, willow, sycamore, Alder forest. There’s been a lot of Arundo removal  
23 in this area to help improve that vegetation.

24                           We also had fish for the first time. Unfortunately, they’re not native fish.  
25 There are Green Sunfish. There are Mosquito Fish. We also have amphibians  
26 unfortunately. They’re not native either. Bull frog and my favorite the African  
27 clawed frog occur there. There are no known native fish. No known native  
28 amphibians yet that may occur there in this reach.

                          But the important thing to remember about this is that this water is  
independent of anything that goes on at Seven Oaks. It doesn’t have anything to  
do with it. And it will persist. I was out there last month. I read an article in the  
Los Angeles what the driest year in 130 years of record. *There’s flowing water  
here in the driest year. There’s no releases from Seven Oaks Dam.*

                          So the project would not affect the persistence of this riparian community  
and the species it supports.” (HT May 3, 43:7-12, 43:20 to 44:16, emphasis  
added).

1 Put otherwise, “[a]quatic resources in the two-mile reach of Segment D are maintained primarily  
2 by up-welling groundwater from the San Jacinto Fault and by seasonal inflow from San Timoteo  
3 Creek. The persistence of these aquatic resources does not depend on releases from Seven Oaks  
4 Dam. Consequently, these habitats and species would not be significantly affected by the Project  
5 should it be built.” (Muni/Western Ex. 9-0, pp. 79:28 to 80:2).

6 Upon cross-examination, Ms. Anderson agreed with Mr. Leidy’s general description of  
7 the lower portion of Segment D (HT May 3, 230:12-14) and his testimony that the fish found in  
8 this portion of Segment D are nonnative fish. (HT May 3, 235: 5-24). She testified that she had  
9 no concerns as to the hydrologic analysis presented by Muni/Western (HT May 3, 222:8-12). She  
10 also stated that neither she nor the Center for Biological Diversity had “done any kind of  
11 hydrologic analysis that would refute” Mr. Leidy’s testimony that “the water that exists below  
12 Tippecanoe Avenue exhibits independent of what happens at Seven Oaks Dam.” (HT May 3,  
13 235: 25 – 236:8). Ms. Anderson further testified that for purposes of the testimony that she  
14 presented, she did not assume that the Muni/Western project would have significant hydrologic  
15 impacts on the availability of water within Segment D. (HT May 3, 237: 23 – 238: 3). Finally,  
16 she stated that she didn’t “feel qualified to comment on hydrological issues.” (HT May 3, 238:3-  
17 4) because, as she acknowledged, she is not an expert in hydrology (HT May 3, 214:19).

18 Despite agreeing with Mr. Leidy’s description of the lower portion of Segment D and  
19 disclaiming any expertise in hydrologic analysis or having performed any hydrological analysis  
20 of the impacts of the Project, Ms. Anderson insisted that the public trust resources in the lower  
21 portion of Segment D were somehow dependent on flows in the Santa Ana River:

22 Mr. O’Brien: Okay. So you’re saying that when there are high flows in  
23 the Santa Ana River main stem that that would also contribute to that particular  
reach?

24 Ms. Anderson: That’s what I would say, but also subsurface flows, because  
25 riparian doesn’t need surface flows in order to persist. You know, they’re a pretty  
deep-rooted species, so --

26 Mr. O’Brien: But you haven’t done any analysis that would allow to us  
27 [sic] know when those subsurface flows are available?

28 Ms. Anderson: No, or if they aren’t available either. (HT May 3 231: 2-  
13).

1 Ms. Anderson similarly expressed the concern that the Project would lower groundwater  
2 levels in the lower portion of Segment D, thereby harming riparian resources in that area. (HT  
3 May 3, 261:10-21).

4 The SWRCB should ignore Ms. Anderson's testimony relating to the effects of the Project  
5 on groundwater or surface water in the lower portion of Segment D for three reasons. First, any  
6 conclusion expressed by Ms. Anderson regarding this subject is not competent expert testimony.  
7 Ms. Anderson forthrightly admitted that she was not a hydrologist and admitted that neither she  
8 nor the Center had done any sort of hydrologic analysis. (HT May 3, 214: 19; May 3, 235: 25 –  
9 236: 8). It is elementary that in order to express an opinion, particularly on a technical question  
10 like the impacts of the Project on surface and groundwater resources in Segment D, a witness  
11 must have performed the requisite analysis. [*Behr v. County of Santa Cruz* (1959) 172 Cal. App.  
12 2d 697, 709-710 (an expert must base opinions either on facts personally observed or on  
13 hypotheses that find support in the evidence)]. The Center's failure to perform any such analysis  
14 means that Ms. Anderson's testimony has no probative value and must be disregarded by the  
15 State Board. (*Behr v. County of Santa Cruz, supra*, 172 Cal. App. 2d at 709-710).

16 Second, Ms. Anderson's unsupported claim that the Project would have an impact on  
17 groundwater or surface water resources in the lower portion of Segment D is contradicted by prior  
18 testimony with which she agrees. As noted above, Ms. Anderson stated, repeatedly, that she did  
19 not disagree with the hydrological analysis performed by Muni/Western. (HT May 3, 230: 12-14;  
20 May 3, 235: 5-24). That hydrological analysis was the foundation for Mr. Leidy's conclusion that  
21 the Project would not interfere with the sources of water for public trust resources in the lower  
22 portion of Segment D (Muni/Western Ex. 9-0; ¶¶ 44-45) evidence that was based on hydrological  
23 information provided to Mr. Leidy by Mr. Beeby. (Muni/Western Exs. 9-93, 11-3, 1:14-17).  
24 Thus, Ms. Anderson both claims to agree with – and disagree with – Muni/Western's hydrology.  
25 Given that Ms. Anderson's testimony lacks any foundation, as discussed above, this internal  
26 contradiction requires the SWRCB to ignore her testimony. [*Behr v. County of Santa Cruz,*  
27 *supra*, 172 Cal. App. 2d 697 (where expert opinion was not based on any evidence and in fact  
28 was contrary to the evidence, the testimony did not constitute substantial evidence); *Maples v.*

1 *Kern County Assessment Appeals Board, supra*, 103 Cal. App. 4th at 198 (when an expert's  
2 opinion is premised upon facts contradicted by the only evidence of record, the expert's opinion  
3 does not constitute substantial evidence in support of the judgment); *Bushling v. Fremont Medical*  
4 *Center* (2004) 117 Cal. App. 4th 493, 510-11 (expert opinion was of no evidentiary value where  
5 conclusions lacked a reasoned explanation, because an expert opinion is worth no more than the  
6 reasons and facts on which it is based)].

7 Third, and most important, Ms. Anderson's testimony is simply not plausible. As noted  
8 above, Ms. Anderson seemed to suggest that the Project would have an impact on public trust  
9 resources either by diverting surface water or lowering the groundwater table. (HT May 3, 231:  
10 2-13; May 3, 261: 10-21). If her claim is that these resources are dependent on releases of water  
11 from Seven Oaks Dam, then those resources could not persist in a year like 2007, one of the driest  
12 years on record, and one in which the Corps has not made any releases from Seven Oaks Dam.  
13 (HT May 3, 44:11-14). The record is clear, though, that these resources are continuing to persist  
14 even in this very dry year. (Muni/Western Exs. 9-60 to 9-66). Thus, Ms. Anderson's claim must  
15 be that the Project will, in some way, reduce groundwater levels in the lower portion of Segment  
16 D sufficiently to adversely affect public trust resources. She never identified any mechanism for  
17 such an effect. Indeed, only evidence in the record suggests quite the contrary:

18 Mr. Buse: And in your view, none of these dewatering effect will occur in  
19 the reach of the river and the watershed that you discussed today in your  
20 testimony?

21 Mr. Leidy: It will not occur in the reach that is on the screen now, because  
22 those sources of water are primarily surface sources of water. If you check the  
23 well records for the Commerce Center well, which is immediately adjacent to the  
24 river, groundwater is well below the rooting depth of riparian plants at the present  
25 time, so it's not being supported by groundwater.

26 [...]

27 Mr. Buse: ...Under a range of reasonably foreseeable conditions, is it your  
28 testimony that there is not and cannot be any influence from the releases from  
29 Seven Oaks Dam on the reach of the Santa Ana that you discussed in your rebuttal  
30 testimony today.

31 Mr. Leidy: Would that be with or without the project?

32 Mr. Buse: With or without the project.



1 Mr. Leidy: Well, certainly releases from Seven Oaks Dam have the  
2 potential to reach this location statistically, but what I'm saying is, it doesn't  
3 matter what goes on at Seven Oaks Dam in terms of the viability and persistence  
of this habitat type, because the water that this habitat depends on has nothing to  
do with what's going on at Seven Oaks Dam.

4 Mr. Buse: And has no relation to the dewatering benefit that you've heard  
5 discussed from the project?

6 Mr. Leidy: That is correct. (HT May 4, 95: 25 – 98: 6)

7 In short, Ms. Anderson claimed – without foundation or analysis – that the Project would  
8 affect public trust resources either by reducing flows in the Santa Ana River mainstem or by  
9 affecting groundwater levels. Ms. Anderson's testimony ignored the obvious and persistent  
10 source of water to the lower portion of Reach D – San Timoteo Creek, water from the Zanja, and  
11 runoff from the golf course. By overlooking these perennial sources of water that sustain public  
12 trust resources, Ms. Anderson's testimony does not constitute substantial evidence. [*Jennings v.*  
13 *Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal. App. 4th 1108, 1116-17 (when an  
14 expert's opinion is purely conclusory because unaccompanied by reasoned explanation connecting  
15 factual predicates to ultimate conclusion, the opinion has no evidentiary value because an expert  
16 opinion is worth no more than the reasons upon which it rests); *See also Pacific Gas & Electric*  
17 *Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1135 (where an expert bases his conclusion  
18 upon assumptions or factors which are speculative, remote or conjectural, then his conclusion has  
19 no evidentiary value); *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center,*  
20 *supra*, 62 Cal. App. 4th at 1137].

21 (3) ***The Project Will Not Have a Significant Adverse Impact on***  
22 ***Public Trust Resources in Segment F***

23 The record shows that the Project will not have a significant adverse impact on public  
24 trust resources in Segment F. Statements to the contrary by Ms. Anderson – again – lack  
25 foundation and misunderstand the testimony of Mr. Beeby upon which she claimed to rely. For  
26 this reason, the SWRCB must ignore this portion of Ms. Anderson's testimony.

27 Segment F begins at the RIX/Rialto outfalls and ends at Riverside Narrows.  
28 (Muni/Western Ex. 5-90, ¶ 167; (HT May 3, 48: 9 – 50: 23). Segment F is shown in Mr. Leidy's

1 flyover movie between minute 5:56 and minute 8:28. (Muni/Western Ex. 9-125). Mr. Leidy  
2 stated in his oral testimony that in Segment F “there’s very little hydrological effect of the  
3 project.” (HT May 3, 50: 22-23). In his written testimony Mr. Leidy concluded that  
4 “implementation of the Project would have a less-than-significant impact on aquatic and semi-  
5 aquatic species and aquatic and riparian habitats in Segment F when compared to the No Project  
6 alternative.” (Muni/Western Ex. 9-0, p. 73: 12-14). The Project would not have a significant  
7 impact in Segment F because flows in Segment F are maintained by the RIX-Rialto WWTP  
8 outfalls and not by upstream flows in the Santa Ana River. (Muni/Western Ex. 9-0, ¶¶ 167, 172-  
9 174).

10 On cross-examination, Ms. Anderson expressed her opinion that the Project would have  
11 effects on water availability within Segment F.<sup>18</sup> The basis for this opinion turned out to be  
12 Muni/Western’s hydrology testimony by Mr. Beeby the previous day:

13 Mr. O’Brien: For purposes of your testimony, did you assume that the  
14 Muni/Western project would have any affects [sic] on water availability within this  
Segment F we’ve been discussing?

15 Ms. Anderson: Yes, I did.

16 Mr. O’Brien: You did. What were those assumptions?

17 Ms. Anderson: Well, the assumption is if – the Santa Ana River, to my  
18 understanding, is hydrologically connected. I mean, that’s why it’s a river. And  
19 so taking water out of the stream seems that that would affect the amount of water  
downstream.

20 [...]

21 Ms. Anderson: ...Right now, my understanding is, how the Seven Oaks  
22 Dam operates is when the flood flows come, they’re sequestered behind the dam.  
23 And once the event is over, they start releasing that water in smaller amounts  
going down the Santa Ana River. And presumably it’s hydrologically connected  
and will reach the lower segments.

24 Mr. O’Brien: That’s what I want to focus in on, your assumption that it’s  
hydrologically connected. What is the basis for that assumption?

25 <sup>18</sup> Ms. Anderson did not disclaim her previous statements concerning her lack of expertise in the field of  
26 hydrology. Those prior statements preclude her from offering her opinions as to the hydrology of Segments F and G.  
27 [*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal. App. 3d 1, 66-67 (“It is well settled that an  
expert’s qualifications must be established with respect to the subject matter of his testimony.”); *Putensen v. Clay*  
28 *Adams, Inc.* (1970) 12 Cal. App. 3d 1062, 1081].

1 Ms. Anderson: That it's a river.

2 Mr. O'Brien: Okay. So you're assuming that diversions that occur in the  
3 vicinity of the dam during the proposed diversion season, that that water that's  
4 going to be diverted would otherwise reach Segment F because of this hydrologic  
5 connection that you're assuming?

6 Ms. Anderson: Yes.

7 Mr. O'Brien: But you don't have any data, you don't have any technical  
8 analysis that supports that assumption, correct?

9 Ms. Anderson: Yes, other than what – the only thing I have is what was  
10 presented in the testimony yesterday.

11 Mr. O'Brien: Okay. *So the only thing you have is what the Muni/Western  
12 experts have said about the hydrology?*

13 Ms. Anderson: Yes. (HT May 3, 241:9 – 243:15, emphasis added).

14 When pressed further for the basis of this opinion, Ms. Anderson stated that her opinion “would  
15 have been formed by data sets, papers that I had read about the river.” (HT May 3, 244:16-17).  
16 However, Ms. Anderson then acknowledged that she is “not an expert in hydrology.” (HT May 3,  
17 244: 20-21). Thus, the sole basis for Ms. Anderson's opinion regarding hydrologic impacts of the  
18 Project on Segment F, for which she is not qualified to testify, is Mr. Beeby's testimony offered  
19 on May 2, 2007 regarding the overall hydrology of the Santa Ana River and the Project's  
20 hydrological impacts thereon.

21 Ms. Anderson fundamentally misunderstood Mr. Beeby's testimony. Mr. Beeby testified  
22 – without objection – that the Project would reduce median flow in Segment F by less than one  
23 percent when compared with conditions absent the Project. (Muni/Western Ex. 5-1, ¶ 191;  
24 Muni/Western Ex. 5-50). The Project has an insignificant effect in Segment F because the RIX  
25 and Rialto wastewater treatment facilities maintain a perennial flow in Segment F. (HT May 2,  
26 193: 4-6; 198: 3-6; 199: 22-24). Muni/Western Ex. 5-57 shows graphically how badly Ms.  
27 Anderson misunderstood Mr. Beeby's testimony. That exhibit plots the probability that a given  
28 flow will be exceed against the mean daily discharge. Inspection of the exhibit shows that there  
is no visible difference between the No Project flow regime and the flow regime under any of the  
Project scenarios. For this reason, Ms. Anderson's opinion on the potential impacts of the Project  
on Segment F is based on an assumption that is directly contrary to the evidence on which she

1 relies. [*In re Powers' Estate* (1947) 81 Cal. App. 2d 480, 485-86 (an expert opinion that assumes  
2 facts contrary to the only proof cannot rise to the dignity of substantial evidence); *See also Behr*  
3 *v. County of Santa Cruz*, *supra*, 172 Cal. App. 2d 697; *Maples v. Kern County Assessment*  
4 *Appeals Board, supra*, 103 Cal. App. 4th at 198]. For this reason, the State Board should not give  
5 any credence to Ms. Anderson's testimony regarding the impacts of the Project on Segment F.

6 (4) ***The Evidence Presented to the SWRCB Indicates that the Project***  
7 ***Will Not Have a Significant Adverse Impact on Public Trust***  
8 ***Resources in Segment G***

9 The record shows that the Project will not have a significant adverse impact on public  
10 trust resources in Segment G. As was the case in connection with Segment F, any statements by  
11 Ms. Anderson to the contrary lack foundation and rely on inadmissible hearsay. For these  
12 reasons, the SWRCB must ignore this portion of Ms. Anderson's testimony

13 Segment G begins at Riverside Narrows and ends at the Prado Flood Control Basin.  
14 (Muni/Western Ex. 9-0, ¶ 175). Segment G is shown in Mr. Leidy's flyover movie between  
15 minute 8:29 and minute 9:13. (Muni/Western Ex. 9-125). Mr. Leidy concluded that  
16 "implementation of the Project would have a less-than-significant impact on aquatic and semi-  
17 aquatic species and aquatic and riparian habitats in Segment G when compared to the No Project  
18 alternative." (Muni/Western Ex. 9-0, p. 74: 14-16). During his oral testimony, Mr. Leidy  
19 elaborated on that conclusion as follows: "Segment G is a continuation really of Segment F. It  
20 has more water, greater coverage of riparian vegetation. And this segment ends down at Hamner  
21 Avenue at the head of the Prado flood control basin. [¶] Segment G – essentially in Segment F,  
22 there's very little hydrological effect of the project. In Segment G there's virtually none. In fact,  
23 the mean flows, median flows, minimum flows they're all the same with or without the project. It  
24 doesn't matter." (HT May 3, 50:18 to 51:1).

25 Ms. Anderson again opined that the Project would have hydrologic impacts in Segment  
26 G:<sup>19</sup>

27 Mr. O'Brien: For purposes of your testimony, did you assume that the  
28 Muni/Western project would have significant water availability impacts on

<sup>19</sup> As noted in footnote 18 above, Ms. Anderson's statements in a field outside her expertise are not admissible.

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Segment G?

Ms. Anderson: I think it would have water impacts.

Mr. O'Brien: So you made that assumption?

Ms. Anderson: Yes.

Mr. O'Brien: And I'm going to ask you the same question I asked you before. Did you perform any analysis or did you – do you have an independent hydrologic opinion that supports that assumption?

Ms. Anderson: And I'll answer as I did last time. Yes, in talking with hydrologists and reading papers, that was my understanding and that's what I used as the basis for my assumption if you want to call it that.

Mr. O'Brien: Can you identify these hydrologists that you talked to?

Ms. Anderson: Yes, I can give you their names.

Mr. O'Brien: Please do.

Ms. Anderson: One of them was Eric Larsen who's an alluvial geomorphologist. And the other fella's name is Mark Rains.

Mr. O'Brien: And these gentlemen told you that there was a hydrologic connection between diversions that would occur upstream by my clients and flows in Segment G, is that your testimony?

Ms. Anderson: No, not specifically for any segment. It's just that the river is hydrologically connected.

Mr. O'Brien: Okay. So the river is hydrologically connected at all times no matter what climatic conditions we're talking about, is that you're [sic] working assumption?

Ms. Anderson: Yes. (HT May 3, 247: 18 – 249: 2)

Thus, in discussing Segment G, Ms. Anderson abandoned her claim that she relied on Mr. Beeby's testimony, instead relying on her consultation with Messrs. Larson and Rains.

Ms. Anderson's reliance on unidentified statements by Messrs. Larson and Rains does not constitute substantial evidence on which the State Board can rely. Once again, as noted previously, Ms. Anderson is not a hydrologist and so cannot offer the opinions that she presented on cross-examination. (*See California Shoppers, Inc. v. Royal Globe Ins. Co., supra* at footnote 18). Moreover, although the SWRCB's regulations do not forbid the introduction of hearsay testimony, here, there are too many uncertainties to provide the SWRCB with any degree of confidence that Ms. Anderson's testimony is probative. Ms. Anderson's statement on the

1 potential impacts of the Project relies on statements by Messrs. Larson and Rains that are not in  
2 the record and that appear to be oral in character. (HT May 3, 248: 4 – 249: 2). Although Mr.  
3 Larson was actually listed on the Center’s Notice of Intent to appear, the Center declined to  
4 present him at the hearing. (Center for Biological Diversity Notice of Intent to Appear, March  
5 21, 2007). Ms. Anderson provided no information to the SWRCB regarding the qualifications of  
6 Larsen and Rains as expert witnesses or their familiarity with the Project or even with the Santa  
7 Ana River. Ms. Anderson also did not provide the SWRCB with any description of the  
8 information that either of these men may or may not have had regarding the Santa Ana River or  
9 the Project; indeed, it is not known whether Ms. Anderson even described the Project to these  
10 gentlemen. Ms. Anderson did not provide any information to the SWRCB about the actual  
11 statements that these gentlemen made to her, about any questions they may have asked her about  
12 the Project, any assumptions that they may have made regarding either the Santa Ana River or the  
13 Project, or any qualifications that they may have included in their opinions. Finally, Ms.  
14 Anderson did not provide the SWRCB with any information about the manner in which Messrs.  
15 Larson and Rains’ statements to her were translated into her own opinions and what, if any,  
16 additional analysis she may have performed. Because of these very significant uncertainties, the  
17 basic policy underlying the hearsay rule – to ensure that decisions are made with reliable and  
18 probative evidence – counsels the SWRCB to ignore Ms. Anderson’s statements regarding the  
19 impacts of the Project on Segment G.<sup>20</sup>

20 (b) *The Project Would Have Minimal (Less-than-Significant After*  
21 *Mitigation) Impacts on Terrestrial Wildlife and Plants*

22 The record is clear that the Project will have less-than-significant impacts after mitigation  
23 on terrestrial wildlife and plants.

24 Robert Thomson, Muni/Western’s expert on terrestrial biology, testified that the Project  
25 would have two different types of effects: (i) effects resulting from the construction of pipelines  
26

27 <sup>20</sup> To the extent that Ms. Anderson may have relied upon Mr. Beeby’s hydrologic analysis for her conclusions  
28 about Segment G, as she did for Segment F, Mr. Beeby’s testimony again supports the conclusion that the Project has  
no detectable impacts on flows in Segment G. (Muni/Western Ex. 5-1, ¶ 192; Muni/Western Ex. 4-3, p. 3.1-47).

1 and other facilities needed to divert, convey or put water to reasonable and beneficial use and (ii)  
2 effects resulting from the operation of those facilities. (Muni/Western Ex. 8-1, ¶ 44; HT May 3,  
3 52: 16-20). Mr. Thomson testified that while certain sensitive, protected and common species are  
4 affected by both the construction of Project facilities and the operations of the Project, the  
5 construction of Project facilities is the “dominant impacting source.” (HT May 3, 52: 16-20).

6 Mr. Thomson summarized the construction-related impacts in his oral testimony,  
7 including impacts from habitat disturbance and removal, impacts from human presence and  
8 construction activities, and a temporary loss of the movement corridor between the foothills and  
9 the alluvial fan. (Muni/Western Exs. 8-1, ¶¶ 45-46; 8-17, slide 16; HT May 3, 60: 3 – 61: 1). Mr.  
10 Thomson testified that these construction impacts are less than significant, after the  
11 implementation of the mitigation measures called for in the Muni/Western EIR and adopted by  
12 the Muni/Western Boards of Directors. (HT May 3, 60: 5 – 61: 1; *see* Muni/Western Exs. 4-3 at  
13 3.3-32 through 3.3-55; 4-4 at 2-65 through 2-114; 4-5 at pp. 123-211).

14 Mr. Thomson also described the two major operational impacts of the Project: increased  
15 duration of inundation of habitat within Seven Oaks Reservoir and a reduced frequency of  
16 overbank flows. (HT May 3, 61: 4 – 62: 22; Muni/Western Ex. 3-17, slide 17; Muni/Western Ex.  
17 8-1, ¶¶ 47 - 54). Relying on the analysis of Mr. Leidy in for the inundation of habitat behind  
18 Seven Oaks Dam in Segment A,<sup>21</sup> Mr. Thomson concluded that this impact “would be a very  
19 small amount of time, and it would only occur when there is sufficient water to have already  
20 subjected these resources to inundation as a result of flood control. As a result of that, it was  
21 determined that these were less than significant impacts.” (HT May 3, 61:7-11). Turning to the  
22 reduced frequency of overbank flows, Mr. Thomson testified that the Project would significantly  
23 affect approximately 10 acres of woolly-star and San Bernardino kangaroo rat habitat near the  
24 confluence of Mill Creek. (HT May 3, 62: 1-3). To address this impact, Muni/Western  
25 “developed several overlapping approaches to mitigation for these impacts. This includes the  
26 monitoring and removal of nonnative invasive species in coordination with a multi-species habitat  
27

28 <sup>21</sup> These impacts are discussed in more detail in section III.C.7(a)(1) above.

1 conservation plan and their plans for mitigation of similar impacts for the Seven Oaks Dam.” (HT  
2 May 3, 62: 11-16; Muni/Western Ex. 8-1, ¶ 58; Muni/Western Ex. 4-3, Section 3.3 and Appendix  
3 E). In particular, Mr. Thomson noted that Muni/Western committed in the Final EIR to address  
4 the impact to the 10 acres of woolly-star and San Bernardino kangaroo rat habitat by adopting a  
5 performance standard of restoring ten acres of intermediate to late stage RAFSS habitat to the  
6 early or intermediate stage RAFSS habitat during the first twenty years of Project  
7 implementation. (Muni/Western Ex. 4-4, pp. 2-117 and 2-118; HT May 3, 62: 17-22). As a  
8 matter of law, such a performance standard represents fully adequate mitigation under CEQA. [14  
9 Cal. Code Regs. § 15126.4(a)(1)(B); *See Sacramento Old City Association v. City of Sacramento*  
10 (1991) 229 Cal. App. 3d 1011, 1028-29].

11 The Center for Biological Diversity’s witness, Ileene Anderson, did not disagree with Mr.  
12 Thomson’s conclusion that construction- related terrestrial impacts would be reduced to a less-  
13 than-significant level as a result of mitigation measures adopted by Muni/Western.. (HT May 3,  
14 249: 4-12). Ms. Anderson’s written testimony disagrees with Mr. Thomson’s conclusions as to  
15 whether Muni/Western can fully mitigate for the Project’s operational effects; however, the bare  
16 assertions in Ms. Anderson’s testimony do not provide the State Board with credible evidence to  
17 depart from Mr. Thomson’s conclusions.

18 With regard to the potential operational impacts of the Project, Ms. Anderson testified that  
19 the San Bernardino kangaroo rat and the woolly-star “require intermittent significant flood events  
20 that reduce their habitat.” (HT May 3, 23-25). In so doing, she agreed with Mr. Thomson’s  
21 testimony and the conclusions in the Muni/Western EIR. (HT May 3, 57: 8-14, Muni/Western  
22 Exs. 4-3, Appendix E; 4-4, 2-73, 2-74). Ms. Anderson also testified that the construction and  
23 operation of Seven Oaks Dam for flood control has caused substantial change in the hydrology of  
24 the Santa Ana River. (HT May 3, 222:13-20). She continued: “Now that the flood waters are  
25 going to be held back and released at a significantly lower rate, that those species in the absence  
26 of any successful mitigation strategy will be suffering. Their habitat won’t be renewed, and that’s  
27 of grave concern to us.” (HT May 3, 223:7-11). Again, in making these statements, Ms.  
28 Anderson agreed with the scientific testimony presented by Muni/Western. (HT May 3, 62: 10-



1 22, Muni/Western Ex. 4-4, 2-117; 8-1, ¶ 58, on the mitigation measure designed to offset the  
2 Project's impact on woolly-star habitat). Finally, Ms. Anderson criticized the Muni/Western  
3 proposed mitigation measures, stating: "At this time, the methodologies [proposed by  
4 Muni/Western] are not definitively successful. Therefore, uncertainty remains if techniques are  
5 truly available, especially on the large scale, to actually mitigate the numerous significant impacts  
6 to biological resources downstream of the Seven Oaks Dam." (Center for Biological Diversity Ex.  
7 1-1, ¶13). Thus, Ms. Anderson did not disagree with Mr. Thomson's assessment of the nature of  
8 the potential operational impacts of the Project but only with the likelihood of that the mitigation  
9 measures proposed by Muni/Western would be successful.

10 Ms. Anderson's statement regarding the likelihood of success of the Muni/Western  
11 mitigation measures is not credible and certainly does not constitute substantial evidence. Ms.  
12 Anderson ignores the fact that the mitigation measures outlined by Muni/Western in Mitigation  
13 Measure Bio-10 (Muni/Western Ex. 4-4, 2-117, 2-118) are substantially the same as the measures  
14 called for by the U.S. Fish & Wildlife Service – the federal agency with expertise in wildlife  
15 management and charged with protecting the San Bernardino kangaroo rat and the woolly-star –  
16 in the Biological Opinion for the operation of Seven Oaks Dam. (Muni/Western Ex. 11-5, pp. 7-  
17 9). Further, Ms. Anderson's testimony ignores the fact that Muni/Western will implement  
18 Mitigation Measure Bio-10 in consultation with the U.S. Fish & Wildlife Service and the  
19 California Department of Fish & Game so as to take advantage of the latest scientific information.  
20 (Muni/Western Ex. 4-4, pp. 2-117, 2-118). Indeed, review of the Psomas report attached to Ms.  
21 Anderson's testimony indicates that none of the methods being examined by the scientists  
22 attempting to develop sound restoration methods for the woolly-star rely on large quantities of  
23 water. (Center for Biological Diversity Ex. 4-1, pp. 8-9). Thus, as a matter of evidence, Ms.  
24 Anderson's conclusion that the Muni/Western mitigation measures are somehow inadequate is  
25 purely speculative and lacks no foundation in any credible scientific opinion.

26 Even assuming, for the sake of argument, that Ms. Anderson's conclusion were based on  
27 sound scientific evidence, her conclusion would be legally irrelevant. Under well-established  
28 CEQA caselaw, a lead agency may adopt a performance measure when it wishes to mitigate for

1 an impact of a project but recognizes that there may be some uncertainty as to the precise method  
2 through which it will accomplish that goal. (*Sacramento Old City Association, supra*, 229 Cal.  
3 App. 3d at 1028-29). If a lead agency adopts such a performance measure – which Muni/Western  
4 did for the operational impacts of the Project – that mitigation measure is adequate, as a matter of  
5 law, to reduce the impacts of the project to a less-than-significant level. [*Sacramento Old City*  
6 *Association v. City Council, supra*, 229 Cal. App. 3d at 1028-29; *Laurel Heights Improvement*  
7 *Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 418; 14 Cal. Code  
8 Regs. § 15126.4(a)(1)(B)]. Thus, Ms. Anderson’s conclusion as to the adequacy of the  
9 Muni/Western mitigation measures fails.

10 **IV.**  
11 **CONCLUSION**

12 For the reasons set forth above, the evidence in the record demonstrates that  
13 Muni/Western could divert and store up to 200,000 af during a repetition of water year 1968/1969  
14 hydrology and place that water to reasonable and beneficial use, without injury to other legal  
15 users of water and consistent with all valid senior water rights. The evidence in the record also  
16 demonstrates that the diversion and storage of water by Muni/Western would be in the public  
17 interest in that it will reduce dependence on the Delta, it will facilitate water recycling and  
18 conservation, and it will mimic the natural hydrograph of the Santa Ana River, while causing  
19 minimal impacts to public trust resources. Consequently, Muni/Western urge the State Board to  
20 issue permits for the Applications, based on the findings set forth in Attachment 1 and on the  
21 terms and conditions proposed in Attachment 2, at the earliest possible date.

22 DATED: June 6, 2007

Respectfully submitted,

23 DOWNEY BRAND LLP

24  
25 By: Andrea P. Clark.  
26 ANDREA P. CLARK  
27 Attorneys for Applicants  
28 San Bernardino Valley Municipal Water District  
and Western Municipal Water District of  
Riverside County

# ATTACHMENT 1

## Attachment 1

### Proposed Findings Water Right Application Nos. 31165 and 31370

Muni/Western ("Applicants") propose that the SWRCB make the following findings in connection with Water Right Application Nos. 31165 and 31370:

After reviewing the testimony and evidence presented by the parties during the water right hearing in relation to Water Right Application Nos. 31165 and 31370, the State Water Board makes the following findings:

1. There is unappropriated water available for appropriation from the Santa Ana River or its tributaries at the points of diversion identified in Application Nos. 31165 and 31370 and described in Table \_\_.<sup>1</sup>
2. The amount of such unappropriated water varies widely from year to year and ranges from 0 af to as much as 200,000 af in any given year.
3. Applicants have demonstrated that they would be able to take control of such unappropriated water by: (i) directly diverting such unappropriated water at a maximum rate of 1,250 cubic feet per second, (ii) diverting to storage up to 50,000 afy of unappropriated water, and/or (iii) diverting to underground storage up to 200,000 afy of unappropriated water at a maximum rate of 1,250 cubic feet per second.
4. Applicants have demonstrated that they would be able to place up to 200,000 afy of such unappropriated water to reasonable and beneficial use within the place of use defined by their respective service areas.
5. Applicants have demonstrated that they would be able to divert and/or store up to 200,000 afy of such unappropriated water without interfering with valid senior water rights or otherwise causing injury to any legal user of water.

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<sup>1</sup> Muni/Western provided the SWRCB with a complete list of these proposed points of diversion on May 7, 2007.

6. Applicants have demonstrated that the priority of rights for consumptive use among all legal users of native water from the Upper Area of the Santa Ana River is as follows:

(a) The right of City of Redlands, East Valley Water District, Bear Valley Mutual Water Company, Lugonia Water Company, North Fork Water Company and Redlands Water Company to divert up to 88 cfs.

(b) The right of San Bernardino Valley Water Conservation District to divert pursuant to License Nos. 2831 and 2832.

(c) The rights sought by Applicants to divert and store pursuant to Application Nos. 31165 and 31370.

In addition, Southern California Edison holds non-consumptive rights to the use of native water of the Santa Ana River for the generation of hydroelectric power that can and have been exercised consistent with the aforesaid consumptive water right priorities.

7. The appropriation of up to 200,000 afy of such unappropriated water by Applicants will best develop, conserve and utilize the water of the Santa Ana River in the public interest. Specifically, the proposed appropriation of water will:

(a) Reduce Applicants' demands for water imported by the State Water Project from the Sacramento/San Joaquin Delta and from the Colorado River.

(b) Facilitate water recycling within Applicants' service areas and elsewhere in the Santa Ana River watershed by providing a high-quality source of water with low salinity that allows for repeated cycles of water use and re-use.

(c) Be consistent with state-of-the-art water conservation measures and urban water conservation plans, including but not limited to the Applicants' plan to reduce water demand within their respective service areas through conservation by 10%.

(d) Improve the reliability of the water supply available to Applicants by diversifying Applicants' sources of water and by promoting the conjunctive use of surface and groundwaters.

(e) Reduce the area at risk of soil liquefaction in San Bernardino during earthquakes by nearly 80%.

(f) Accelerate the clean-up of groundwater contamination plumes in the San Bernardino Basin Area, thereby allowing increased conjunctive use of surface and groundwaters.

(g) Improve salinity levels in the San Bernardino Basin Area, again allowing increased conjunctive use of surface and groundwaters.

(h) Mimic the natural hydrology of the Santa Ana River to the extent feasible by: (i) not interfering with environmental releases made by the U.S. Army Corps of Engineers and/or by the Santa Ana River Mainstem Local Sponsors pursuant to the Biological Opinion issued by the U.S. Fish & Wildlife Service for the operation of Seven Oaks Dam for flood control purposes and (ii) limiting the Project's maximum diversion rate to 1,250 cubic feet per second.

(i) Have minimal (less-than-significant after mitigation) impacts on public trust resources in the Santa Ana River corridor.

(j) Have minimal (less-than-significant after mitigation) impacts on terrestrial fish and wildlife resources located away from the Santa Ana River corridor.

8. In reaching this decision, the State Water Board has considered the relative benefits to be derived from all beneficial uses of the waters of the Santa Ana River system, including but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, all uses specified for protection in the Santa Ana Regional Water Quality Control Board's Basin Plan, and the reuse and recycling of water within the Santa Ana River watershed. The State Water Board has also been guided by the policy that domestic use of water is the highest use and irrigation is the next highest use of water. The State Water Board has further given consideration to the California Water Plan and to the state goal of providing a decent home and a suitable living environment for every Californian.

# ATTACHMENT 2

## Attachment 2

### Proposed Permit Terms and Conditions Water Right Application Nos. 31165 and 31370

Muni/Western propose that the SWRCB grant permits for Water Right Application Nos. 31165 and 31370 on the following terms and conditions in addition to the mandatory permit terms added to all water right permits:

1. The water appropriated under Application Nos. 31165 and 31370 shall be limited to the quantity which can be beneficially used. Such water shall not exceed:
  - (a) 400 cubic feet per second by direct diversion and offstream storage under Application No. 31165 and 1,250 cubic feet per second by direct diversion and offstream storage under Application No. 31370 (the total under both Applications shall not exceed 1,250 cubic feet per second);
  - (b) 50,000 acre-feet per annum by storage from October 1 of each year to September 30 of the succeeding year;
  - (c) 100,000 acre-feet per annum under Application No. 31165 and 100,000 acre-feet per annum under Application No. 31370, to be collected to underground storage at a maximum rate of 1,250 cubic feet per second from January 1 to December 31 of each year (the total under both Applications shall not exceed 200,000 acre-feet per annum); and
  - (d) The total amount of water to be diverted for direct use and for storage for subsequent use under both Applications shall not exceed 200,000 acre-feet per water year from October 1 to September 30.

Water appropriated under Application Nos. 31165 and 31370 shall only be diverted from the points of diversion listed in Table \_\_\_ for use within the Permittees' service areas.<sup>1</sup>

2. Water appropriated under Application Nos. 31165 and 31370 shall not interfere with the exercise of valid senior water rights.
  - (a) Permittees shall comply with the provisions of paragraph 3 of the Seven Oaks Accord and paragraph 5 of Exhibit A to the settlement agreement between Permittees and the San Bernardino Valley Water Conservation District. Inclusion in this permit of certain terms of the referenced agreements shall not be construed as disapproval of other provisions of those agreements or as affecting the

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<sup>1</sup> Muni/Western provided the SWRCB with a complete list of these proposed points of diversion on May 7, 2007.



enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this permit.

- (b) Consistent with the aforementioned settlement agreements and the Stipulation of Applicants dated April 5, 2007, and in light of the removal of Application No. 31371 from consideration at the hearing, the priority of rights for consumptive use among all legal users of native water from the Upper Area of the Santa Ana River is as follows:
- (1) The right of City of Redlands, East Valley Water District, Bear Valley Mutual Water Company, Lugonia Water Company, North Fork Water Company and Redlands Water Company to divert up to 88 cubic feet per second.
  - (2) The right of San Bernardino Valley Water Conservation District to divert pursuant to License Nos. 2831 and 2832.
  - (3) The rights of Permittees to divert and store pursuant to Application Nos. 31165 and 31370.

In addition, Southern California Edison holds non-consumptive rights to the use of native water of the Santa Ana River for the generation of hydroelectric power that can and have been exercised consistent with the aforesaid consumptive water right priorities.

3. Permittees shall not divert water released by the U.S. Army Corps of Engineers and/or the Santa Ana River Mainstem Project Local Sponsors from Seven Oaks Reservoir for environmental mitigation purposes as required in the Multi-Species Habitat Management Plan to be developed pursuant to the December 19, 2002 Biological Opinion for the operation of Seven Oaks Dam for flood control purposes, as may be revised in the future. Nothing in this paragraph shall prevent Permittees from diverting any water released from Seven Oaks Reservoir in excess of such environmental mitigation releases.
4. This permit shall not be construed as conferring upon Permittees the right of access to Seven Oaks Dam, the points of diversion, and lands necessary for related facilities, or the lands necessary for inundation for water storage. Permittees shall not commence construction and operation of water diversion facilities at Seven Oaks Dam without a written access agreement from the Santa Ana River Mainstem Project Local Sponsors.
5. Access to, construction upon, or inundation of National Forest Systems lands shall not commence prior to authorization by the Forest Service, in accordance with applicable laws and regulations. Such authorization will require compliance with all applicable federal laws and regulations. Muni/Western specifically recognize that completion of the

applicable legal process does not guarantee such authorization will be granted, the issuance of these water rights permits notwithstanding.

6. Permittees shall not, without the prior written consent of Southern California Edison, construct, operate or maintain diversion works at points of diversion located upstream of the flood inundation pool of Seven Oaks Dam in a manner that interferes with the operations and maintenance of the hydroelectric works licensed to Southern California Edison by the Federal Energy Regulatory Commission license for Project No. 1933. Permittees' diversion of water at such points of diversion shall not interfere with Southern California Edison's diversion of water for hydroelectric purposes, again as described in the Federal Energy Regulatory Commission license for Project No. 1933. Nothing in this Permit shall be construed to limit Permittees' diversion of water from such points of diversion at times when the quantity of water available for diversion at such points of diversion exceeds the demand of Southern California Edison's facilities to divert water from the Santa Ana River system.
7. Rights under this Permit are, and shall be, specifically subject to existing rights as determined by the judgments in *Orange County Water District v. City of Chino et al.* (Orange County Superior Court No. 117628, April 17, 1969) and *Western Municipal Water District of Riverside County et al. v. East San Bernardino County Water District et al.*, (Riverside County Superior Court No. 78426, April 17, 1969).
8. The diversion of water under this Permit shall be subject to regulation by the Watermasters appointed to administer and enforce the terms of the judgments in *Orange County Water District v. City of Chino et al.* (Orange County Superior Court No. 117628, April 17, 1969) and *Western Municipal Water District of Riverside County et al. v. East San Bernardino County Water District et al.*, (Riverside County Superior Court No. 78426, April 17, 1969) in the manner contemplated in those judgments.
9. Permittees shall obtain all necessary federal, state and local agency permits required by other agencies prior to the construction of Project facilities or the diversion of water. Copies of such permits and approvals shall be forwarded to the Deputy Director, Division of Water Rights.

1 **PROOF OF SERVICE**

2 I am a resident of the State of California, over the age of eighteen years, and not a party to  
3 the within action. My business address is Downey Brand LLP, 555 Capitol Mall, Tenth Floor,  
4 Sacramento, California, 95814-4686. On June 6, 2007, I served the within document(s):

5 **CLOSING BRIEF OF APPLICANTS SAN BERNARDINO  
6 VALLEY MUNICIPAL WATER DISTRICT AND WESTERN  
7 MUNICIPAL WATER DISTRICT OF RIVERSIDE COUNTY**

- 8  **BY ELECTRONIC MAIL:** by transmitting via electronic mail the document(s)  
9 listed above to the electronic notification address(es) set forth in the attached  
10 service list on this date. Parties whose e-mail addresses are listed on the attached  
11 agreed to accept electronic service, pursuant to the rules specified in the hearing  
12 notice issued by the Board.
- 13  **BY HAND:** by personally delivering the document(s) listed above to the person(s)  
14 at the address(es) set forth below.
- 15  **BY MAIL:** by placing the document(s) listed above in a sealed envelope with  
16 postage thereon fully prepaid, in the United States mail at Sacramento, California  
17 addressed as set forth below – **to Kenneth L. Jeske ONLY**
- 18  **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an  
19 overnight delivery service company for delivery to the addressee(s) on the next  
20 business day.
- 21  **BY PERSONAL DELIVERY:** by causing personal delivery by \_\_\_\_\_ of  
22 the document(s) listed above to the person(s) at the address(es) set forth below.

23 **SEE ATTACHED SERVICE LIST**

24 I am readily familiar with the firm's practice of collection and processing correspondence  
25 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same  
26 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
27 motion of the party served, service is presumed invalid if postal cancellation date or postage  
28 meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on June 6, 2007, at Sacramento, California.

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Terri D. Kuntz

SERVICE LIST

1  
2 Adam Keats  
Center for Biological Diversity  
3 1095 Market Street, Suite 511  
San Francisco, CA 94103  
4 [akeats@biologicaldiversity.org](mailto:akeats@biologicaldiversity.org)  
5  
6 Susan Wilson  
Deputy City Attorney  
7 The City of Riverside  
3900 Main Street  
8 Riverside, CA 92522  
[swilson@riversideca.gov](mailto:swilson@riversideca.gov)  
9  
10 James L. Erickson, Esq. for City of Chino  
Counsel to the City of Chino City Attorney  
c/o Jimmy L. Gutierrez, APC  
11 12616 Central Avenue  
Chino, CA 91710  
12 [jim@city-attorney.com](mailto:jim@city-attorney.com)  
13  
14 Christopher J. McNevin, Esq. for Orange  
County Water District  
Amy Gaylord  
15 Pillsbury Winthrop Shaw Pittman LLP  
725 South Figueroa Street, Suite 2800  
16 Los Angeles, CA 90017-5406  
[chrismcnevin@pillsburylaw.com](mailto:chrismcnevin@pillsburylaw.com)  
17 [amy.gaylord@pillsburylaw.com](mailto:amy.gaylord@pillsburylaw.com)  
18  
19 Nino Mascolo  
Southern California Edison Company  
2244 Walnut Grove Avenue  
Rosemead, CA 91770  
20 [nino.mascolo@sce.com](mailto:nino.mascolo@sce.com)  
21  
22 Jane Farwell  
Division of Water Rights  
State Water Resources Control Board  
23 P.O. Box 2000  
Sacramento, CA 95812-2000  
24 [JFarwell@waterboards.ca.gov](mailto:JFarwell@waterboards.ca.gov)  
25  
26 Song Her  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
27 Sacramento, CA 95812-2000  
[SHer@waterboards.ca.gov](mailto:SHer@waterboards.ca.gov)  
28  
Michael T. Fife for Chino Basin Watermaster  
Bradley J. Herrema  
Hatch & Parent  
21 East Carrillo Street  
Santa Barbara, CA 93101  
[mfife@hatchparent.com](mailto:mfife@hatchparent.com)  
[bherrema@hatchparent.com](mailto:bherrema@hatchparent.com)  
Jill N. Willis for the City of Riverside  
Best Best & Krieger  
3750 University Ave., Suite 400  
Riverside, CA 92502  
[jill.willis@bbklaw.com](mailto:jill.willis@bbklaw.com)  
Steven M. Kennedy, Esq. for East Valley  
Water District  
Brunick, McElhaney & Beckett  
1839 Commercenter West  
P.O. Box 6425  
San Bernardino, CA 92412-6425  
[skennedy@bbmblaw.com](mailto:skennedy@bbmblaw.com)  
Joshua S. Rider, Staff Attorney  
Forest Service, USDA  
33 New Montgomery, 17th Floor  
San Francisco, CA 94105  
[joshua.rider@usda.gov](mailto:joshua.rider@usda.gov)  
Peter J. Keil for Santa Ana River Mainstream  
Project Local Sponsors  
Ellison, Schneider & Harris LLP  
2015 H Street  
Sacramento, CA 95814-3109  
[pjk@eslawfirm.com](mailto:pjk@eslawfirm.com)  
Erin Mahaney  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000  
[EMahaney@waterboards.ca.gov](mailto:EMahaney@waterboards.ca.gov)

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PARTICIPANTS MAKING POLICY STATEMENTS ONLY

Kenneth L. Jeske, Director  
Public Works and Community Services Agency  
City of Ontario  
1425 South Bon View Avenue  
Ontario, CA 91761-4406  
**VIA U.S. MAIL**

Chandra Ferrari  
Department of Fish & Game  
1416 Ninth Street, 13th Floor  
Sacramento, CA 95814  
[cferrari@dfg.ca.gov](mailto:cferrari@dfg.ca.gov)