
State Water Resources Control Board

July 7, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING GRANTING DEPARTMENT OF WATER RESOURCES' REQUEST FOR OFFICIAL NOTICE

On June 15, 2017, the Department of Water Resources (DWR) submitted a request for official notice of the following sur-rebuttal exhibits: DWR-936, -937, -946, -947, -949, and -950. These exhibits were authenticated and discussed in the written, sur-rebuttal testimony of Allan Davis (DWR-935). DWR withdrew DWR-935 because Mr. Davis was not available, due to a court appearance in another matter, when he was scheduled to present his testimony and be subject to cross-examination. DWR also withdrew Mr. Davis' statement of qualifications (DWR-934) and three other exhibits that were authenticated and discussed in Mr. Davis' written, sur-rebuttal testimony (DWR-938, -939, and -948). All of these exhibits are related to the condemnation of land in connection with the original construction of Clifton Court Forebay. They were offered as sur-rebuttal to the rebuttal testimony of Suzanne Womack on behalf of Clifton Court, L.P. concerning alleged property damage to Clifton Court's land adjacent to Clifton Court Forebay. Clifton Court opposed DWR's request for official notice in a letter dated June 19, 2017. DWR filed a response to Clifton Court's objection on June 21, 2017.

In adjudicative proceedings before the State Water Resources Control Board, official notice may be taken of matters that may be judicially noticed. (Cal. Code Regs., tit. 23, § 648.2.) In general, judicial notice may be taken of legal and factual matters that are not reasonably subject to dispute. Judicial notice is a substitute for formal proof. The Evidence Code includes a list of matters that may be judicially noticed, including court records and "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subds. (d) & (h).) Consistent with the Evidence Code, courts have taken judicial notice of the existence of real property records and a variety of matters that can be deduced from them, including parties, dates, and legally operative language, when the authenticity of the documents was not challenged. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265 [disapproved on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919].)

Official notice may be taken of DWR's exhibits. DWR-936, -937, -946, and -947 are court records, on file with Contra Costa County Superior Court. DWR-949 is a copy of an assessor's map, on file in the Contra Costa County Assessor's Office. DWR-950 is a director's deed, which was notarized and recorded in the Contra Costa County Recorder's Office. Clifton Court has not challenged the relevancy or authenticity of any of these documents.

Clifton Court's primary objection is not to DWR's request for official notice, but to the fact that Clifton Court has been deprived of the opportunity to cross-examine Mr. Davis, which Clifton

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Court claims is a due process violation. Clifton Court does not have a right, however, to cross-examine a witness who is no longer testifying. Clifton Court also argues that DWR's failure to submit DWR-936, -937, -938, -939, -946, -947, -948, -949, and -950 in its case-in-chief or during rebuttal has deprived Clifton Court of the opportunity to present condemnation documents that DWR has neglected to submit. This argument has merit. Although the foregoing exhibits are responsive to Ms. Womack's rebuttal testimony, they are also responsive to the testimony presented by Clifton Court as part of its case-in-chief (CCLP-21), and therefore DWR should have submitted them during rebuttal. Accordingly, we will afford Clifton Court the opportunity to respond to DWR's request for official notice by submitting any additional condemnation documents that have not been submitted by DWR.

For the reasons given above, DWR's request for official notice is granted. Because Mr. Davis' testimony has been withdrawn, Clifton Court will not have an opportunity to cross-examine him. Clifton Court may submit, however, any court records or other official documents concerning the condemnation of land in connection with the construction of Clifton Court Forebay that were not listed in DWR's request for official notice. **Any such documents must be submitted by noon on Monday, July 17, 2017.** They should be labeled as sur-rebuttal exhibits, accompanied by an updated exhibit identification index, and served on the other parties by the July 17, 2017 deadline.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer