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*J Bell*  
**FILED / ENDORSED**  
MAY - 3 2021  
By J. Bell, Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SACRAMENTO**

Coordinated Proceeding  
Special Title (Rule 3.550)  
**OROVILLE DAM CASES**

JCCP NO. 4974  
Assigned to: James E. McFetridge, Dept. 30  
**PRETRIAL ORDER**  
Trial Date: May 10, 2021  
Time: 9:00 a.m.  
Dept: 30  
Judge: Hon. James E. McFetridge

**PRETRIAL ORDER**

1 This Pretrial Order has been prepared based on the Court's Pretrial Conference Order dated  
2 March 26, 2021, the Joint Pretrial Statement filed on April 30, 2021, and the items discussed at the  
3 Pretrial Conference on May 3, 2021.

4 The following counsel will be the trial attorneys:

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22 **I. STIPULATIONS OF FACT**

23 After meeting and conferring, the parties have not entered into any factual stipulations.

24 **II. STIPULATIONS REGARDING EVIDENCE AND AUTHENTICITY**

25 On April 12, 2021 the parties filed a List of Joint Exhibits. After meet and confer efforts the  
26 parties have identified additional documents that they agree should be admitted into evidence during  
27 trial, see §§ III., IV., *infra*. The parties stipulate that all items on the Joint Exhibit List are authentic  
28 and admissible.

1 **III. JOINT EXHIBIT LIST**

2 On April 12, 2021, the parties filed a Joint Trial Exhibit List. The parties previously  
3 submitted a joint trial exhibit list. The parties have continued to meet and confer on matters related to  
4 the identification, authenticity, and objections to admissibility of the various exhibits. The parties  
5 identified additional exhibits where they agree on admissibility. A copy of the Joint Exhibit List is  
6 attached as Exhibit 1 to the Joint Pretrial Statement.

7 The parties used Excel format instead of the Word format provided by the Courtroom Clerk of  
8 Department 30. **The information in Ex. 1 will be transferred to the Court's format and sent to**  
9 **the Courtroom Clerk by email.** The Joint Exhibits are numbered 1 - 97 and consist of exhibits that  
10 the parties agree are authentic and admissible.

11 **IV. SEPARATE TRIAL EXHIBIT LISTS**

12 To the extent each party has an exhibit that will be presented at trial that was not listed in the  
13 Joint Trial Exhibit List, a separate Trial Exhibit List will be attached to the Pretrial Order. That  
14 Separate Trial Exhibit List does not need to include impeachment and rebuttal exhibits; however, in  
15 the interest of avoiding unnecessary delays, counsel should err on the side of disclosure whenever  
16 possible. A party's failure to provide a separate exhibit for inspection constitutes a valid ground for  
17 objection to the exhibit. Any exhibit not listed on the Separate Trial Exhibit List is subject to  
18 exclusion at trial. The Court will rule on any objections to those Separate Trial Exhibits.

19 The parties attached Exhibits 2 and 3, Plaintiffs' Trial Exhibit List and DWR's Trial Exhibit  
20 List, respectively, to the Joint Pretrial Statement. The Separate Trial Exhibit Lists do not contain  
21 documents which may be used to refresh witness' recollection, for purposes of impeachment, or  
22 solely for demonstrative purposes.

23 The parties used Excel format instead of the Word format provided by the Courtroom Clerk of  
24 Department 30. **The information in Exs. 2 and 3 will be transferred to the Court's format and**  
25 **sent to the Courtroom Clerk by email.**

26 Plaintiffs' Exhibits, see Ex. 2, are numbered 1000 – 1458. These consist of exhibits Plaintiffs  
27 may offer at trial which are not offered as Joint Exhibits.

1 DWR's Exhibits, see Ex. 3, are numbered 2000 – 2307. These consist of exhibits DWR may  
2 offer at trial which are not offered as Joint Exhibits.

3 Except where noted in the individual party exhibit lists, no party contests the authenticity of  
4 any document that party produced that is on any party's exhibit list.

5 The parties are also sending to the Court a hard drive containing an electronic copy of each  
6 exhibit, along with a Combined Trial Exhibit List which will be indexed and hyperlinked to the  
7 exhibits identified in the list on the drive.

#### 8 **V. JOINT TRIAL WITNESS LIST**

9 On April 12, 2021, the parties filed a Joint Trial Witness List, that will be attached to the  
10 Pretrial Order. To the extent there is a witness who a party expects to call who is not on the Joint  
11 Trial Witness List and not an impeachment or rebuttal witness, counsel for that party must notify  
12 opposing counsel when the need to call such a witness is known. All parties are free to call any  
13 witness in the Joint Trial Witness List or who is separately listed by an opposing party (with  
14 appropriate advance notice). The parties attached their Joint Trial Witness List as Exhibit 4 to the  
15 Joint Pretrial Statement. Non-parties who will not be testifying by deposition have been or will be  
16 subpoenaed for trial consistent with the Code of Civil Procedure.

#### 17 **VI. RESTRICTIONS ON WITNESSES**

18 The trial will be conducted by live streaming technology and will be available for viewing by  
19 the public on YouTube. Pursuant to Evidence Code section 777, witnesses are excluded and shall not  
20 view the trial so that such witnesses cannot hear the testimony of other witnesses, unless the Court  
21 orders otherwise. Counsel for the parties are responsible for admonishing each witness of this order,  
22 which does not apply to parties and officers or employees designated by the attorney for a party that  
23 is not a natural person. (Evid. Code, § 777(b), (c).)

24 A witness who is excluded from viewing the trial by this Order is prohibited from reviewing a  
25 verbatim record or video/audio recording of the testimony of other witnesses at the trial until after the  
26 witness has completed his or her testimony at the trial. Further, a witness who testifies at the trial is  
27 prohibited from communicating with anyone about his or her trial testimony, unless the witness  
28

1 wishes to communicate with his or her attorney about matters of privilege, and may communicate  
2 with anyone if the right to do so is guaranteed by the United States Constitution.

3 Those prohibitions do not apply to the parties. An attorney who calls a witness to testify at  
4 trial must, before the trial, advise the witness of those restrictions.

## 5 **VII. EVIDENTIARY AND OTHER LEGAL ISSUES**

6 The parties may list all evidentiary and legal issues that are likely to arise at trial under this  
7 heading, including such topics as disputes concerning the admissibility of evidence or expert  
8 testimony that have not already been addressed in motions in limine; the elements of plaintiffs'  
9 inverse condemnation cause of action; whether recovery is barred as a matter of law by a particular  
10 defense; disputes concerning proof and valuation of property damage, and so on. The purpose of this  
11 listing of issues is to advise the Court in advance of issues and problems that might arise at trial.

### 12 ***A. Plaintiffs' Issue No. 1: DWR's Hearsay Objections to Testimony by Expert*** 13 ***Witnesses***

#### 14 **1. Plaintiffs' Position**

15 Plaintiffs noticed, and both parties took, the deposition of three members of the Independent  
16 Forensic Team (John France, John Trojanowski, and Irfan Alvi) and two members of the FERC After  
17 Action Panel (Alfred Hendron and Nicolas Sitar). The parties agreed that those witness' testimony  
18 would be presented at trial through their depositions. DWR now objects to every designation made by  
19 Plaintiffs where the *question or the answer* references reports drafted and published by the  
20 Independent Forensic Team or the FERC After Action Panel Report. (See Exhibit 6, *infra*, § XVIII.)  
21 Presumably DWR intends to do the same at trial for a host of witnesses. DWR's position is baseless.

22 Witnesses are allowed to review documents to refresh their memories. (See Evid. Code §  
23 771.) Experts commonly refer to their reports during testimony to refresh their recollections. The IFT  
24 Report with its appendices is over 500 pages. The FERC After Action Panel Report is roughly 50  
25 pages. The IFT and FERC After Action Panel witnesses were entitled to review their reports to  
26 refresh their recollection. Throughout their depositions these witnesses said that they needed to  
27 review the reports to refresh their memories. (See Citations Chart, *infra*. [*e.g.*, France: "...I'd have to  
28 go into specific sections of report to refresh my memory, at p. 49; "...it's easier just to cite it in the

1 report than for me to try to remember whether we did it two and a half years ago,” at p. 54; reading  
2 report to refresh “my memory here a little bit,” at pp. 194, 199, 208, 211, 216[.] Indeed, DWR’s  
3 counsel routinely referred to the IFT report in questioning Mr. France and other witnesses. (See *e.g.*,  
4 France: “And if you need to refer to the report, which is Exhibit 166, help yourself,” at p. 388; see  
5 also France at pp. 425, 428, 444, 479, 485, 486.) An expert using a report to refresh their recollection  
6 as to their opinions does not make the testimony hearsay. Indeed, it routinely takes place at trial.

7 Even if the hearsay rule applied, which it does not, the Past Recollection Recorded exception  
8 makes the testimony admissible. (See Evid. Code § 1237.)

9 Next, throughout the depositions of the five IFT and FERC After Action Panel Witness, both  
10 the witness’ counsel and DWR counsel objected to questions on subject matters outside the report.  
11 (See, *e.g.*, France at p. 29 [“I’m objecting only to the extent that you are asking him for opinions  
12 which are outside of the report...he’s not here to offer any present-day opinions, just what was in the  
13 report”]; France at p. 52 [DWR counsel: “Same objections. It also calls for expert opinion beyond the  
14 scope of his report”].) Thus, at the depositions of these experts their counsel and DWR’s counsel  
15 objected to any testimony outside the reports. Now, at trial, DWR’s counsel is objecting to any  
16 testimony inside the reports. In short, DWR is baselessly trying to exclude testimony it deems  
17 harmful.

18 DWR’s contention that the plaintiffs tried to hide when witnesses were reading from or  
19 referencing their reports is wrong and contrary to the record.

Plaintiffs' Citations Chart for IFT and FAAP Witnesses

*Refreshing Recollection, Referencing the Reports,*

*Objections Related to the Reports, and Instructions to Review the Reports*

John France									
Citation	Category	Citation	Category	Citation	Category	Citation	Category	Citation	Category
17:23 - 18:3	Need report	62:2 - 62:9	Need report	114:23 - 115:13	Need report	185:13 - 185:22	Need report	394:14 - 394:22	Outside report
17:23 - 18:14	Attorney allows reference	64:5 - 64:13	Outside report	115:17 - 115:20	Need report	189:4 - 189:6	Need report	395:3 - 395:11	Outside report
22:2 - 22:7	Need report	66:11 - 66:20	Need report	115:17 - 115:30	Attorney allows reference	189:4 - 189:6	Attorney allows reference	422:25 - 423:10	Outside report
29:3 - 29:18	Outside report	67:4 - 67:10	Attorney allows reference	122:16 - 122:23	Need report	192:6 - 192:12	Outside report	424:18 - 425:6	Need report
34:18 - 35:3	Need report	69:24 - 70:6	Need report	122:16 - 122:23	Attorney allows reference	194:5 - 194:8	Need report	424:18 - 425:6	Attorney allows reference
38:12 - 38:20	Outside report	70:7 - 70:9	Attorney allows reference	123:6 - 123:11	Need report	199:11 - 199:15	Need report	428:13 - 428:19	Attorney allows reference
40:2 - 40:19	Outside report	76:8 - 76:11	Outside report	130:1 - 130:19	Need report	208:14 - 208:18	Need report	433:6 - 433:14	Need report
41:4 - 41:8	Need report	76:16 - 76:17	Need report	131:19 - 132:2	Outside report	209:13 - 209:22	Need report	433:6 - 433:14	Attorney allows reference
42:9 - 42:22	Need report	77:17 - 77:24	Outside report	132:22 - 133:2	Outside report	211:10 - 211:15	Need report	441:12 - 441:22	Need report
43:17 - 44:3	Outside report	87:1 - 87:7	Outside report	133:12 - 133:21	Outside report	216:3 - 216:9	Need report	444:5 - 444:19	Attorney allows reference
48:18 - 49:7	Need report	93:19 - 93:22	Need report	145:21 - 146:7	Need report	226:13 - 226:23	Need report	467:1 - 467:14	Outside report
52:2 - 53:21	Outside report	93:19 - 93:22	Attorney allows reference	152:2 - 152:7	Outside report	236:22 - 237:3	Need report	467:1 - 467:14	Need report
54:8 - 54:19	Need report	100:14 - 100:20	Outside report	172:10 - 172:15	Need report	271:25 - 272:8	Need report	478:22 - 479:9	Need report
54:21 - 54:22	Attorney allows reference	105:21 - 106:1	Attorney allows reference	172:10 - 172:15	Attorney allows reference	276:9 - 276:20	Outside report	478:22 - 479:9	Attorney allows reference
56:3 - 56:7	Need report	107:23 - 108:5	Outside report	177:22 - 178:1	Need report	388:7 - 388:15	Attorney allows reference	480:12 - 481:14	Need report; Attorney allows reference
56:8 - 56:10	Attorney allows reference	111:14 - 112:22	Need report	177:22 - 178:1	Attorney allows reference	388:23 - 389:9	Need report	485:24 - 486:5	Attorney allows reference
56:19 - 56:25	Outside report	114:17 - 114:22	Need report	180:4 - 180:19	Need report	390:9 - 390:14	Need report	545:6 - 545:17	Need report
								561:13 - 561:20	Outside report

  

Alfred Henson Vol. 1		John Trojanowski		Irfan Alvi		Nicholas Sitar			
Citation	Category	Citation	Category	Citation	Category	Citation	Category		
30:1 - 31:5	Need report; Attorney allows reference	100:18 - 101:18	Outside report	81:22 - 82:5	Need report	17:25 - 18:11	Need report	26:23 - 27:16	Need report
46:18 - 47:8	Outside report	103:13 - 104:7	Outside report; Need report; Attorney allows reference	100:22 - 101:10	Need report	17:25 - 18:11	Attorney allows reference	71:10 - 73:1	Outside report
52:14 - 53:8	Need report	105:8 - 105:20	Need report; Attorney allows reference	131:15 - 131:23	Need report	80:2 - 80:12	Need report	74:11 - 75:6	Need report; Attorney allows reference
53:14 - 54:19	Outside report	108:13 - 109:4	Need report	358:3 - 358:23	Attorney allows reference	159:10 - 159:24	Need report	75:19 - 75:25	Need report; Attorney allows reference
63:1 - 63:8	Outside report	114:21 - 115:12	Need report; Attorney allows reference	379:20 - 379:24	Need report	159:10 - 159:24	Attorney allows reference	85:23 - 86:11	Outside report
79:15 - 80:20	Outside report	121:22 - 123:6	Need report	380:9 - 380:12	Attorney allows reference	203:2 - 204:12	Need report; Attorney allows reference	88:5 - 90:5	Outside report
90:4 - 91:18	Outside report	123:17 - 123:6	Attorney allows reference	420:5 - 421:9	Attorney allows reference	260:6 - 261:3	Need report	91:6 - 91:15	Outside report
93:3 - 93:21	Outside report	131:4 - 131:12	Outside report	426:23 - 428:6	Need report; Attorney allows reference	262:13 - 263:10	Need report		
95:2 - 96:16	Outside report; need report	134:5 - 134:16	Outside report	445:16 - 445:22	Need report				
99:11 - 99:15	Outside report	137:19 - 138:4	Outside report	448:12 - 448:18	Attorney allows reference				
				482:25 - 483:5	Attorney allows reference				
				489:17 - 491:2	Need report				
				534:17 - 534:25	Need report				
				534:17 - 534:25	Attorney allows reference				
				538:6 - 538:19	Need report				

A copy of these excerpts from the witnesses' depositions is attached as Exhibit 12.

Finally, DWR's election to insist that the experts DWR and FERC retained are not qualified, cannot reference their reports, and that the reports are also inadmissible is misguided. DWR objects to their own questions as part of testimony designated by Plaintiffs. DWR contends that the individuals who prepared the report are not qualified to testify as to its contents and conclusions—a position DWR conveniently never had before the results of the report were known and the witnesses offered testimony about the causes and circumstances of the failures of the Oroville Dam.

This is a bench trial. The Court is well positioned to hear competing testimony from witnesses, allow cross examination, and review the evidence in light of the arguments presented by the parties. Allowing members of the team of independent experts DWR commissioned to review and assess the Spillway Failure does not present any evidentiary prejudice to DWR. DWR only objects because of the substance. The objections should be overruled.

1                   2.     DWR's Response

2                   Plaintiffs mischaracterize DWR's objections and misapply the Rules of Evidence. DWR is not  
3 objecting to "any testimony" about matters within the Independent Forensic Team (IFT) Report and  
4 FERC After Action Panel Report. DWR is merely asking plaintiffs comply with the Rules of  
5 Evidence, which, in many instances, they chose to ignore when they took these depositions. This is  
6 perhaps most notable in those portions of the designations where either the examiner or the witness  
7 read wholesale sections of reports into evidence, clearly knowing these were out-of-court statements  
8 being offered for the truth of the matter asserted (see, e.g., Trojanowski Transcript, 108:13-109:12.)  
9 In fact, during the very first of these depositions, DWR's counsel gave plaintiffs' counsel fair  
10 warning that this was improper and that DWR was going to lodge the very objections it has now  
11 lodged:

12  
13                   MR. GIMPLE: [Mr. McCarthy], may I ask one other thing; can we make it clear when  
14 the witness is reading? Do you mind, because I think in that last answer he read  
15 everything. That was all read, and it would just be nice for the record, and it would be  
16 clearer if it indicated that he's reading as opposed to testifying.

17                   MR. MC CARTHY: I disagree. I disagree that reading is not testifying, so no.

18                   BY MR. MC CARTHY:

19                   Q. Go ahead, sir, answer the question.

20                   MR. GIMPLE: I reserve my right to object to the admissibility of his report, which  
21 apparently you're going to try to make admissible by having him read it and then not  
22 identify where he's reading. So I would just object and give fair notice that if him  
23 reading the report is going to be offered into testimony to get over a hearsay objection,  
24 we do intend to object.

25 (Deposition of John France, at 27:7-24.)

26                   Plaintiffs' counsel had a full and fair opportunity to correct this situation. Counsel not only  
27 refused to do so, counsel would not even agree to require the witness to identify when he was reading  
28 material into the record, which suggests a strategy to intentionally blur the line between hearsay and  
admissible testimony. The deposition was plaintiffs' chance to correct this clear deviation from the  
Rules of Evidence. Plaintiffs' counsel shunned that opportunity.



1 Plaintiffs' ex-post-facto attempts to recover from this failed strategy are unavailing. Witnesses  
2 and counsel were not "refreshing recollection" when they read hearsay into the record. Refreshing  
3 recollection occurs when a witness testifies he cannot recall something, then the attorney shows the  
4 witness a document and asks whether that document refreshes the witness' recollection. If the witness  
5 says "yes," the witness then testifies based on his refreshed recollection; he does not read into  
6 evidence the document that refreshed him. Moreover, the proponent of the testimony does not have  
7 the right to introduce into evidence the document used to refresh recollection; only the adverse party  
8 has that right. ( Evid. Code, § 771; *People v. Lee* (1990) 219 Cal.App.3d 829, 840.)

9 It is even more absurd for plaintiffs to characterize the wholesale recitation of hearsay as "past  
10 recollection recorded." The foundation for past recollection recorded requires that, among other  
11 things, the witness first testifies that he has insufficient recollection to testify as to the subject of the  
12 question.( Jefferson, *California Evidence Benchbook*, Section 11.1 (4<sup>th</sup> Ed. 2020); Evid. Code, § 1237,  
13 subdiv. (a).) To lay a proper foundation for past recollection recorded, the witness must next review  
14 the document then testify that, upon review, it does not refresh his recollection. (Jefferson, *supra*, at  
15 §11.3, p. 11-3.) Only then does the document come into evidence. That is not at all what is happening  
16 in any of the testimony plaintiffs designated. Plaintiffs have the burden to lay the foundation for this  
17 testimony, not DWR. They have not done so -- not in the designations themselves and not in the chart  
18 they now offer. Furthermore, that chart now adds certain testimony they never designated when first  
19 required to do so, which they must not be allowed to do now.

20 AS DWR explains in its motions in limine numbers 4 and 5, the FERC After Action Panel  
21 Report and IFT report are inadmissible hearsay to which no hearsay exceptions apply. Plaintiffs knew  
22 DWR would make these objections and were warned about it when the depositions were taken but  
23 consciously decided to continue eliciting inadmissible testimony. They must not be allowed to avoid  
24 the ramifications of that decision by making baseless claims about refreshing recollection or about  
25 past recollection recorded.

26 Furthermore, much of the designated testimony is inadmissible under Supreme Court  
27 authority specifically prohibiting a party from entering case-specific hearsay into the record through  
28 an expert. (*People v. Sanchez* (2016) 63 Cal.4th 665, 676.) One of the many examples of plaintiffs

1 running afoul of this rule is their designation of page 250:4-15 of the transcript of IFT member John  
2 France, where Mr. France testifies, in part, as follows:

3  
4 Q. · So these notes were provided to you by another member of the IFT; correct?

5 A. · That is correct.

6 Q. · And under Bill Acres paragraph, the last sentence says, "Although fully aware  
7 of the detailed geological descriptions of the moderately weathered rock, he never  
8 raised any concerns regarding potential erosion." Did I read that accurately?

9 A. · Yes.

10 Q. · Was that data that was reported to you from another member of the IFT?

11 A. · Yes, through these notes, that's correct.

12 This is but one example of dozens of plaintiffs' designations that unabashedly contain case-  
13 specific hearsay. In the above passage, the witness and counsel are not only reading hearsay into the  
14 record, they are reading multiple levels of hearsay into the record. There are numerous other  
15 designations exactly like this one.

16 There are yet other designations where plaintiffs just as blatantly flaunt the Rules of Evidence,  
17 albeit in different respects. These include areas where there is no foundation that the witness has  
18 either a lay or expert foundation for the evidence plaintiffs seek to introduce from that witness.

19 For example, IFT member John Trojanowski testified that he is not a geologist and is not  
20 qualified as a geologist. (Deposition of John Trojanowski at 172:13-21) [You know, like I said, I'm  
21 not a -- a geologist... I think a geologist would be a better person to ask if that's really true.]. That did  
22 not stop plaintiffs from designating geology opinions from him. (See e.g. Deposition of John  
23 Trojanowski at 409:23-411:1). There are other designations where a witness is asked not whether  
24 something is his opinion but only whether it is the "IFT's" opinion, meaning the opinion of a team of  
25 six persons intentionally selected precisely because they were qualified in different disciplines.  
26 (Deposition of Irfan Alvi 96:14-97:25). In those situations, plaintiffs' designations do not even  
27 confirm that the opinion they are asking about was a personal opinion held by the witness who is  
28 offering it.

1 In sum, DWR's objections are well-founded and plaintiffs should be held to the Rules of  
2 Evidence and to the ramifications of a strategy they consciously pursued and to a result they had  
3 every opportunity to avoid.

4 ***B. Plaintiffs' Issue No. 2: Logistics of Plaintiffs' Trial Testimony***

5 1. Plaintiffs' Position

6 Plaintiffs previously objected to a trial by video-conference in this matter. Plaintiffs' position  
7 has not changed. A case of this magnitude, length, and complexity, should be presented to the fact  
8 finder in person. Additionally, Plaintiffs and many of their affiliated witnesses have unusable or  
9 unreliable home internet connections, and limited technical ability or experience in order to be able to  
10 testify remotely without assistance. In overruling Plaintiffs' objection to proceeding by Zoom, the  
11 Court noted that Plaintiffs should overcome this technical barrier to effective participation through  
12 various other means. As a result, Plaintiffs who require technical assistance to testify remotely will be  
13 appearing at counsel's office in Woodland, California in an attempt to be able to reasonably  
14 participate in their own trial. Plaintiffs intend to examine those witnesses with counsel and the  
15 witness in the same conference room, with both the attorney and witness visible on the screen.

16 2. DWR's Response

17 DWR does not object to Plaintiffs proposal of how to present their witness so long as it is  
18 accordance with the Court's pretrial order. In response to some of Plaintiffs' commentary above,  
19 DWR notes that on April 23, 2021, the Court of Appeal summarily denied Plaintiffs' writ on their  
20 Objection to Trial by Zoom.

21 ***C. Plaintiffs' Issue No. 3: Objections to and Admissibility of DWR Records as***  
22 ***Evidence***

23 1. Plaintiffs' Position

24 Plaintiffs reserve their right to object that specific pieces of evidence offered by DWR lack a  
25 proper witness to authenticate or lay a foundation for DWR's own documents. However, because  
26 DWR's own records themselves are likely to be admissible given a proper sponsor and foundation,  
27 any such objections should be handled on a document-by-document basis as the evidence is  
28

1 introduced. Plaintiffs cannot object to the foundation for records without knowing what foundation  
2 DWR's counsel will provide before offering the evidence.

3 DWR's contrary position—objecting to 90% of the evidence Plaintiffs intend to offer—would  
4 require a misapplication of the Evidence Code. DWR's historic records of inspections, maintenance,  
5 design, and construction of the Oroville Dam should come in, not just the cherry-picked selections  
6 DWR finds helpful to its defense. If the Court adopts DWR's strained interpretation of the Evidence  
7 Code, that same strained interpretation should apply across the board, both to the exhibits offered by  
8 Plaintiffs and the exhibits offered by DWR. To allow DWR to self-select which of its own historical  
9 records fit into a hearsay exception or are otherwise admissible prejudices Plaintiffs.

10 Finally, the purpose of the hearsay rules is to prevent the admission of unreliable evidence. If  
11 DWR contends that the DWR records plaintiffs offer as exhibits cannot be considered reliable, it  
12 should say so and explain why it has been operating the Oroville Dam for over fifty years without a  
13 reliable record keeping and information management system. Assuming DWR believes its own  
14 admittedly authentic records are reliable, those records are (1) not hearsay, or (2) fit well within (at  
15 least) one hearsay exception.

16 2. DWR's Response:

17 Here again plaintiffs' mischaracterize DWR's objections and again misconstrue the standard  
18 for admissibility. They also again misconstrue the standards for admissibility of evidence. DWR is  
19 not "cherry-picking" favorable evidence. DWR has admitted to the authenticity of all of its own  
20 documents, save a very few where there are genuine issues about whether the exhibit is a correct  
21 version of the original. What DWR cannot do is agree to wholesale admissibility just because a  
22 document was prepared by DWR, which is apparently how plaintiffs read the Rules of Evidence.  
23 Some documents may be admissible hearsay themselves but still contain inadmissible hearsay. Some  
24 may be admissible for one purpose but not for another. Until the document is offered into evidence,  
25 DWR cannot reasonably be expected to stipulate to admissibility without knowing the purpose for  
26 which it is being introduced or the foundation upon which it is offered. In other words, DWR is only  
27 asking that these objections be handled "on a document-by-document basis as the evidence is  
28 introduced," exactly like plaintiffs have proposed with their supposed reservation at the beginning of

1 their comments above. The only difference between plaintiffs and DWR is that DWR has preserved  
2 its objections by making them now, while plaintiffs are trying to wrangle for themselves a right they  
3 are waiving by not asserting all of their objections now as the court ordered.

4 ***D. DWR's Issue No. 1: CEII Materials***

5 1. DWR's Issue No. 1: "CEII" Materials

6 During discovery in this case DWR produced numerous documents that contain specific  
7 engineering and detailed design information for the Oroville Dam and its appurtenant structures,  
8 including the newly constructed spillway. Some of these detailed engineering and design documents  
9 are classified as Critical Energy/Electrical Infrastructure Information ("CEII") under 18 Code of  
10 Federal Regulations part 388.113 because the information could expose infrastructure vulnerabilities  
11 that could be useful to someone planning an attack on critical infrastructure. DWR produced the CEII  
12 documents under a Stipulated Protective Order signed by the court on November 2, 2018 because  
13 they pose a risk to national security and should be protected from public disclosure.

14 Some of the proposed trial exhibits contain CEII. Without divulging too much in this public  
15 filing, DWR notes that some of the exhibits depict conditions that could potentially be of value to  
16 someone seeking to do harm to these critical facilities. This is not to say plaintiffs should be  
17 prohibited from examining witnesses about these documents or that plaintiffs' ability to present their  
18 case should be frustrated. DWR merely requests that, before certain documents are displayed for all  
19 to see on YouTube, there be procedures in place to allow DWR to request protection from public  
20 disclosure for specific items that may give rise to CEII concerns. This is a matter DWR requests be  
21 added to the agenda for the pretrial conference.

22 2. Plaintiffs' Response:

23 Plaintiffs have no objection to materials containing CEII being appropriately handled. In order  
24 to avoid any inadvertent disclosure, Plaintiffs have requested a list of documents that are in the  
25 exhibit lists that contain CEII.

26 ///

27 ///

28 ///

1 **VIII. OPENING STATEMENTS**

2 During the conference on April 13, 2021, the parties discussed trial briefs, opening  
3 statements, and closing arguments. The parties will file and exchange trial briefs of no more than 25  
4 pages on May 7, 2021.

5 Each party will have 1 hour to present an opening statement.

6 **IX. VIDEOSTREAMING TECHNOLOGY AND PRESENTATION OF EXHIBITS**

7 Aside from hosting the trial using videostreaming technology, the Court will rely upon the  
8 parties to provide necessary technology for viewing scanned or electronically displayed exhibits.  
9 Regardless of which party calls a witness, each side shall have equal access to electronic documents  
10 that will be shown to the Court and the witness during trial. Attorneys and witnesses must be in a  
11 suitable space for video and audio presentation that will be free from exterior noise, feedback, echoes  
12 and distortion. Video and audio deficiencies may result in trial delays and interruption of testimony.

13 **Because of the limited video space created by the videostreaming or “Zoom” technology,**  
14 **only the trial attorneys and witnesses should be using that technology during trial. Reducing**  
15 **the amount of open screens assist the Court Reporter during transcription. Others may view**  
16 **the trial on YouTube.**

17 **X. PROTOCOL FOR WITNESSES**

18 The witnesses testifying at trial will provide testimony without reading notes or glancing at  
19 writings or flash cards or other prompts. No one else will be present in a room where a witness is  
20 testifying. Witnesses may be shown exhibits during testimony consistent with the Evidence Code.

21 An attorney who calls a witness to testify at trial must, before the witness testifies, advise the  
22 witness of the protocol for witnesses testifying in this Court. This should include the following  
23 information: (A) the location of where the witness will testify; (B) the proper attire to wear while  
24 testifying; (C) the fact that the witness will be placed under oath; (D) that the witness should adjust  
25 the witness chair and the microphone so the microphone is close to and directly in front of the  
26 witness's mouth; (E) that the witness should speak only in response to a question; (F) the witness  
27 should wait for a ruling on any objections before proceeding to answer a question; (G) the witness  
28 should answer all questions with words, not gestures or nodding of the head; and (H) that substances

1 such as food, beverages, and chewing gum should not be consumed by the witness during testimony  
2 but water is allowed.

3 Trial attorneys are admonished not to interrupt a witness or each other to make objections or  
4 argue about an objection. This is a bench trial. The Court will listen to a witness' answer to a  
5 question, then hear the objection to the answer (that was not apparent from the question), and, if the  
6 objection is sustained, strike the objectionable testimony or otherwise disregard the inadmissible part  
7 of the answer. The Court Reporter will not be able to transcribe when more than one person is  
8 speaking at the same time.

9 See Plaintiffs' Evidentiary and Other Legal Issues, § VII.2., *supra*, regarding certain Plaintiffs  
10 and witnesses who will be testifying from counsel's office. As discussed at the April 13 conference,  
11 expert witnesses are allowed to have their file before them during testimony, as they would in an in-  
12 person trial. **However, experts will only be permitted to refer to their reports to refresh  
13 recollection pursuant to Evidence Code Section 771. There may be circumstances in which an  
14 expert is asked to list numerous items relied upon as stated in the report and, unless there is an  
15 objection, reading from that list will be permitted. Any other use of a report by experts or  
16 other witnesses during their trial testimony will require permission from the Court.**

#### 17 **XI. DEMONSTRATIVE AIDS**

18 A party using a demonstrative aid during trial must, before the demonstrative aid is displayed,  
19 show the demonstrative aid to trial counsel of all other parties participating in the trial. The term  
20 "demonstrative aid" includes charts, diagrams, models, samples, and animations, but does not include  
21 exhibits admitted into evidence or outlines of opening statements or closing arguments.

#### 22 **XII. DISPUTES REGARDING EXPERT WITNESS TESTIMONY**

23 A frequent objection to expert witness testimony is that the witness is going beyond his or her  
24 deposition testimony. If opposing counsel objects to an expert's trial testimony on the grounds that  
25 the expert is giving opinion testimony that was not provided at deposition, the witness will be  
26 temporarily excluded from the courtroom (i.e., placed in the waiting room). Outside the presence of  
27 the expert witness, the objecting attorney must provide the court and counsel with specific page/line  
28 citations to deposition testimony establishing the expert's opinion on the relevant subject matter, the

1 expert's commitment on the record during the deposition that he or she had no other opinions to  
2 provide or offer, and an explanation affirmatively showing that the opinion to be provided by the  
3 expert at trial goes beyond opinions at that expert's deposition even though that expert testified those  
4 were the only opinions he or she intended to offer at trial. If that showing is made, the burden will  
5 then shift to the attorney for the party offering that expert to explain the alleged discrepancy between  
6 the opinions given at deposition and the opinion now elicited at trial. The undersigned will then rule  
7 on the objection.

### 8 **XIII. DISPUTES REGARDING DISCOVERY**

9 Another common objection pertains to testimony or exhibits that a party contends was not  
10 produced or provided during discovery. If such an objection is made, the objecting party will have  
11 the burden to pinpoint what discovery request was made or deposition question was asked that  
12 required a response, then show what the party's response was to that discovery request or deposition  
13 question, and demonstrate how the testimony or exhibit sought to be admitted should have been  
14 disclosed in light of that information. The Court will give counsel and opportunity to respond before  
15 ruling on the objection.

### 16 **XIV. STANDING ORDER PROHIBITING FILING OF PLEADINGS AFTER TRIAL 17 BEGINS**

18 Once trial begins, under no circumstances will supplemental points and authorities or motions  
19 in limine or any other pleading be filed and served on opposing counsel without leave of court. If a  
20 party wants to file a motion or other pleading during the trial, counsel for that party will first meet  
21 and confer with opposing counsel to resolve the dispute and thereby avoid a request for leave of  
22 court. After those meet and confer efforts have been exhausted, then counsel may request leave of  
23 court to file the motion or pleading. This procedure does not apply to trial motions (i.e., nonsuit), that  
24 are authorized by statute).

### 25 **XV. COURT DETERMINATION OF CUMULATIVE EVIDENCE**

26 During trial, the Court may, in light of other evidence previously presented, determine that  
27 further evidence on a point would be cumulative. Should the proponent of evidence deemed  
28



1 cumulative disagree with the Court's determination, that party may present argument or other matters  
2 for consideration before the Court makes a final ruling.

3 **XVI. TRIAL SCHEDULE**

4 The parties have prepared a trial schedule for each day of trial. That schedule includes time  
5 estimates for both sides to examine each witness. Counsel will make an effort to abide by those  
6 estimates. If a trial attorney exceeds a given time estimate for questioning a witness the Court will  
7 inform the parties and request an estimate for additional time needed to complete the witness  
8 examination. Redirect and redirect examination will depend upon what has been elicited from the  
9 witness during the preceding examinations.

10 At the end of each trial day the Court will have a brief scheduling conference with counsel.  
11 The scheduling conference will serve to avoid bench conferences and other trial interruptions. It will  
12 be used to plan the next day's proceedings and to fix the order of witnesses and exhibits, avoid  
13 surprises and ensure that the parties will not run out of witnesses. Counsel may raise anticipated  
14 problems and the Court may hear offers of proof and arguments as needed to resolve disputes. At the  
15 start of each trial day counsel can address last-minute changes in the order of witnesses or exhibits or  
16 follow up on matters raised at the previous day's conference.

17 The parties have met and conferred regarding scheduling of witnesses. Plaintiffs have  
18 identified their first ten witnesses and the parties have exchanged time estimates for those witnesses.  
19 These are included below (in approximate order). Both parties' testimony of John France will be  
20 played by video during the first 10 witnesses depending on scheduling.

<u>Witness</u>	<u>Plaintiffs' Estimate</u>	<u>DWR's Estimate</u>
George Onyett (Plaintiff JEM Farms)	1.5 Hours	45 Minutes
Tom Miller (Plaintiff Tom Miller)	1.5 Hours	45 Minutes
Liz Heckles (Plaintiffs Lang)	1 Hour	1 Hour
David Sarkisian (DWR)	1.5 Hours	1 Hour (may reserve)
Alex Samaan (DWR)	1 Hour	45 Minutes
Frank Glick (DWR)	1.5 Hours	1 Hour (may reserve)

1	Holly Nichols (DWR)	1 Hour	45 Minutes (may reserve)
2	Allen Marr (Plaintiff Expert)	2.5 Hours	1.5 Hours
3	Martin McCann (Plaintiff Expert)	2.5 Hours	1.5 Hours
4	Sheriff Honea (Third Party) (Thurs. May 13)	1 Hour	45 Minutes
5	John France (IFT Member; deposition video)		

6           **The parties will continue to exchange information about witnesses to be called at trial,**  
7 **including time estimates that each side expects for completing direct and cross-examination. At**  
8 **the Pretrial Conference, the Court ordered the parties to list witnesses with time estimates that**  
9 **will be sufficient to cover the days of trial starting on May 10, 2021, through May 26, 2021**  
10 **(excluding Fridays and Memorial Day). The parties will maintain a 10 day projection of trial**  
11 **witnesses with time estimates as the case moves forward. The Court leaves it to the parties to**  
12 **agree on the frequency of updating the 10 day schedule of witnesses.**

13 **XVII. CLOSING ARGUMENTS, WRITTEN FINDINGS AND CONCLUSIONS**

14           During the April 13 conference, the parties discussed this item. Each party will have 1 hour to  
15 present a closing argument.

16           The parties **may** first exchange proposed findings of fact and conclusions of law within seven  
17 (7) days after close of evidence. **At the conference on April 13, there was a discussion about**  
18 **whether an exchange of proposed findings and conclusions of law would be necessary.**  
19 **However, the Court will require each side to file and serve proposed findings and conclusions of**  
20 **law, regardless of whether or not those pleadings are exchanged between counsel. Toward the**  
21 **end of trial the Court will set a briefing schedule after discussion with the parties. Findings**  
22 **shall be stated in neutral language, avoiding argument and conclusions, and identify the evidence that**  
23 **establishes each finding. The Court may consider directing each party to submit additional proposed**  
24 **findings of fact and counter-findings before issuing a proposed statement of decision. The Court will**  
25 **then issue a proposed statement of decision in accordance with California Rule of Court 3.1590.**

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1 **XVIII. OTHER PRETRIAL ORDERS**

2 **A. Deposition Designations**

3 The parties have designated, counter-designated, objected, and met and conferred on  
4 objections to the various deposition designations. Copies of the Plaintiffs' Objections to DWR's  
5 Deposition Designations, along with DWR's responses, was attached as Exhibit 5, DWR's  
6 Objections to Plaintiffs' Deposition Designations, along with Plaintiffs' responses, was attached as  
7 Exhibit 6, and Exhibits 7-11, with the objected to designations for the five witnesses, Mr. France (Ex.  
8 7), Mr. Sitar (Ex. 8), Mr. Trojanowski (Ex. 9), Mr. Hendron (Ex. 10), and Mr. Alvi (Ex. 11), were all  
9 attached to the Joint Pretrial Statement filed in April 30, 2021. Testimony designated by Plaintiffs,  
10 and objected to by DWR, is highlighted in green. Testimony designated by DWR, and objected to by  
11 Plaintiffs, is highlighted in blue.

12 Additional testimony designated by the parties where there is no objection is not contained in  
13 Exhibits 7-11.

14 **The Court will rule on those objections.**

15  
16 Dated: May 3, 2021



DATED: May 3 2021  
**IT IS SO ORDERED**  
*[Signature]*  
Judge Of The Superior Court

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

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**OROVILLE DAM CASES**

**Case Number: JCCP 4974**

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**CERTIFICATE OF SERVICE VIA EMAIL**

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **PRETRIAL ORDER** by emailing true copies thereof, to the persons and addresses shown below:

**Eric J. Buescher - liaison counsel for Plaintiffs: [ebuescher@cpmlegal.com](mailto:ebuescher@cpmlegal.com)**

**Niall McCarthy - liaison counsel for Plaintiffs: [NMcCarthy@cpmlegal.com](mailto:NMcCarthy@cpmlegal.com)**

**Bethany M. Hill - liaison counsel for Plaintiffs: [BHill@cpmlegal.com](mailto:BHill@cpmlegal.com)**

**Randy W. Gimple - counsel for defendant: [rgimple@ccplaw.com](mailto:rgimple@ccplaw.com)**

**Don Carlson - counsel for defendant: [dcarlson@ccplaw.com](mailto:dcarlson@ccplaw.com)**

**Bruce McGagin - counsel for defendant: [bruce.McGagin@doj.ca.gov](mailto:bruce.McGagin@doj.ca.gov)**

**Scott Cavanaugh - counsel for defendant: [Scott.Cavanaugh@doj.ca.gov](mailto:Scott.Cavanaugh@doj.ca.gov)**

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: May 4, 2021

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

By: J. BELL,

Deputy Clerk