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10 San Joaquin County Flood Control and
Water Conservation District, and
11 Mokelumne River Water and Power Authority

12 **BEFORE THE**

13 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

14 HEARING IN THE MATTER OF)	OBJECTIONS OF THE COUNTY OF SAN
CALIFORNIA DEPARTMENT OF WATER)	JOAQUIN, SAN JOAQUIN COUNTY
15 RESOURCES AND UNITED STATES)	FLOOD CONTROL AND WATER
BUREAU OF RECLAMATION REQUEST)	CONSERVATION DISTRICT, AND
16 FOR A CHANGE IN POINT OF)	MOKELUMNE RIVER WATER AND
DIVERSION FOR CALIFORNIA WATER)	POWER AUTHORITY TO WRITTEN
17 FIX)	TESTIMONY AND EXHIBITS
_____)	SUBMITTED BY PETITIONERS; JOINDER
18		IN WRITTEN OBJECTIONS SUBMITTED
19		BY OTHER PROTESTANTS

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1 **I. INTRODUCTION**

2 Protestants County of San Joaquin, San Joaquin County Flood Control and Water Conservation
3 District, and Mokelumne River Water and Power Authority (collectively, the “San Joaquin County
4 Protestants”), respectfully submit the following objections to the written testimony and other evidence
5 proffered by Petitioners California Department of Water Resources (“DWR”) and the United States
6 Bureau of Reclamation (“Reclamation”) (collectively, “Petitioners”) in support of the Petition for
7 Change in the Point of Diversion. The San Joaquin County Protestants also join in, adopt, and
8 incorporate by reference the objections and motions to exclude evidence submitted by other
9 Protestants identified below.

10 **II. SCOPE AND CONTEXT OF THE SAN JOAQUIN COUNTY PROTESTANTS’**
11 **PROCEDURAL AND EVIDENTIARY OBJECTIONS**

12 The State Board’s October 30, 2015 Notice of Petition explains that Part 1 of the WaterFix
13 Hearing “focus[es] on the potential effects of the Petition on agricultural, municipal, and industrial
14 uses of water and associated legal users of water and conditions that should be placed on any approval
15 of the Petition to protect those uses.” (SWRCB Notice of Petition, p. 2.) The State Board identified
16 the key issues to be decided in Part 1 as follows:

- 17 (1) Will the changes proposed in the Petition in effect initiate a new water
18 right?
- 19 (2) Will the proposed changes cause injury to any municipal, industrial or agricultural
20 uses of water, including associated legal users of water?
- 21 a. Will the proposed changes in points of diversion alter water flows
22 in a manner that causes injury to municipal, industrial, or
23 agricultural uses of water?
- 24 b. Will the proposed changes in points of diversion alter water
25 quality in a manner that causes injury to municipal, industrial, or
26 agricultural uses of water?
- 27 c. If so, what specific conditions, if any, should the State Water
28 Board include in any approval of the Petition to avoid injury to
these uses?

(SWRCB Notice of Petition, p. 11.)

Petitioners bear the heavy burden of proof in this matter. In Part 1A of the WaterFix Hearing,
that means, at the very least, that the Petition must “[i]nclude sufficient information to demonstrate a
reasonable likelihood that the proposed change will not injure any other legal user of water.” (Wat.
Code § 1701.2(d); see, also, Wat. Code § 1701.3(b)(1) [Board may request additional information

1 “needed to demonstrate that the change will not injure any other legal user of water.”.) Unless and
2 until Petitioners meet this “no injury” standard of proof – i.e., unless and until they establish their
3 prima facie case – the Protestants are under no obligation whatsoever to come forward with any
4 affirmative evidence or argument to establish the likelihood of injury to legal users of water.

5 The objections set forth below apply only to written testimony and other evidence submitted on
6 May 31, 2016 by Petitioners in connection with Part 1 of the WaterFix Hearing. The San Joaquin
7 County Protestants reserve all rights to object to additional evidence Petitioners may later proffer in
8 connection with Part 1, as well to any evidence Petitioners may submit in connection with Part 2 of
9 the WaterFix Hearing, which is to “focus on the potential effects of the Petition on fish and wildlife
10 and recreational uses and conditions that should be placed on any approval of the Petition to protect
11 those uses, including consideration of appropriate Delta flow criteria for the California WaterFix
12 Project.” (SWRCB Notice of Petition, p. 12.)

13 In submitting these Objections, the San Joaquin County Protestants are mindful of the State
14 Board’s June 10, 2016 Ruling with respect to the Objections due on July 12, 2016:

15 [O]nly objections that, if valid, would preclude petitioners’ witnesses
16 from testifying must be submitted by [July 12]. At a minimum, any
17 motions to disqualify any of petitioners’ witnesses, or to exclude a
18 witness’s testimony, in whole or in part, must be filed and served on
19 petitioners and the other parties by 12:00 noon on July 12, 2016. The
20 parties are strongly encouraged, but not required, to submit any other
21 procedural or evidentiary objections by ... July 12 For example,
22 objections concerning petitioners’ exhibits, or objections that go to the
23 weight that should be afforded petitioners’ testimony or exhibits, but not
24 their admissibility, may be made after the July 12, 2016 deadline,
25 although we would prefer to receive all objections in writing by 12:00
26 noon July 12, 2016.

27 (SWRCB’s June 10, 2016 Ruling, p. 2.) Accordingly, the Objections stated herein include the
28 Objections that would disqualify or otherwise preclude Petitioners’ witnesses from testifying, in whole
or in part, as well as some objections which, if sustained, might not result in exclusion of evidence,
but, rather, would go to the weight of the evidence or result in restricted use of the evidence. That
said, consistent with the June 10 Ruling, the San Joaquin County Protestants reserve their right to
make further and additional evidentiary objections as evidence is offered by Petitioners during Part 1
of the WaterFix Hearing.

1 **III. PROCEDURAL OBJECTIONS**

2 **A. This Hearing Should Not Proceed until the Final EIR/EIS Has Issued and the Parties**
3 **Have Been Afforded an Opportunity to Review the Final EIR/EIS.**

4 Jointly with the Central Delta Water Agency and the South Delta Water Agency, in October,
5 2015, the San Joaquin County Protestants submitted substantive and detailed comments to the Partially
6 Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement
7 (“RDEIR/SDEIS”). Those comments, and comments submitted by many other parties, have yet to be
8 addressed. The Petitioners must address those comments in a final EIR/EIS, which will certainly
9 contain detailed information regarding operational criteria and the Bay-Delta Plan Update. The final
10 EIR/EIS will almost certainly result in substantial further evaluation of the impacts and alternatives
11 which received little or no evaluation, or plainly deficient analysis, in the RDEIR/SDEIS.

12 Without the final EIR/EIS, information essential to a responsible evaluation of the issues to be
13 addressed in Part 1 will not be available to Protestants, nor will Petitioners be in a position to even
14 begin to meet their burden of proving that the change petition includes sufficient information to
15 demonstrate a reasonable likelihood that the proposed change will not injure any other legal use of
16 water. For the same reason, until the final EIR/EIS is adopted and the Protestants have had sufficient
17 opportunity to evaluate the changes made to address the comments to the RDEIR/SDEIS, it will be
18 inappropriate and contrary to law for this Board to process the Petition or to conduct the evidentiary
19 hearing.

20 Notwithstanding the hearing officers’ rejection of this procedural objection in the February 11,
21 2016 Pre-Hearing Conference Ruling (pp. 1-2), the San Joaquin County Protestant reassert this
22 Objection and request that this hearing be postponed to allow for review of the final EIR/EIS.

23 **B. As Currently Structured, This Proceeding Unfairly and Unlawfully Shifts the Burden**
24 **of Proof and Persuasion with Respect to “No Injury” from the Petitioners to the**
25 **Protestants.**

26 Water Code § 1701.2 provides that prior to any approval of a change petition, the petitioner
27 must establish that the change will not operate to the injury of any legal user of the water involved.
28 The same requirement appears again in Cal. Code Regs., tit. 23, § 791(a) [“After notice of an
application to appropriate water has been given pursuant to Article 3, changes in point of diversion,

1 place of use, or purpose of use as stated in the application, permit, or license may be allowed only
2 upon petition and provided that the petitioner establishes that the proposed change(s) will neither in
3 effect initiate a new right nor injure any other legal user of water.”]. As a matter of law, the
4 Petitioners bear the burden of establishing “no injury.”

5 However, Petitioners in this proceeding are relying on the State Board to identify and require
6 mitigation measures to prevent injury to other legal users. Although Petitioners’ proffered written
7 testimony refers to the “no injury” test in a number of places, it offers no analysis of the “no injury”
8 question. That was, of course, supposed to be the overriding issue in the Part 1A, but the hearing has
9 been structured, apparently, on the expectation that the Protestants must make an affirmative showing
10 of injury.

11 As noted, unless and until Petitioners satisfy by competent evidence their burden of
12 establishing the likelihood of “no injury” to legal users of water, the Protestants are under no
13 obligation at all to put on an affirmative case. By going forward with the WaterFix Hearing as
14 currently structured, the State Board is effectively requiring Protestants to do just that. The net effect
15 is to shift the burden of proof and persuasion with respect to “no injury” from the Petitioners, i.e., to
16 allow Petitioners to avoid their burden of proof.

17 **C. This Hearing Should Not Proceed until the State Board has Completed its Review and**
18 **Update of the Bay-Delta Water Quality Control Plan.**

19 This hearing is premature, also, because the State Board must complete its review and update
20 of the Bay-Delta Water Quality Control Plan prior to considering approval of the Petition. The use of
21 current flow standards, D-1641, or interim Delta flow criteria cannot meet the Board’s statutory
22 obligation under the 2009 Delta Reform Act to include “appropriate Delta flow criteria” protective of
23 beneficial and public trust resources in any order approving a change such as that at issue here.
(Water Code § 85086(c)(2).)

24 **IV. EVIDENTIARY OBJECTIONS**

25 **A. Overview of Rules Governing Admissibility of Evidence in this Proceeding**

26 **1. The State Board’s October 30, 2015 Notice of Petition**

27 The State Board explained in its October 30, 2015 Notice of Petition and Notice of Public
28

1 Hearing that evidence proffered in this proceeding will be admitted in accordance with Gov. Code
2 §11513. Although section 11513 provides that in administrative hearings the technical rules relating
3 to evidence and witnesses need not be strictly applied, relevant evidence must be “the sort of evidence
4 on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code, §
5 11513(c).) In the administrative hearing context, “the evidence must be relevant and reliable.”
6 (*Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.) The applicable
7 SWRCB regulation (Cal. Code Regs., tit. 23, § 648(b)) incorporates Evidence Code sections 801-805;
8 Water Code § 1100 incorporates the Civil Discovery Act (Code Civ. Proc. § 2016.010 et seq.).

9 Consistent with Gov. Code § 11513(d), the Notice of Petition also states: “Hearsay evidence
10 may be used to supplement or explain other evidence, but over timely objection shall not be sufficient
11 in itself to support a finding unless it would be admissible over objection in a civil action.” (Notice of
12 Petition, p. 36.)

13 The State Board’s October 30, 2015 Notice of Petition also directed the parties to comply with
14 the requirement that all “[e]xhibits based on technical studies or models shall be accompanied by
15 sufficient information to clearly identify and explain the logic, assumptions, development, and
16 operation of the studies or models.” (Notice of Petition, p. 33.)

17 2. The February 11 Pre-Hearing Conference Ruling.

18 In its February 11, 2016 Pre-Hearing Conference Ruling, the hearing officers for the
19 California WaterFix Petition Hearing observed that the information provided by Petitioners “lacks
20 clarity in several ways, including whether operational criteria are intended to constrain project
21 operations or are identified for modeling purposes only, areas where a specific operational component
22 or mitigation measure is not yet chosen or identified, operational parameters that are not defined and
23 deferred to an adaptive management process, and lack of clarity concerning some mitigation
24 measures.” (February 11, 2016 Ruling, p. 6.) The hearing officers directed Petitioners to provide the
25 information required by California Code of Regulations, title 23, § 794(a) “in a succinct and easily
26 identifiable format.” (February 11, 2016 Ruling, p. 7.) Information required by section 794(a)
27 includes proposed diversion, release and return flow schedules and identification in quantitative terms
28 of any projected change in water quantity, water quality, timing of diversion or use, consumptive use

1 of the water, reduction in return flows, or reduction in the availability of water within the streams
2 affected by the proposed change(s). (Cal. Code Regs., tit. 23, § 794(a)(6) and (a)(9).)

3 **3. Rules Applicable to Expert Testimony, Generally.**

4 While application of the rules in this Hearing may be relaxed in comparison to their application
5 in court proceedings, the rules governing admissibility of expert testimony are themselves well
6 established. Obviously, the witness must be qualified to testify as an expert. (*People v. Chavez*
7 (1985) 39 Cal.3d 823, 827-829.) It follows that proffered expert testimony must be excluded where
8 the witness's qualifications do not extend to the subject matter at issue, i.e., where the proffered
9 testimony is beyond the scope of the witness's expertise. (Evid. Code § 720 [The witness must be
10 qualified, by knowledge, skill, experience, training, or education, as an expert in the appropriate
11 field.]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1174-1175.)

12 A proper objection lies where the question does not require or lend itself to expert testimony.
13 This follows from the rule that the subject matter at issue must require expert testimony because it is
14 outside the common knowledge and experience of ordinary jurors. (Evid. Code § 801; *People v.*
15 *Ochoa* (2000) 26 Cal.4th 398, 437; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Expert
16 opinion should not be admitted if persons of ordinary education could reach a conclusion as
17 intelligently as the witness. (*People v. McDonald* (1984) 37 Cal.3d 351, 367.)

18 Nor may expert testimony be admitted where its admission would usurp the role of the trier of
19 fact or of those charged with making legal determinations. (*Summers v. A. L. Gilbert Co.* (1999) 69
20 Cal.App.4th 1155, 1183 [witness was not allowed to give opinions on law].) Allowing an expert to
21 give an opinion on a question of law usurps the role of the trial judge, and the evidence is
22 incompetent. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863 [not proper in malicious
23 prosecution action for attorney-witnesses to opine as to whether a reasonable attorney would conclude
24 there was probable cause to file an action]; *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31
25 Cal.App.4th 1094 [expert testimony on the interpretation of an insurance contract is inappropriate];
26 *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50 [The existence and scope of a
27 defendant's duty to supervise an agent is a legal question, and an expert may not give an opinion in an
28 area that is within the province of the court to decide.]

1 As reflected in the State Board's October 30, 2015 Notice of Petition, expert witnesses may
2 rely on hearsay evidence, the work of others, test results and measurements from procedures
3 conducted by others, and other material that they themselves did not produce. However, the
4 underlying work, writings, measurements, and other underlying evidence must not be unreliable,
5 speculative, *improper* hearsay, or otherwise inadmissible. Accordingly, in the context of the
6 WaterFix Hearing, proffered expert testimony must be excluded where it is based on matter of a type
7 on which an expert may not reasonably rely or where its is unsupported by the material on which the
8 expert relies. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747,
9 771-772.) Proffered expert testimony must be excluded if it is speculative or based on assumptions
10 not support by the record. (*Ibid.*; *Long v. Cal-Western States Life Insurance* (1955) 43 Cal.2d 871,
11 882 [speculative or conjectural data are not properly the subject of expert testimony]; *Korsak v. Atlas*
12 *Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525 [If the expert uses hearsay as the basis for an
13 opinion, it should be reliable and necessary and not conjecture or speculation, and the expert must not
14 testify to the out-of-court statements as independent facts.]) Expert testimony must be excluded or
15 accorded no weight where the basis for the opinion reflects an unacceptable level of uncertainty,
16 speculation and guesswork. (*Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange*
17 *County, Inc.* (2000) 85 Cal.App.4th 1042, 1051.)

18 4. Applicability of the *Kelly/Frye* Rule in Administrative Hearings.

19 Proffered expert testimony must be excluded if it is not based on principles or procedures that
20 have gained general acceptance in their field. (*Frye v. United States* (D.C. Cir. 1923) 293 F. 1013;
21 *People v. Kelly* (1976) 17 Cal.3d 24; *People v. Leahy* (1994) 8 Cal.4th 587, 594.) In California, the
22 *Kelly* rule, also known as the "general acceptance test," allows for the admission of expert opinion
23 grounded in a scientific theory or technique only if the theory or technique is generally accepted as
24 reliable in the relevant scientific community. Under this rule, evidence based on a new scientific
25 method must satisfy three requirements to be admissible: (1) the technique has gained general
26 acceptance in its field; (2) the witness furnishing the testimony is qualified to give evidence on the
27 acceptance of the technique; and (3) correct scientific procedures were used. (*People v. Diaz* (1992) 3
28 Cal.4th 495, 526.) "It is the proponent of [the expert] testimony, of course, who has the burden of

1 making the necessary showing of compliance with *Frye*, i.e., of demonstrating by means of qualified
2 and disinterested experts that the new technique is generally accepted as reliable in the relevant
3 scientific community.” (*People v. Shirley* (1982) 31 Cal.3d 18, 54, citing *People v. Kelly, supra*, 17
4 Cal.3d at pp. 36-40; accord, *Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298,
5 311.)

6 The San Joaquin County Protestants recognize that the State Board has at times taken the
7 position that the *Kelly/Frye* rule does not apply to the Board’s administrative proceedings. (See
8 SWRCB’s March 18, 2016 “Ruling on the Following Motions Filed in the Matters of Administrative
9 Civil Liability (ACL) Complaint Against Byron-Bethany Irrigation District (BBID) and Draft Cease
10 and Desist Order (CDO) Against The West Side Irrigation District (WSID),” at p. 3.) The rationale
11 for not applying the *Kelly/Frye* rule in this context is that in administrative proceedings the danger of
12 a lay-jury being misled or unduly prejudiced by such evidence does not exist. (*Ibid.*)

13 Respectfully, however, such past statements by the State Board cannot withstand scrutiny
14 under prevailing California law. In *Seering v. Department of Social Services, supra*, 194 Cal.App.3d
15 298, the court rejected the Department of Social Services’ argument that the *Kelly/Frye* rule does not
16 apply in administrative proceedings, explaining:

17 While it is true that an administrative hearing “need not be conducted according to
18 technical rules relating to evidence and witnesses” and that hearsay is admissible in
19 such a hearing (see Gov. Code, § 11513, subd. (c)), we conclude that the purpose of
20 the *Kelly-Frye* rule will be served by applying it in this context. In *Amber B. and
Christine C.*, the court was concerned that the trial judge in a dependency hearing
21 might be misled by the “aura of infallibility” that may surround unproven scientific
22 methods and might “ascribe an inordinately high degree of certainty” to the expert’s
23 opinion. We see no reason why an administrative law judge in a proceeding to revoke
24 a license, and later a trial judge reviewing the administrative record under the
25 independent judgment standard, would be any less likely to be misled by the “aura of
26 infallibility” with which the courts have been concerned. Consequently, we reject the
27 contention that the *Kelly-Frye* rule should not apply in a proceeding such as this.

28 (194 Cal.App.3d at p. 310.)

Since *Seering v. Department of Social Sciences* was decided, agencies’ contentions that the
Kelly/Frye rule does not apply in such administrative proceedings has been rejected by the courts.
(See, e.g., *Texaco Producing v. County of Kern* (1998) 66 Cal.App.4th, 1029, 1047-1048 [rejecting
the agency’s contention that *Kelly/Frye* does not apply in administrative proceedings but then

1 declining to apply *Kelly/Frye* on other grounds]; *Harris Transportation Co. v. Air Resources Board*
2 (1995) 32 Cal.App.4th 1472, 1478 [“We agree as a general matter the *Kelly* standard is applicable to
3 administrative proceedings.”].)

4 **B. Objection to Petitioners’ Reliance on CalSim II Modeling, Generally.**

5 In the context of the WaterFix Petition Hearing, the most obvious *Kelly/Frye* issues arise in
6 connection with the Petitioners’ witnesses’ reliance on CalSim II modeling and other models that rely
7 on CalSim II. CalSim II is also subject to objection on the ground that it lacks foundation, relies on
8 speculation and does not have sufficient indicia of reliability to be properly applied in the context of
9 this proceeding.

10 Although CalSim II might not be considered “new” in some circles, it does not pass the
11 general acceptance test. As stated in the CalSim II Strategic Review conducted in 2003:

12 There has not been a sufficiently systematic, transparent, and accessible approach to the
13 development and use of hydrologic, water demand, capacity, and operational data for
14 CALSIM II. . . . The administration of data development is fragmented, disintegrated,
15 and lacks a coherent technical or administrative framework.

16 (A Strategic Review of CALSIM II and its Use for Water Planning, Management, and Operations in
17 Central California, Attachment 1, p. 20 (December 4, 2003).) The Petitioners agreed:

18 The validity of data inputs impacts both model results and model credibility. The
19 greatest concern is the validity of the hydrologic inputs and parameters. Concern is
20 compounded by the current lack of complete documentation. Over the last two years
21 DWR and Reclamation have attempted to document model inputs. Reclamation is
22 currently documenting the current CalSim-II hydrology procedures. This effort needs
23 to be extended and updated.

24 (Peer Review Response: A Report by DWR/Reclamation in Reply to the Peer Review of the CalSim II
25 Model Sponsored by the CALFED Science Program in December 2003, Attachment 2, p. 12.)

26 Subsequent reports have been similarly critical of the CalSim II model, and the San Joaquin
27 County Protestants are not aware of any thorough peer review process under which the current CalSim
28 II has passed muster. None of the prior peer reviews of CalSim II appear to have been submitted
with the modeling evidence that would be essential for validating the model for any specific use.
Against this backdrop, Petitioners’ use of CalSim II as a core foundational basis for a proposed project
of this magnitude is unsupportable.

Further, the San Joaquin County Protestants understand that Petitioners have not provided the

1 detailed information regarding the CalSim II model requested by the Pacific Coast Federation of
 2 Fishermen's Associations and the Institute for Fisheries Resources. While that information would not
 3 have been an adequate substitute for a thorough and proper peer review of the current version of
 4 CalSim II, it might have provided at least some basis for evaluating Petitioners' use of CalSim II in
 5 the WaterFix context.

6 For these reasons, Petitioners' reliance on CalSim II lacks foundation, is speculative, and
 7 cannot pass muster under the *Kelly/Frye* test. Because reliance on CalSim II modeling is more or
 8 less ubiquitous throughout Petitioners' May 31, 2016 case-in-chief written submissions, the San
 9 Joaquin County Protestants object to Petitioners' use of CalSim II, and other models that rely on
 10 CalSim II, to support the Petition. This blanket objection is in addition to specific objections to
 11 Petitioners' use of CalSim II in the Objections chart below.

12 C. Objections to Specific Written Testimony and Exhibits Proffered by Petitioners.

13 The San Joaquin County Protestants object to the following written testimony and exhibits
 14 proffered by Petitioners on the following grounds.

EXHIBIT	OBJECTION
DWR-3, at pp. 8-9, 16-17	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.
DWR-4, at p. 38	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.
DWR-5, at pp. 16-17, 28-82	A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule. B. Improper and inadmissible expert opinion testimony because it includes legal conclusions (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.

EXHIBIT	OBJECTION
DWR-51, at pp. 10:7-16; 12:14-16; 13:17- 14:9, 14:21-17:3 (Pierre Testimony)	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature (e.g., Ms. Pierre's reliance on the adaptive management plan). The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>
DWR-53, at pp. 8:17-19, 11:20-12:16 (Sergent Testimony)	Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.
DWR-53, at pp. 3:22-25, 8:13-21, 8:25-9:1, 10:24-15:11 (esp. 11:10-13), 24:5-28 (Sergent Testimony)	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.
DWR-53, at pp. 11:10-13; 17:23-18:4 (Sergent Testimony)	Evidence Code § 1523 (secondary evidence rule); DWR has possession or control of the referenced writings, which are the best and most reliable evidence of their content; a responsible trier of fact would not rely on secondary evidence of their content under these circumstances.
DWR 61, at pp. 5:23-25, 6:6-8, 7:18-27, 8:1-8, 16:9-15, 17:5-11, 17:23-25, 19:15-26, 20:6-18 (Leahigh Testimony)	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.
DWR 61, at pp. 11:20-24; 12:1-6 (Leahigh Testimony)	Lacks foundation, relies on facts not in evidence; also runs afoul of the secondary evidence rule (Evidence Code § 1523).
DWR 61, at p. 11:25-28 (footnote 10) (Leahigh Testimony)	Evidence Code § 1523 (secondary evidence rule). The witness's characterization of WR 2010-0002 is misleadingly incomplete and inaccurate – the best evidence of what WR 2010-0002 actually says is WR 2010-0002 itself.

EXHIBIT	OBJECTION
DWR-66 (Nader-Tehrani Testimony)	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material. Further this testimony's analysis of durations of time series data for DSM2 modeling (4:4-9) is not peer-reviewed. Input data for DSM2 derives from CalSim II output and, therefore, lacks foundation and based on facts not in evidence or which are speculative in nature. Insofar as this testimony relies on CalSim II modeling, it should be excluded under <i>Kelly/Frye</i> .
DWR-66, at pp. 2:10-11, 4:23-7:21, 8:7-11:18 (Nader-Tehrani Testimony)	Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.
DWR 71, at pp. 2:19-23, 9:2-17, 15:5-24, 16:18-18:5; 19:25-21:4 (Munevar Testimony)	Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.
DWR 71, at pp. 2:19-23, 12:15-18, 12:27-13:20, 15:5-24, 16:12-21, 17:7-14, 19:10-24, 19:25-21:4 (Munevar Testimony)	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.

EXHIBIT	OBJECTION
DWR-114	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>
DWR-115	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.
DWR-116	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p>
DWR-117	Lacks foundation and based on facts not in evidence and which are speculative in nature. The Draft Adaptive Management Plan is based on inadequate, unreliable, and speculative underlying factual assumptions about potential future decision-making by agencies and individuals, some of which are not the Petitioners and will not be acting under the control by Petitioners. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon.
DWR-324	Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.

EXHIBIT	OBJECTION
DWR-513	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions (<i>Summers v. A. L. Gilbert Co.</i> in the guise of expert testimony (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>
DWR-514	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions (<i>Summers v. A. L. Gilbert Co.</i> in the guise of expert testimony (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>
DWR-515	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>

EXHIBIT	OBJECTION
<p>DOI-4, at pp. 2, 6 (joining in the improper testimony of Ms. Sergeant); pp. 7-9 (testimony re documents separately included as DOI-13 through DOI-31) (Sahlberg Testimony)</p>	<p>Evidence Code § 1523 (secondary evidence rule); DWR has possession or control of the referenced writings, which are the best and most reliable evidence of their content; a responsible trier of fact would not rely on secondary evidence of their content under these circumstances.</p>
<p>DOI-4, at pp. 6-7, 9 (Sahlberg Testimony)</p>	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions (<i>Summers v. A. L. Gilbert Co.</i> in the guise of expert testimony (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>
<p>DOI-5, at pp. 14, 17, 18 (Sahlberg Power Point)</p>	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>

EXHIBIT	OBJECTION
DOI-7, at p. 4 (Milligan)	<p>A. Lacks foundation and based on facts not in evidence or which are speculative in nature. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. This evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the <i>Kelly/Frye</i> rule.</p> <p>B. Improper and inadmissible expert opinion testimony because it includes legal conclusions in the guise of expert testimony (<i>Summers v. A. L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1183), speculation, and/or irrelevant material.</p>

V. JOINDER IN OTHER PROTESTANTS' WRITTEN OBJECTIONS

In order to reduce repetition of arguments in this complex proceeding, Protestants County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority hereby join in, adopt, and incorporate by this reference the motions to disqualify Petitioners' witnesses, motions to exclude Petitioners' witnesses' testimony, in whole or in part, and objections to Petitioners' witnesses' written testimony and exhibits, submitted by the following Protestants and groups of Protestants:

- Central Delta Water Agency and South Delta Water Agency;
- Sacramento Valley Water Users;
- Save the California Delta Alliance;
- California Sportfishing Protection Alliance (CSPA), California Water Impact Network (C-WIN), and AquaAlliance;
- Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources;
- Friends of the River, Sierra Club California, Environmental Water Caucus, and Planning and Conservation League
- Local Agencies of the North Delta, Bogle Vineyards/Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange/DWLC, Stillwater Orchards, Friends of Stone Lakes National Wildlife Refuge and Islands Inc.;
- San Joaquin Tributaries Authority; and

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

Objections of the County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority to Written Testimony and Exhibits Submitted by Petitioners; Joinder in Written Objections Submitted by Other Protestants

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated July 11, 2016, posted by the State Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on July 12, 2016.

Signature: Tonia Robancho
Name: Tonia Robancho
Title: Legal Assistant for Thomas H. Keeling
Freeman Firm

Party/Affiliation:
County of San Joaquin, San Joaquin County Flood Control
and Water Conservation District, and Mokelumne River
Water and Power Authority

Address:
Freeman Firm, A Professional Law Corporation
1818 Grand Canal Blvd., Suite 4, Stockton, CA 95207

1
2 Restore the Delta.


3 VI. CONCLUSION

4 This Hearing on Petitioners' Petition for Change in the Point of Diversion is premature and
5 should not proceed until the issuance and appropriate vetting of the final EIR/EIS, and until the State
6 Board has completed its review and update of the Bay-Delta Water Quality Control Plan. As presently
7 structured, this proceeding unfairly and unlawfully shifts the burden of proof and persuasion with
8 respect to "no injury" from the Petitioners to the Protestants; unless and until Petitioners carry their
9 heavy burden of proof and persuasion, Protestants should be under no obligation whatsoever to make
10 an affirmative showing of "injury" to legal users of water. For all these reasons, and based upon the
11 procedural objections of other Protestants incorporated herein by reference, this Hearing should not
12 proceed at this time.

13 Moreover, Petitioners' evidence, including the above-referenced written witness testimony and
14 exhibits, lacks foundation, impermissibly relies on facts and assumptions not in evidence, relies on
15 unreliable hearsay and other improper evidence, runs afoul of the *Kelly/Frye* rule, and/or exceeds the
16 permissible scope of witness testimony. For all these reasons, and for the reasons stated by other
17 Protestants whose evidentiary objections are incorporated herein by reference, the Petitioners'
18 evidence referenced herein should be excluded, in whole or in part. Alternatively, to the extent these
19 objections go to the weight of the evidence rather than to admissibility, the San Joaquin County
20 Protestants respectfully submit that such evidence should be disregarded or accorded only nominal
21 weight.

22 Dated: July 12, 2016

FREEMAN FIRM
A PROFESSIONAL LAW CORPORATION

23
24 By: 
THOMAS H. KEELING
25 Attorneys for Protestants County of San
26 Joaquin, San Joaquin County Flood Control
27 and Water Conservation District, and
28 Mokelumne River Water and Power
Authority