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8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
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10 HEARING IN THE MATTER OF
11 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
12 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
13 DIVERSION FOR CALIFORNIA WATER
FIX
14

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' RESPONSE TO
OBJECTIONS SUBMITTED BY
CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,
CALIFORNIA WATER IIMPACT
NETWORK, AND AQUALLIANCE**

15 California Department of Water Resources ("DWR") files this response to
16 objections filed in the hearing in the matter of DWR and U.S. Bureau of Reclamation's
17 ("Reclamation's") Request for a Change in Point of Diversion for California Water Fix.
18 DWR reserves the right to provide additional responses to these objections and to
19 respond to other objections that may be raised later.

20 **I. INTRODUCTION**

21 California Sportfishing Protection Alliance, California Water Impact Network, and
22 AquAlliance (collectively "Protestants") filed Objections to all written testimony and
23 exhibits filed by DWR and Reclamation. Protestants joined in objections filed by
24 other organizations. On July 20, 2016, DWR filed DWR's Master Response to
25 Similar Objections Made by Protestants Collectively ("Master Response") and
26 incorporates its Master Response here. DWR also incorporates its individual
27 responses to each set of objections filed by other organizations to which
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1 Protestants joined and incorporated by reference. (See Protestant's July 11, 2016
2 letter, p. 1) .

3 **II. STATEMENT OF FACTS**

4 DWR refers to the Statement of Facts in its Master Response. (Master Response,
5 at 3-5.)

6 **III. PROTESTANTS' GENERAL PROCEDURAL OBJECTIONS LACK MERIT**

7 DWR refers to the California State Water Resources Control Board's
8 ("Board") procedural orders. DWR incorporates its Master Response
9 regarding the propriety of the timing and sequencing of the hearing on the
10 Request for Change in Point of Diversion for California Water Fix. (*Id.*, at 21-
11 25.) In addition, DWR incorporates its Master Response that makes clear
12 that the hearing process does not unlawfully shift the burden of proof. (*Id.*,
13 at 25-26.)

14 **IV. PROTESTANTS' SPECIFIC ARGUMENTS LACK MERIT**

- 15 A. Protestants object to all testimony filed by DWR and Reclamation in this
16 matter. Such a sweeping blanket objection is as grossly overbroad as it is
17 unfounded. DWR refers to its Master Response. (*Id.*, at 10-11.)
- 18 B. Testimony about reservoir operations and their effect on other users of
19 water, and any opinions, or conclusions derived therefrom, should be
20 admitted. DWR's testimony includes evidence specific to the range of
21 operational and regulatory conditions that could influence SWP and CVP
22 reservoir storage for Shasta, Trinity, Oroville, and Folsom Reservoirs.
23 (DWR-71, at 18-19.) This testimony includes assumptions and results of
24 modeling that analyzes end of September reservoir storage, an analysis
25 relevant to determining injury to legal users or water. (See DWR-66, DWR-
26 71.) DWR's experts reviewed the results of this modeling to provide
27 opinions which is relevant to the Board's determination as to effects of the
28 proposed project, Alternative 4A, on legal users of water. (See DWR-53,

1 DWR-66, DWR-71.) This modeling testimony should be admitted and the
2 weight of the evidence considered by the Board in its decision-making.
3 DWR also refers to its Master Response regarding the efficacy of the model
4 programs and description of the project operations. (Master Response, at
5 14 (Section E) and 18 (Section F.)

6 C. Adequate foundation has been established that the four modeled
7 alternatives presented by DWR and Reclamation bracket the range of
8 operational and regulatory conditions that allow analysis of reservoir
9 operations and possible changes resulting from the change in point of
10 diversion. See above response. (*Id.*)

11 D. The testimony of Armin Munevar, Jennifer Pierre, Maureen Sergent and
12 John Leahigh should be admitted. Specific testimony of Jennifer Pierre and
13 John Leahigh as to collaborative science and adaptive management is also
14 admissible. DWR incorporates its Master Response and its response to
15 objections filed by San Joaquin Tributaries Authority. (See Master
16 Response, at 9-10, Section B, and at 11-13, Section C.)

17 E. Protestants California Sportfishing Protection Alliance et. al additional
18 objection to testimony from John Leahigh regarding Water Rights Order
19 2010-002 (WR 2010-0002) should be overruled. (CSPA comments pages 9
20 and 10).

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22 Unfortunately, the exact evidentiary basis for the objection to the WR 2010-0002
23 testimony is unclear. Protestants do not appear to object to the WR 2010-0002 testimony
24 on the grounds of hearsay, foundation, form, or any other known ground – but rather, on
25 the basis that they disagree with the Department’s compliance with WR 2010-0002,
26 which is not a proper grounds for objecting to evidence. Any such factual objections go
27 to the weight of the testimony that the board will consider, not the admissibility of the
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1 testimony on evidentiary grounds. (See, e.g. *Sinaiko v. Superior Court* (2004) 122
2 Cal.App.4th 1133, 1141 [objections to factual basis of expert witness' testimony goes to
3 weight, not admissibility].)

4 The Board previously entertained objections to documents on the basis "that the
5 documents contain false information that [protestants] should have had the opportunity
6 to rebut." (In *The Matter Of Specified License And Permits Of The State Water Project*
7 *And The Central Valley Project* (2009) SWRCB Ord. No. WR 2009-0033, 2009 WL
8 6648151, at *7). However, this objection does not appear applicable to the present case,
9 because protestants have exercised multiple opportunities to present this specific
10 objection. The closest approximation to an evidentiary grounds for an objection based on
11 disagreement with the assertion would be relevance; therefore, the Department
12 responds on that basis, even though that objection was not framed as a relevance
13 objection.
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15 In proceedings before the Water Board, "relevant evidence shall be admitted if it is the
16 sort of evidence on which responsible persons are accustomed to rely in the conduct of
17 serious affairs." Gov. Code, § 11513 (referenced by Cal. Code Regs., tit. 23, § 648.5.1).
18 Generally, it is Board practice to consider "all relevant evidence" when making its rulings.
19 (In *The Matter Of WR Order 2001-04-DWR Implementing Condition 6 Of Order WR 95-*
20 *10 As Modified By Order WR-98-04 California-American Water Company* (2001);
21 SWRCB Ord. No. WR 2001-13), WL 36253670, at *3).
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23 As fact finder, the Board will determine whether the introduced evidence is relevant to
24 the proceeding. The Department expresses confidence that the Board can interpret its
25 own order and will best determine the relevance of Department compliance with that
26 order to the current Change Petition proceedings. The Department respectfully submits
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1 that the Board's discussion of its modified compliance schedule for the interior Delta
2 water quality objectives in WR 2010-0002 is relevant to the determination as to whether
3 the petition will cause injury to any legal user of water.

4 To the extent that a response to the protestants' allegations would assist in the Board's
5 determination of relevance, the Department stands by John Leahigh's testimony, and
6 reiterates that it has not drafted a new compliance plan for south Delta salinity because,
7 as stated in the testimony, "update of the south Delta objectives and water rights
8 implementation proceeding have not yet occurred." The Department's view is supported
9 by a reading of WR 2010-0002 as a whole, by the Board's continued acceptance of the
10 Department's quarterly compliance reports and the Department's San Joaquin Salinity
11 Management Plan compliance activities, and by the Board's decision not to order a new
12 compliance plan in response to Protestant's identical, previous objections when asked to
13 do so in other forums. (See, e.g., California Sportfishing Protection Alliance complaint to
14 Exec. Director Tom Howard and Deputy Director Barbara Evoy, July 21, 2015, available
15 at [http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/2015/cspa_jennings072215.pdf)
16 [/tucp/2015/cspa_jennings072215.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/2015/cspa_jennings072215.pdf)).

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19 Because of the nature of the objection, and because of the factual basis supporting the
20 Department's interpretation of WR 2010-0002, the Board should overrule the objection
21 regarding John Leahigh's testimony so that it may consider the relevance and weight of
22 the testimony.

23 F. Protestants general objections to testimony and exhibits based upon the use
24 of CalSim II and DSM2 modeling must fail. Protestants urge application of
25 Kelly-Frye standards but acknowledge they are not required. Any challenge
26 they have to the reliability of the modeling can be addressed through cross-
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1 examination and evidence exclusion is not justified. DWR refers to its
2 Master Response Sections B and E.

3 G. Protestants request to exclude the testimony of twelve witnesses should be
4 denied. DWR complied with the Board's procedures and refers to its Master
5 Response and individual Responses to similar objections lodged by other
6 protesting entities. (See Master Response, at 11-13, Section D.)

7 **V. CONCLUSION**

8 Protestants put forth an oxymoron by which they simultaneously challenge
9 evidence as insufficient and seek to exclude it to eradicate any evidence for the
10 Board to consider. They seek to put the cart before the horse to block any path
11 forward. DWR incorporates its Master Response and all other individual
12 responses to objections filed in these proceedings.

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14 Dated July 22, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



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