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10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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12 HEARING IN THE MATTER OF  
CALIFORNIA DEPARTMENT OF WATER  
13 RESOURCES AND UNITED STATES  
BUREAU OF RECLAMATION REQUEST  
14 FOR A CHANGE IN POINT OF  
DIVERSION FOR CALIFORNIA WATER  
15 FIX

**DEPARTMENT OF WATER  
RESOURCES' RESPONSE TO LOCAL  
AGENCIES OF THE NORTH DELTA, ET  
AL.'S OBJECTIONS TO PETITIONERS'  
EVIDENCE**

16  
17 California Department of Water Resources ("DWR") submits this response to the  
18 objections to evidence submitted by Protestants Local Agencies of the North Delta;  
19 Bogle Vineyards/Delta Watershed Landowner Coalition; Diablo Vineyards and Brad  
20 Lange/Delta Watershed Landowner Coalition; Stillwater Orchards/Delta Watershed  
21 Landowner Coalition; Friends of Stone Lakes National Wildlife Refuge and Islands Inc.  
22 (collectively "LAND et al.") in the matter of DWR and U.S. Bureau of Reclamation's  
23 (collectively "Petitioners") Request for a Change in Point of Diversion for California  
24 Water Fix.<sup>1</sup> Where applicable in this response, DWR cites to the Master Response to

25  
26 <sup>1</sup> LAND et al. also joins and incorporates the objections and motions of protestants Central and  
27 South Delta Water Agencies, the Sacramento Valley Water Users, the County of San Joaquin, the Pacific  
28 Coast Federation of Fishermen's Associations, Restore the Delta, Save the California Delta Alliance, and  
the environmental coalition that includes Friends of the River, Sierra Club, Planning and Conservation  
League, and Environmental Water Caucus. (See Objections, p. 1:8-16.) DWR's responses to these  
"incorporated" objections can be found in the concurrently-filed specific responses to the objections filed  
by these individual protestants, which responses are herein incorporated.

1 Similar Objections Made by Protestants Collectively ("Master Response") filed on July  
2 20, 2016, which also provides a common Statement of Facts and Evidentiary Standards  
3 for DWR's separate responses to individual Protestants' objections.

## 4 INTRODUCTION

5 In a string of objections strung together as one conflated argument, Protestants  
6 LAND et al. object to the *entirety* of Petitioners' evidence and testimony in this  
7 proceeding and "object to the Hearing Officers' consideration of it for purposes of this  
8 proceeding." (Objections, p. 4.) For the most part, however, LAND et al.'s broad  
9 objections challenge the overall sufficiency of the evidence submitted in support of the  
10 Petition, seeking to argue the merits of the Petition, or specific evidence, rather than the  
11 admissibility of the evidence in this proceeding. The Board should reject such attempts  
12 to use a forum intended for objections to evidence to instead interject testimony and  
13 argument. Parsed down, LAND et al.'s argument appears to contain the following  
14 "objections": (1) the evidence submitted fails to include the basic information necessary  
15 to support the proposed change, and (2) Petitioners fail to provide credible and  
16 scientifically acceptable evidence on which a reasonable person could rely. For the  
17 reasons herein, LAND et al.'s objections to evidence should be overruled.

## 18 ARGUMENT

### 19 A. LAND et al.'s Objections to Exclude All Evidence Should Be 20 Disregarded as an Improper De Facto Motion for Judgment

21 Through these objections, LAND et al. seeks to exclude *all* of Petitioners' case-in-  
22 chief and object to even "the Hearings Officers' consideration of it for purposes of this  
23 proceeding." As more extensively discussed in the DWR's Master Response, Argument  
24 Section C (pp. 10:11-11:9.), the Board should reject blanket objections to "all testimony"  
25 as the functional equivalent of a motion for judgment, which the Board generally  
26 disallows in evidentiary proceedings. As noted in the Master Response, it is generally  
27

1 the Board's policy to consider all relevant evidence, according evidence its proper  
2 weight, when making its rulings.

3 **B. Protestants' "Objection" that the Petitioners' Evidence Fails to Include**  
4 **Basic Information to Support its Proposed Change is Without Merit**

5 LAND et al. broadly and incorrectly alleges in a few conclusory sentences (pp.  
6 1:18-2:4) that Petitioners failed to include basic information required to support their  
7 proposed change, including the information required by Board regulations at Sections  
8 794(a)(6) and (9) of Title 23 and a "necessary description of the changes being  
9 proposed."<sup>2</sup> Aside from bare accusations, LAND et al. make no attempt to argue how  
10 Petitioners' testimony and extensive supporting exhibits fail to provide sufficient  
11 information. Petitioners' testimony and supporting exhibits not only provide a description  
12 of current operations and the proposed project but also extensive testimony regarding  
13 effects of the proposed changes including on water quantity, water quality, timing of  
14 diversion or use, and consumptive use. (See e.g., SWRCB-1 [Petition], SWRCB-2  
15 [Addendum and Errata to Permit], SWRCB-3 [RDEIR/EIS], DWR-051 [project  
16 description/operational guidelines]; DWR-057 [CWF design and construction impacts],  
17 DWR-053 and DOI-04 [changes to water rights permit], DWR 061 and DOI-07 [current  
18 and anticipated operations of the SWP-CVP], and DWR-066 and 071 [analysis of project  
19 changes in water supply, water quality, and water levels].) More extensive discussion  
20 regarding the adequacy of the testimony concerning the proposed project operations is  
21 provided in Section F of the Master Response, and is incorporated herein.

22 Moreover, this "objection" goes more to the sufficiency of the evidence and  
23 Petitioners' burden of proof, a determination within the purview of the Board. For  
24 example, on page 2, lines 2-4, LAND et al. argue that the Petitioners failed to rebut their  
25 allegation that the Petition should be framed as one for a new water right, merely  
26 disagreeing with the testimony provided in DWR-53 on this topic. Protestants will have

27 <sup>2</sup> In footnote 1, LAND et al. reserve their right to continue to make "fundamental arguments" in this  
28 proceeding that the current Petition is incomplete and is improperly framed as a change in point of  
diversion under Water Code Section 1701.

1 the opportunity to challenge the sufficiency of Petitioners' evidence on cross examination  
2 and in rebuttal. As such, LAND et al.'s broad objection to the "completeness" of the  
3 evidence provided should be overruled and all relevant evidence should be admitted.

4 **C. Protestants' Objections to Petitioners' "Scientific" Evidence Are**  
5 **Without Merit.**

6 The remainder of LAND et al.'s argument raises objections to the "scientific"  
7 evidence, including modeling results, submitted by Petitioners. (Objections, p. 2:5-4:9.)  
8 LAND et al. cites an incorrect evidentiary standard for the admissibility of such evidence,  
9 the "Kelly-Frye standard," and then, under this incorrect standard, characterize the  
10 modeling analyses as "unreliable" and "not generally accepted in the scientific  
11 community." DWR's Master Response, Section E (pp. 14-18) addresses this common  
12 objection to the modeling analyses, and is incorporated herein. As stated in the Master  
13 Response, the Kelly-Frye standard does not apply to administrative proceedings before  
14 the Board.<sup>3</sup> Further, the Master Response provides extensive discussion regarding the  
15 wide acceptance and credibility of the modeling utilized by Petitioners. For these  
16 reasons, LAND et al.'s objections to the reliability and "acceptance" of such modeling  
17 analyses and, by extension, the testimony that relies on such analyses is without merit.

18 Finally, interspersed within its argument challenging the reliability of Petitioners  
19 modeling evidence, LAND et al. provides assertions that do not object to the admissibility  
20 of evidence but rather prematurely challenge the weight that particular evidence should  
21 be afforded or attempt to provide contrary evidence. (See e.g., Objections, pp. 3:4-4:4.)  
22 For example, LAND et al. allege that the boundaries used in the analyses do not reflect  
23 proposed operations or compliance with existing regulatory requirements and that water  
24 quality discussed in terms of monthly averages does not reflect real time water quality  
25 injuries to legal water users. As addressed in Section B of DWR's Master Response,

26 <sup>3</sup> See also the Board's March 18, 2016 Ruling on Motions filed in the enforcement proceedings  
27 against Byron-Bethany Irrigation District and the West Side Irrigation District in which the Board explained  
28 the reasons why the Kelly-Frye standard does not fully translate to the administrative context, including  
proceedings before the Board.

1 these "factual objections" are improper and should be disregarded as they are  
2 conclusory, lack foundation and are generally irrelevant. The presentation of  
3 contradictory evidence or challenges to the sufficiency of evidence is the function of  
4 cross examination and rebuttal testimony in which Protestants are afforded the  
5 opportunity to challenge the weight of evidence provided. It is within the expertise and  
6 purview of the Board to then review the "scientific" evidence submitted to determine  
7 whether such testimony is the sort of information on which a reasonable person would  
8 rely and the proper weight to afford such evidence. (Government Code § 11513.)  
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### 10 CONCLUSION

11 For the foregoing reasons, Protestants LAND et al.'s objections should be  
12 overruled.  
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15 Dated: July 22, 2016

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES



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