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10 Diablo Vineyards and Brad Lange / Delta Watershed Landowner Coalition
11 Stillwater Orchards / Delta Watershed Landowner Coalition

12 **BEFORE THE**
13 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

14 HEARING IN THE MATTER OF
15 CALIFORNIA DEPARTMENT OF WATER
16 RESOURCES AND UNITED STATES
17 BUREAU OF RECLAMATION'S
18 REQUEST FOR A CHANGE IN POINT OF
19 DIVERSION FOR CALIFORNIA WATER FIX

20 **LAND ET AL.'S OPPOSITION TO DWR'S**
21 **OBJECTIONS TO REBUTTAL TESTIMONY**
22 **AND EXHIBITS SUBMITTED BY LAND ET**
23 **AL. (GROUP 19)**

1 **INTRODUCTION**

2 Local Agencies of the North Delta, Delta Watershed Landowner Coalition, Bogle
3 Vineyards, Diablo Vineyards, and Stillwater Orchards (collectively "LAND et al.") hereby
4 respond to the Department of Water Resources' ("DWR's") Objections to the Rebuttal
5 Testimony and Exhibits LAND-75, LAND-76, LAND-77, and LAND-79 ("DWR Objection"). As
6 explained below, the exhibits are proper rebuttal evidence and DWR's motion lacks merit.

7 **STATEMENT OF FACTS**

8 LAND-79 is an updated version of the research report Dr. Leinfelder Miles is preparing
9 regarding soil salinity in the South Delta. The study was cited in LAND-78. A previous draft of
10 the report was submitted by CDWA et al. (CDWA-140.)

11 LAND-75, LAND-76 AND LAND -77 are the Protests of Bogle Vineyards, Diablo
12 Vineyards, and Stillwater Orchards. They contain a summary of the concerns of these water
13 users with the proposed California WaterFix ("Delta Tunnels") project. These exhibits were
14 offered as evidence as Part of the Rebuttal Case of LAND et al. on May 19, 2017.

15 **LEGAL STANDARD**

16 This administrative hearing is governed by Title 23 of the California Code of
17 Regulations, sections 648-648.8, 649.6, and 760; Chapter 4.5 of the Administrative Procedure
18 Act (commencing with 11400 of the Government Code); sections 801 to 805 of the Evidence
19 Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648, subd.
20 (b).)

21 Any relevant evidence is admissible if it is the sort of evidence on which responsible
22 persons are accustomed to rely on in the conduct of serious affairs. (Govt. Code, § 11513,
23 subd. (c).) The hearing officers have discretion to exclude evidence if its probative value is
24 substantially outweighed by the probability that its admission will necessitate undue
25 consumption of time. (Govt. Code, § 11513 subd. (f).) In addition, "[r]ebuttal evidence is
26 limited to evidence that is responsive to evidence presented in connection with another party's
27 case-in-chief, and it does not include evidence that should have been presented during the
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1 case-in-chief of the party submitting rebuttal evidence.” (October 30, 2015 Hearing Notice, p.
2 36.)

3 ARGUMENT

4 **I. LAND-79 Supports the Rebuttal Testimony of Dr. Michelle Leinfelder-Miles and** 5 **Does Not Duplicate Prior Admitted Evidence**

6 LAND-79 is an updated version of the research report Dr. Leinfelder Miles is preparing
7 regarding her study of soil salinity in the South Delta, which was cited in LAND-78. DWR did
8 not object to any substantive content in the Dr. Leinfelder-Miles testimony (LAND-78) as being
9 outside the scope of rebuttal. An earlier version of this report has been admitted as SDWA-
10 140. DWR has moved to admit only pages 2 to 4 of LAND-79, or, in the alternative, to strike it
11 in its entirety. (DWR Obj., p. 3:15-17.)

12 After highlighting editorial and other changes to the report (DWR Obj., pp. 4-5), DWR
13 argues that LAND-79 is duplicative of prior admitted evidence (DWR Obj., pp. 3:17-27, 5:18-
14 28). The parties agree that LAND-79 is not identical to prior admitted evidence; it is an
15 updated version of a previously submitted study. (DWR Obj., p. 3:19-27.) Thus, it is not
16 duplicative. Instead, LAND-79 represents Ms. Leinfelder-Miles current draft report and expert
17 opinions.

18 DWR also complains that if LAND-79 is not stricken, “such revisions will require sur-
19 rebuttal from Petitioners on newly raised issues, assumptions and conclusions regarding the
20 effect of water salinity on soil salinity and eventually crop yields.” (DWR Obj., p. 5:12-14.)
21 LAND et al. invite DWR to respond as needed in sur-rebuttal to the updated scientific
22 information presented in the report and Dr. Leinfelder-Miles’ Testimony.

23 DWR and other parties have submitted hundreds of references in support of their
24 various arguments. Exhibits do not necessarily even require sponsoring testimony to be
25 admitted; instead, the Officers “have flexibility to admit evidence and make determinations as
26 to [] credibility.” (February 21, 2017 Evidentiary Ruling, p. 16.) With respect to LAND-79,
27 DWR was afforded the opportunity to cross-examine Ms. Leinfelder-Miles regarding both her
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1 testimony (LAND-78) and the updated study (LAND-79).¹ Moreover, Dr. Leinfelder-Miles has
2 explained the reason for the new version of the report and how it relates to SDWA-140. The
3 purpose was to “update the report with the aim of eventual peer review and publication.” (May
4 19, 2017 Rough Transcript, pp. 57:9-58:13.)

5 Under the Evidence Code, the opinion testimony of an expert may be based on matter
6 personally perceived by or known to the expert or any matter “made known” to the expert,
7 provided such matter is “of a type that reasonably may be relied upon by an expert in forming
8 an opinion upon the subject to which his testimony relates.” (Evid. Code, § 801, subd. (b);
9 *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) DWR concedes that LAND-79 is a
10 legitimate reference with respect to at least portions of the LAND-78 testimony. (See DWR
11 Obj., p. 4:3-5.)

12 LAND-79 supports Dr. Leinfelder-Miles’ rebuttal testimony (LAND-78), and LAND-78
13 was not challenged as outside the scope of rebuttal. Admission of LAND-79 provides updated
14 scientific information for the Hearing Officers’ and hearing parties’ consideration and should
15 be admitted.

16 **II. LAND-75, LAND-76, and LAND-77 Support LAND-78 and Are Admissible**
17 **Evidence.**

18 DWR casts aspersions on LAND’s intent in submitting the protests of Bogle Vineyards
19 (LAND-75), Diablo Vineyards (LAND-76), and Stillwater Orchards (LAND-77), arguing the
20 intent is to substantiate water rights and correct an error in LAND’s case-in-chief. (DWR Obj.,
21 pp. 6:10-12, 6:24-7:2.) DWR is incorrect.

22 Under Water Code section 1330, any person may file a protest. It is not necessary
23 document a particular water right to maintain a protest to a water rights change petition. Thus,
24 the water right described in the protests are not necessary to maintenance of a petition in this
25 proceeding. In any case, the LAND protest (LAND-62), has already been accepted into
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27 _____
28 ¹ Petitioners also had the opportunity to cross examine Dr. Leinfelder-Miles during her
participation in the Islands, Inc. et al. Salinity Injury Focus Panel earlier in Part 1A of the
hearing.

1 evidence. The fact that LAND-51 through LAND-55, pertaining to certain water rights on file
2 with the SWRCB, were not previously accepted into evidence *by reference* pursuant to 23
3 CCR section 648.3 is irrelevant to DWR’s current objection to different exhibits LAND-75,
4 LAND-76 and LAND-77. (DWR Obj., p. 6:7-11.)

5 The three protests are legitimate cites within Dr. Michelle Leinfelder-Miles’ Rebuttal
6 testimony (LAND-78).² Dr. Leinfelder-Miles explains that as part of the procedure she would
7 use to evaluate “how water salinity may impact soil salinity and crop yield” she would consider
8 “land owners’ understanding for water quality and how it can vary across different points of
9 diversion on the same farm.” (LAND-78, p. 2:3-9.) The protests describe the concerns that
10 water users have about the proposed Delta Tunnels. LAND-76 is particularly relevant to Dr.
11 Leinfelder-Miles’ testimony because the Diablo Vineyards diversion is located on Ryer Island,
12 where Dr. Leinfelder-Miles performed the study described in II-13 and II-14.

13 Like the hundreds of other exhibits submitted by the parties, LAND-75, LAND-76 and
14 LAND-77 support rebuttal testimony. These protests explain the concerns of water users and
15 water rights holders, and contain information about their water uses and rights. There were
16 not required to be submitted in Part 1A, and may be appropriately be admitted into evidence
17 now.

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28 ² These same exhibits are also relied upon by Marc Del Piero in SJC-76R. (See SJC-76R, p. 17.)

1 **CONCLUSION**

2 The updated report in LAND-79 is relevant, supports the rebuttal testimony contained in
3 LAND-78 and should be admitted. LAND-75, LAND-76, and LAND-77 are likewise admissible
4 because they support the opinions offered in LAND-78. All of these exhibits are proper rebuttal
5 evidence and the Hearing Officers may assign the appropriate weight to the information they
6 contain.

7 Dated: May 23, 2017

SOLURI MESERVE,
A LAW CORPORATION

8
9 By:  _____

10 Osha R. Meserve
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12 Local Agencies of the North Delta
13 Bogle Vineyards/DWLC
14 Diablo Vineyards and Brad Lange/DWLC
15 Stillwater Orchards/DWLC
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1 **STATEMENT OF SERVICE**

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

4 I hereby certify that I have on May 23, 2017, submitted to the State Water Resources
5 Control Board and caused a true and correct copy of the following document:

6 **LAND ET AL.'S OPPOSITION TO DWR'S OBJECTIONS TO**
7 **REBUTTAL TESTIMONY AND EXHIBITS SUBMITTED BY LAND ET AL. (GROUP 19)**

8 to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service
9 List for the California WaterFix Petition Hearing, dated March 30, 2017, posted by the State
10 Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml.

11
12 I certify that the foregoing is true and correct and that this document was executed on May 23,
13 2017.

14 Signature:  _____

15 Name: Mae Ryan Empleo

16 Title: Legal Assistant for Osha R. Meserve
Soluri Meserve, A Law Corporation

17 Party/Affiliation:

18 Local Agencies of the North Delta

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