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22 **BEFORE THE**
23 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

24 HEARING IN THE MATTER OF
25 CALIFORNIA DEPARTMENT OF WATER
26 RESOURCES AND UNITED STATES
27 BUREAU OF RECLAMATION'S
28 REQUEST FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER FIX

**OPENING STATEMENT OF
OSHA R. MESERVE**

**Case in Chief of: Local Agencies of the
North Delta, Bogle Vineyards/DWLC,
Diablo Vineyards/DWLC, Stillwater
Orchards/DWLC, Islands Inc., San Joaquin
County, San Joaquin County Flood
Control and Water Conservation District,
and Mokelumne River Water and Power
Authority, and Islands, Inc.**

**PHYSICAL INJURIES TO WATER USES
FOCUS**

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1 **I. Introduction**

2 Protestants Local Agencies of the North Delta (“LAND”), Bogle Vineyards/DWLC, Diablo
3 Vineyards/DWLC, Stillwater Orchards/DWLC (“LAND et al.”) have joined with Protestants
4 Islands Inc., San Joaquin County, San Joaquin County Flood Control and Water Conservation
5 District, Mokelumne River Water and Power Authority, Islands, Inc. and Daniel Wilson in
6 presenting testimony focused on the Physical Injuries to Water Uses, including injury to
7 surface water and groundwater uses that would occur should the Petition be granted. LAND et
8 al. protestants are also presenting a Joint Case in Chief with Islands, Inc. focused on Salinity
9 Injury generally, and impacts to Ryer Island water uses.¹ Last, LAND has joined with
10 protestants San Joaquin County, San Joaquin County Flood Control and Water Conservation
11 District, Mokelumne River Water and Power Authority, Central Delta Water Agency and South
12 Delta Water Agency, to present a panel focused on water user injury associated with Harmful
13 Algal Blooms, among other impacts to San Joaquin County protestants.² Those submittals are
14 fully incorporated into the LAND, Bogle, Vineyards/DWLC, Diablo Vineyards/DWLC, Stillwater
15 Orchards/DWLC direct Case-in-Chief.

16 As shown in the Notice of Intent to Appear Part 1 Witness Amendment Sheet filed
17 herewith, this coordination of protests is part of an effort to streamline the presentation of
18 testimony and evidence of protestants alleging similar injuries. The overall amount of time
19 requested is about half of what the participating protestants have requested. Moreover, such
20 groupings allow the information to be presented in a more focused and efficient manner.

21 **II. Summary of Testimony to be Provided by Jointly Presented Physical Injuries**

22 **Focus Panel**

23 Entities represented in the combined Physical Injuries to Water Uses presentation
24 include those actively engaged in agricultural operations in the Sacramento-San Joaquin Delta
25 whose water uses would be directly harmed by grant of the Petition, agencies and coalitions
26

27 ¹ See materials uploaded by Islands, Inc. for this jointly presented testimony and
28 evidence.

² See materials uploaded by San Joaquin County et al. for this jointly presented testimony
and evidence.

1 who have a great concern for agriculture and for preserving agriculture in the Delta, or are
2 local government agencies representing these same constituencies. This presentation will
3 describe injuries that are direct injuries to water users. The panel presentation regarding
4 Physical Injuries to Water Uses will include the following information pertaining to injury to
5 water users that would occur should the Petition be granted.

6 **Warren Bogle – Policy Statement**

7 **Daniel Wilson – Impacts on Rivermaid Farms**

8 Mr. Wilson provides the perspective of a farming manager with an historic orchard that
9 would be completely destroyed by proposed Intake #2. Though Protestants list relocation of
10 diversions and turnouts from the CWF sedimentation basins, it is difficult to see how these
11 measures prevent injury when the entire orchard would be destroyed by CWF Intake #2.

12 **Richard Elliot – Impacts on Stillwater Orchards**

13 Mr. Elliot provides the perspective of an operations manager faced with both direct and
14 indirect impacts from operation and construction of the proposed North Delta diversion points.
15 Mr. Elliot describes the impacts of 10+ years of construction on farming operations under the
16 footprint of the massive proposed changes. He describes the fate of the Rose Orchard,
17 including its water diversion on the Sacramento River under the footprint of Intake #2, should
18 the Petition be granted. He also discusses his groundwater well, which is in the vicinity of the
19 Tunnels. For the reasons described in the testimony of engineer Josef Tootle (LAND-35), this
20 groundwater may well become unusable should the Tunnels be built.

21 **Russel Van Loben Sels – Impacts on Amistad Ranches**

22 A farmer and chair of the Delta County Caucus, Mr. Van Loben Sels describes the
23 damage to one of his family's diversions that would occur from construction of Intake #2. He
24 also describes the water delivery and drainage systems in use by individual farmers and
25 reclamation districts, and how those systems cannot easily be modified, as assumed by
26 Petitioners in their attempts to "avoid" injury to "temporarily" impacted diversions.

1 **Josef Tootle – Civil and Geotechnical Engineering Perspective**

2 Mr. Tootle, a civil and geotechnical engineer with 20 years' experience, will address
3 injuries to water users from: (1) the Tunnels and slurry cutoff walls, (2) muck placement; and
4 (3) loss of ground during tunneling activities.³ These project components would interfere with
5 both surface water and groundwater uses in the vicinity of the project, both during and after
6 construction. Mr. Tootle's testimony is supported by Dr. Robert Pyke, who has extensive
7 experience in and outside of the Delta on addressing special problems in geotechnical,
8 earthquake and water resource engineering.

9 **III. Deficiencies in Petition**

10 The following discussion summarizes some of the deficiencies in the Petition, as well as
11 other pertinent consideration for the Hearing Officers in this process. Additional briefing on
12 these and other issues will be provided in the form of rebuttal, and other appropriate junctures.

13 **A. The Proposed Change is Inadequately Described**

14 From the outset of the filing of this Petition, LAND and other protestants have pointed
15 out significant holes in the Petition.⁴ Now, over one year later and after presentation of most of
16 the Case in Chief, glaring deficiencies remain. The information presented in both Petitioners'
17 direct testimony (e.g., DWR-2 Errata, DWR-3 and DWR-5 Errata), as well as supporting
18 exhibits (e.g., DWR-324), are woefully inadequate in describing the proposed change in water
19 rights. Generally, the Petition and its supporting evidence continue to try to hide the real world
20 impacts—and injuries—that would result if the Petition were granted.

21 The Hearing Officers identified that essential information was still missing as of their
22 February 11, 2016 Order, stating:

23 At a minimum, however, petitioners should provide the information required by
24 section 794, subdivision (a) of our regulations.

25 We also agree with some of the parties that, absent a more complete and
26 succinct submittal of information by petitioners, project opponents will not be able

27 ³ Please see Opening Statement of protestants San Joaquin County et al., pp. 11-14
regarding the testimony to be presented on this panel.

28 ⁴ See LAND Protest, Exhibit A, available at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfi/x/noi_protests/docs/land_protest.pdf.

1 to fully-develop their cases in chief, and much substantive content will be
2 deferred to the rebuttal stage of the hearing.

3 (SWRCB Hearing Officer Ruling, February 11, 2016, p. 6.) The information provided in the
4 Case in Chief (e.g., DWR-324) still does not meet this basic requirement. Just as one
5 example, the “changes in property ownership” are still not provided. (Cal. Code Regs., tit. 23,
6 § 794, subd. (a)(7).) Though the change relies on taking by force hundreds of parcels of
7 private property and water rights, detailed plans have been developed for those actions (see,
8 e.g., LAND-69 [Property Acquisition Management Plan]); the Petitioners never acknowledge
9 this plain fact in their materials. Instead, they refer only to the permanent or temporary
10 interference with a total of 15 diversions. (DWR-432, DWR-57, DWR-2 Errata.) In their
11 September 11, 2015 addendum to the Petition, Petitioners simply state that “acquisition . . . will
12 take place prior to construction,” still not mentioning that both water rights and land will be
13 taken by force as necessary. The Petitioners must, and still have not, brought forth this basic
14 information.

15 The project information that is included in the Petition is also misleading. Although the
16 Petition references the ability to take water during high flows, the project is actually being
17 designed to divert during low flows. The 2015 Conceptual Engineering Report states that,
18 “The MPTO/CCO must be able to deliver up to 9,000 cfs at the low water level in the
19 Sacramento River.” (DWR-212, p. 1-1.) If the proposed diversions were not going to take
20 water during low flows, then they would not be designed to operate at low flows. (See also
21 DWR-515.).

22 The Petition also does not identify water transfers as necessary to the requested
23 change, yet the 2015 RDEIR/S description of Alternative 4A operations description states that
24 spring outflow for Longfin Smelt would be provided by water purchases for willing sellers.
25 (SWRCB-3, RDEIR/S, p. 4.1-6.) The Alternative 4 BDCP analysis describes ultimately
26 ramping up to 1.3 million acre-feet of water transfers. (SWRCB-3, RDEIR/S, App. D, pp.
27 D.3.83 to 85.) Injuries to legal water users from these transfers would occur *in addition to* the
28 injuries from conveyance of CVP/SWP water through the new proposed North Delta
diversions. These injuries include both upstream impacts to groundwater rights and resources,

1 as well as additional water quality and other impacts to water users downstream of the
2 proposed new North Delta diversions. (See, e.g., LAND-71, pp. 6-8 and Exhibit C.) On cross-
3 examination, conflicting answers were provided as to the extent to which transfers will be relied
4 upon to meet bypass flows, but such transfers were clearly part of the project described in the
5 RDEIR/S. (SWRCB-3, RDEIR/S, App. D, pp. D.3.83 to 85.) A clear description of the extent to
6 which the activities requested for approval in the Petition: (1) rely on transfers to operate; and
7 (2) facilitate new transfers through the proposed North Delta diversion points must be provided
8 to assess injuries from the proposed action.

9 The SWRCB Hearing Officers have been clear that Petitioners should propose terms
10 and conditions to attempt to avoid injury to legal users of water. Yet Petitioners provided no
11 such information in their Case in Chief, and confirmed during cross-examination that no
12 conditions of approval are being proposed. The lack of proposed conditions appears to stem
13 both from a refusal of Petitioners to attempt to acknowledge the scope of the injuries that grant
14 of the Petition would cause, as well as a desire to improperly place the burden on protestants
15 to undertake an analysis of injury since Petitioners refuse to do so.

16 **B. Though Characterized as a Change, the Petition Requests a New Water**
17 **Right**

18 Petitioners' attempts to characterize this Petition as a "minor change" should be
19 rejected. There is nothing minor about the proposed foundational changes to the SWP/CVP
20 water infrastructure system. Upon cross-examination Petitioners' testimony admitted that the
21 proposed change would require more Sacramento River water than is diverted under current
22 operations of the SWP/CVP. This is a new water source. For these and other reasons, this
23 petition should be for a new water right, not a change. Such a process would include a water
24 availability analysis, which is necessary given the oversubscribed, and stressed, condition of
25 the Sacramento-San Joaquin Delta.
26
27
28

1 **C. Petitioners Failed to Include a Time Extension Request to Construct the**
2 **Sacramento River Diversion Initially Authorized by D-1275**

3 Though having a North Delta diversion on the Lower Sacramento River—near Hood
4 and where Intake #3 is proposed—was authorized in 1967 by D-1275, the diversion was not
5 constructed prior to the expiration of the time to complete construction and beneficial use
6 under the relevant permits. These deadlines passed in 2000 and 2009. Diversion from the
7 Lower Sacramento River near the intake #3 location could only be authorized if additional time
8 to construct the diversion facilities was granted by the Board. However, a revised request for
9 time extension was not included with the Petition. As no request for time extension has been
10 filed, a decision granting the requested change Petition would be improper.

11 **D. The Proposed Change Contradicts the 2009 Delta Reform Act**

12 Under the 2009, Delta Reform Act,

13 “Coequal goals” means the two goals of providing a more reliable water supply
14 for California and protecting, restoring, and enhancing the Delta ecosystem. The
15 coequal goals shall be achieved in a manner that protects and enhances the
unique cultural, recreational, natural resource, and agricultural values of the
Delta as an evolving place.

16 (Wat. Code, § 85054.) Most obviously, the reconfigured “California WaterFix” jettisoned
17 completely the concept of restoration and instead proposes to only undertake mitigation and
18 avoidance for its actions. While Petitioners characterized the actions as involving “physical
19 and operational changes to restore and protect: ecosystem health” and “ecosystem restoration
20 and protection” (DWR-1 Errata (corrected)), the proposed actions include no such measures.

21 In addition, Water Code section 85021 provides that it is state policy to reduce reliance
22 on the Delta in order to achieve the first of the co-equal goals: water supply reliability.
23 Petitioners’ Case in Chief includes no information regarding this legal requirement. The 2015
24 RDEIR/S included an appendix on this topic (SWRCB-3, Alt. 4A, App. G), but the information
25 in the appendix is inconsistent with the plain wording of Water Code section 85021. In fact, the
26 proposed new points of diversion would do nothing to reduce reliance on the Delta, and would
27 instead solidify continued (and potentially increased) reliance on the Delta in the future. In its
28 ruling determining that the 2013 Delta Plan was inadequate, the Sacramento Superior Court

1 found that the “Delta Plan fails to ‘include quantified or otherwise measurable targets
2 associated with achieving’ reduced Delta reliance as required by the Delta Reform Act.”
3 (LAND-73, p. 12.)

4 The Delta Reform Act also requires the Delta Plan to ”promote options for new and
5 improved infrastructure relating to the water conveyance in the Delta, storage systems, and for
6 the operation of both to achieve the coequal goals.” (Wat. Code, § 85320.) The trial court also
7 found that the Delta Plan failed to include conveyance policies, which if they existed would
8 help guide a project such as the Tunnels toward consistency with Delta Reform Act
9 requirements. (See LAND-73, pp. 37-38, 72.) As they do not include reduced reliance on the
10 Delta, the Tunnels run afoul of the plain meaning of key Delta Reform Act requirements.

11 **IV. What Constitutes Injury to Legal Users of Water**

12 **A. Surface Water Uses**

13 Injury from a change in place of use of appropriated water generally occurs when use at
14 the new location results in the appropriator using a greater amount of water than he or she was
15 entitled, or when use at the new location reduces return flows to the watercourse, thus
16 reducing the amount of water available for diversion by downstream users. (See *Barnes v.*
17 *Hussa* (2006) 136 Cal.App.4th 1358, 1365.) “It is ... settled law that the person entitled to the
18 use of water may change the place of diversion, or the place where it is used, or the use to
19 which it was first applied, if others are not injured by such change.” (*Ramelli v. Irish* (1892) 96
20 Cal. 214, 217.) For changes to appropriative rights, as are at issue here, Water Code sections
21 1701 and 1702, the burden of proof is on the party seeking permission from the SWRCB to
22 change the water right (permit or license). (See Evidence Code, § 500 [“a party has the
23 burden of proof as to each fact the existence or nonexistence of which is essential to the claim
24 for relief or defense that he is asserting”].)

25 **B. Groundwater Uses**

26 California law treats the right to extract groundwater, called “overlying right,” the same
27 as a riparian right to appropriate surface water. (*California Water Service Co. v. Edward*
28 *Sidebotham & Son* (1964) 224 Cal.App.2d 715, 725. Both riparian and overlying water rights

1 are usufructuary, and confer the legal right to use the water that is superior to all other users.
2 (*People v. Shirokow* (1980) 26 Cal.3d 301, 307; *City of Barstow v. Mojave Water Agency* (200
3 23 Cal.4th 1224, 1237.) In *Allen v. California Water & Tel. Co.* (1946) 29 Cal.2d 466, 472, the
4 California Supreme Court recognized a right of action where extraction of groundwater would
5 materially increase the risk of salt water intrusion. In *City of Santa Maria v. Adam* (2016) 248
6 Cal. App. 4th 504, 513, the appellate court confirmed that injury to an overlying right to
7 groundwater gave rise to a quiet title action. Thus, injury to groundwater uses would also
8 constitute an injury under Water Code section 1702.

9 **V. The Proposed Changes will Lead to Injury**

10 The proposed facilities would also disrupt water delivery and water removal operations
11 on the Delta islands. The Petition is insufficiently detailed to provide an understanding of how
12 the project will interfere with ongoing agricultural operations and other rural watersystems.
13 The existing ditches, pumps and other interior drainage facilities are vital to the maintenance of
14 low-lying Delta lands. The Tunnels construction will interfere with operation of these facilities
15 for instance, by destroying and disrupting surface water supply delivery and drainage systems,
16 and discharging massive volumes of water from dewatering activities.

17 Changing groundwater elevations, either by lowering the water table with pumping for
18 construction dewatering, or cutting off the seepage through cutoff walls at the intakes, or at
19 shafts, as now proposed, will have both direct and indirect impacts on Delta homes, farms and
20 special districts. As described in the testimony presented in the LAND et al. Physical Injury
21 Focus Panel, the construction and operation of the North Delta diversions would block
22 subsurface flows necessary to groundwater wells. (See, e.g., LAND-35.) The RDEIR/S
23 admits that during construction the project would “deplete groundwater supplies or interfere
24 with groundwater recharge, alter local groundwater levels, or reduce the production capacity of
25 preexisting nearby wells” to a significant and unavoidable level. (SWRCB-3, p. ES-42.) The
26 RDEIR/S also admits that during operations of new facilities the project would “interfere with
27 agricultural drainage in the Delta” so as to lead to a significant and unavoidable impact under
28

1 Impact GW-5. (SWRCB-3, p. ES-43.) This is prima facie evidence of an injury to
2 groundwater use.

3 With respect to water quality, Petitioners' Case in Chief relies on the premise that *if*
4 standards in the 2006 Water Quality Control Plan ("Basin Plan") and D-1641 are met, no injury
5 will occur. (See, e.g., DWR-3, DWR-4 Errata.) Injury may occur, however, in the absence of
6 violations of water quality objectives in cases where the degradation impairs a senior water
7 use. (See, e.g., LAND-67 and LAND-68.) The Basin Plan does not purport to define water
8 rights, which are a property interest; likewise, the Basin Plan "is not to be construed as
9 establishing the quantities of water that any particular water right holder or group of water right
10 holders may be required to release or forego to meet the objectives of this plan." (SWRCB-27,
11 p. 3.) In any case, Petitioners have attempted to game the numbers to create a nonexistent
12 record of past compliance in order to advance the theory that there will be better compliance in
13 the future. (See, e.g., DWR-4 Errata, slides 17-29.) Just as one example, the figures
14 presented by Petitioners counted the standard as being met even when a Temporary Urgency
15 Change Petition had been granted to loosen the typically applicable standard. Such
16 shenanigans do nothing to assuage the concerns of water users relying on instantaneously
17 (not 14-day averaged) high quality water for use on crops, as well as for drinking water.

18 Additional detailed information regarding water quality injuries is provided in the context
19 of the Salinity/Ryer Island focus panel LAND et al. is jointly presenting. This information,
20 among other evidence, connects the permanent drought conditions the North Delta diversions
21 would cause in the Delta and injury to beneficial uses of water. (II-24, pp. 4-6.) While the
22 RDEIR/S concludes that salinity increases would cause less than significant impacts, those
23 conclusions rely on largely unenforceable mitigation measures that are simply a menu of
24 options of items that may or may not be implemented. (See, e.g., SWRCB-3, LAND 2015
25 RDEIR/S, Comment 2622, pp. 8, 23-24.)

26 The RDEIR/S does, however, admit under Impact WQ-32 that Effects on Microcystis
27 Bloom Formation Resulting from Facilities Operations and Maintenance would be significant
28 and unavoidable. (SWRB-3, ES-45.) Additional information connecting the drought conditions

1 imposed by the proposed North Delta diversion points to increases in Harmful Algal Blooms if
2 the Petition is granted, is included in the joint presentation with San Joaquin County and other
3 protestants. (See, e.g., SJC-4, SJC-68.)

4 The RDEIR/S also admits the project would result in significant and unavoidable effects
5 on agriculture as a result of constructing and operating the proposed water conveyance facility
6 under Impact AG-2. (SWRCB-3, p. ES-83.) This conclusion in the RDEIR/S is consistent with
7 the investigations undertaken by protestants with regard to direct physical injuries to
8 agricultural water uses.

9 While Petitioners frame their request as “limited to the addition of three new points of
10 diversion” (DWR Opening Statement, p. 9), in fact, major changes in hydrology of the Delta
11 would result from grant of the Petition, worsening water quality for legal users. For many Delta
12 diverters, operation of the new points of diversion would create permanent drought like
13 conditions in every year, leaving just minimal bypass flows (DWR-515) in the Sacramento
14 River.

15 **VI. Petitioners Have Failed to Meet Their Burden Under Water Code Section 1702**

16 In its Case in Chief, Petitioners present only selected results of the modeling
17 undertaken to provide a comparative analysis of various scenarios. (See, e.g., DWR-3, slides
18 53-82.) Though muddied by various statements during cross-examination, it appears that the
19 modeling prepared by the Protestants in support of the Petition and/or other entitlements they
20 seek, is not part of the hearing record. To the extent there has been late provision of modeling
21 information outside the submission of exhibits for the hearing on May 31, 2016 deadline for
22 Petitioners’ Case in Chief, that failure of process had precluded full examination of the
23 evidence. Protestants have a right to fully examine and rebut evidence, which has been
24 denied in this instance. (See *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158
25 [“nothing can be considered as evidence that was not introduced at a hearing of which the
26 parties had notice or at which they were present”].)

27 Other protestants have important information regarding the deficiencies of the modeling
28 with respect to injuries caused by the proposed change. Serious deficiencies have also been

1 identified by protestants regarding the ability of modeling to provide adequate evidence upon
2 which to base a no injury finding. The Case in Chief itself notes that “models should only be
3 used to estimate trends in a comparative framework.” (DWR-71, p. 13.) In the testimony and
4 during cross-examination, it has been claimed that since the assumption for inputs such as sea
5 level rise and in-Basin water supply demands are the same in all of the scenarios that were
6 modeled, these variables do not affect results. (See, e.g., DWR-71, p. 14.) This assertion,
7 however, does not account for the possibility that the inputs are erroneous. For instance, if the
8 future water supply demands (land use) are wrong assumptions, then each of the modeled
9 results for the various outputs would also be wrong. Comparing five incorrect scenario outputs
10 that all underestimate in-Basin water supply demands would then be useless, as all of the
11 outputs would assume more water entering the Delta than they should.

12 In addition, the use of averages to describe the salinity at the locations provided by the
13 Petitioners is not reliable in demonstrating no injury. Since the tides change daily, there is a
14 range of salinity values expressed over a day. A mean is the average of that range and does
15 not, and is not intended to, describe the ecological or agriculturally important salt
16 concentration. For agriculture, the highest concentration (not the average) of the water
17 diverted for crop use and salinity control can significantly impair productivity and lead to salt
18 buildup. Average salinity can influence the total load of the salt and affect leaching, but it is the
19 absolute instantaneous concentration during irrigation that is critical, not averages. (II-24, p.
20 3.)

21 Petitioners also refused to provide important underlying data beyond what was
22 presented in their Case in Chief in an accessible format. Witnesses on Petitioners’ Modeling
23 Panel testified as to examining outputs that related to the determination of injury at certain
24 nodes in the model, such as EC near the south end of Ryer Island and water levels across
25 from proposed Intake #3. In order to form those opinions, the witnesses would have had to run
26 the models for those scenarios and nodes. Late in the Case in Chief presentation, Petitioner
27 DWR offered to provide assistance to protestants to view outputs of the modeling, yet when
28 requested to provide even just two outputs, DWR refused. (LAND-72.) Thus, the summaries of

1 certain limited modeling outputs selected by Petitioners should be excluded because a
2 responsible person would not rely on such information in the conduct of serious affairs. (See,
3 e.g., DWR-3, slides 53-82, DWR-66; Gov. Code, § 11513.)

4 In short, Petitioners have failed to meet their burden to demonstrate there will be no
5 injury from grant of the Petition.

6 **VII. Inadequate Conditions Are Provided to Prevent Injury to Legal Users of Water**

7 According to the Petitioners, there will be no injury to legal users of water. (See
8 generally, DWR-3, DWR-66, DWR-53.) In support of assertions that there will be no injury to
9 legal users of water, the Petitioners provide vague promises to:

10 (1) Investigate the extent of injury to legal users in the future; or

11 (2) Apply very broad, “menu of options” approaches to allegedly eliminate injury to legal
12 users.

13 Notably, there has been no effort by the Petitioners to even identify what water uses
14 would be injured by grant of the Petition. The sole indication of ground work done with respect
15 to injury to water rights is the identification of 15 existing diversions in the locations of the
16 proposed new North Delta diversion footprints. With respect to those injuries, the Petitioners
17 purport to address the injuries by providing replacement groundwater wells and/or surface
18 water diversions. (DWR-2 Errata, slides 19-20.) According to Petitioners, the measures
19 apparently apply even where the entire farm served by the diversion point would be destroyed.
20 It is nonsensical to discuss the provision of alternate water supplies for an orchard or a farm
21 that no longer exists.

22 Cross-examination confirmed that there has been no specific consideration or inventory
23 of water uses other than the 15 intakes other than those found under the proposed Tunnel
24 diversion and work area footprints. Additionally, no testimony as to agronomic considerations
25 related to increased levels of salinity in irrigation was provided, nor was anyone on the witness
26 list familiar with the methods of diversion⁵ and water distribution used by agricultural water

27 _____
28 ⁵ The LAND et al. protestants are very concerned about the lower water levels and flood control impacts that would result from the operation of new North Delta diversions. It is our understanding that other protestants, including North Delta Water Agency, and the

1 users in the Delta. Moreover, there has apparently been no consideration of injury to
2 groundwater users in the vicinity of major project components, including the obstructions to
3 underflow caused by the Tunnels themselves.

4 Nor does the Petition present any credible information regarding the ability of the
5 Petitioners (or their designees for construction) to effectively respond to the entirely
6 foreseeable damages to private property and other disturbances that would occur upon grant
7 of the Petition. Mitigation is inadequate, and Petitioners have suggested there is no system
8 other than the Government Tort Claims Act to address these foreseeable injuries to legal users
9 of water. The BDCP Chapter 7 Governance structure previously proposed under Alternative 4
10 at least included a Stakeholder Committee. (SWRCB-5.) Now, there is no governance
11 structure at all, and the implementation will apparently be carried out by the SWP and CVP
12 contractors via the Delta Conveyance Facility Design and Construction Enterprise. The
13 existence of "Environmental Commitments" (SWRCB-3, RDEIR/S, App. 3B) does nothing to
14 allay these concerns. Impacts on local communities will be severe, including interruption and
15 degradation of drinking and irrigation water supplies, interruption of access to farms and
16 homes, damage to roads, homes and other structures from subsidence induced by dewatering,
17 and structural or other damages from excessive construction noises and vibrations. The
18 Government Tort Claims Act is entirely inadequate and too slow to adequately address the
19 scope and scale of these readily foreseeable impacts and injuries. The absence of any plan to
20 address these localized impacts indicates a complete disregard for the burdens and significant
21 environmental and other impacts of the project.

22 Mitigation Measures included in the 2015 RDEIR/S do not afford any assurances that
23 the project will not result in injury to groundwater and agricultural water uses. (See SWRCB-3,
24 Appendix A, Mitigation Measures AG-1 [pp. 14-7 to 14-15], GW-1, 5, 11 [pp. 7-12 to 7-18].)
25 Just as one example, Mitigation Measure GW-1 is not intended to apply to the wells that are
26 impacted beyond the arbitrarily selected distance of 2,600 feet. (SWRCB-3, RDEIR/S, App. A,
27 Section 7.3.3.2, p. 7-3, lines 37-38 and p. 7-4, lines 9-13.) Any wells that are impacted
28

Reclamation District Protest, respectively, are presenting detailed information on these injuries.

1 outside of that radius do not receive the mitigation, despite the RDEIR/S's failure to analyze
2 the current groundwater conditions or geology at a project-site specific scale. (SWRCB-3,
3 RDEIR/S, App. A, Section 7.3.3.2, p. 7-4, lines 19-21.) Any new or revised mitigation
4 measures that may be included in the Final EIR/S, which is apparently forthcoming any time,
5 were not available for Petitioners to review and are not part of the Petition now under
6 consideration.

7 **VIII. CONCLUSION**

8 The Petitioners have failed at every turn to provide the information required by law to
9 assess the requested massive change to the hydrology of the Delta. Starting with an
10 incomplete Petition, the proponents of the Tunnels plan have still not delivered what would be
11 required of any other diverter requesting a change before the SWRCB. Assessment of the
12 Petition must occur in an orderly fashion applying applicable legal standards. There are no
13 special exceptions for projects that are "too big to fail." Instead, the greater the scale of the
14 changes, the more important a careful review and conformance with legal requirements is to
15 protection of the public interest.

16 Given the incompleteness of the Petition and the scale of the devastation of land and
17 water proposed in the Petition, there are no conditions that could be suggested at this time to
18 prevent injury to legal users of water from the grant of the Petition. Thus, we respectfully
19 request that the Petition be summarily denied and that these proceedings be dismissed.

20 Respectfully submitted,

21 Dated: September 2, 2016

SOLURI MESERVE,
A LAW CORPORATION

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23 _____
24 Osha R. Meserve
25 Attorneys for Protestants
26 Local Agencies of the North Delta
27 Bogle Vineyards / Delta Watershed Landowner
28 Coalition
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Landowner Coalition
Stillwater Orchards / Delta Watershed Landowner
Coalition