

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
2 Robin McGinnis (SBN 276400)
3 **CALIFORNIA DEPARTMENT OF WATER
RESOURCES**

4 Office of the Chief Counsel
1416 Ninth Street, Room 1104
Sacramento, CA 95814
5 Telephone: (916) 653-5966
E-mail: james.mizell@water.ca.gov
6

7 Attorneys for California Department of Water
Resources

8 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MASTER
OBJECTIONS TO PROTESTANTS'
CASES-IN-CHIEF COLLECTIVELY**

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INTRODUCTION

1
2 California Department of Water Resources (“DWR”) requests that the Hearing
3 Officers issue an order excluding testimony and exhibits included in the cases-in-chief
4 submitted by Protestants¹ that are related to issues outside the scope of Part 1 as
5 described in the hearing notices and rulings in DWR and U.S. Bureau of Reclamation’s
6 (“Reclamation’s”) Request for a Change in Point of Diversion for California Water Fix.

7
8 DWR also requests that Part 1B cases-in-chief testimony and exhibits be excluded
9 if they do not meet the statutory requirements and those requirements described in the
10 October 30, 2015 Hearing Notice. As described in the Water Code, the State Water
11 Resource Control Board’s (“Board’s”) regulations, and the hearing notices, Protestants
12 must clearly and specifically set forth their objections to the approval of the petition with
13 respect to injury to legal users of water and other human uses of water. Much of the
14 submitted testimony amounts to unsupported speculation or assertions.

15
16 These Master Objections are organized under three main arguments: (1) outside
17 the scope of this hearing (funding, other projects/permit processes, and potential
18 property damages claims related to the proposed project); (2) issues related to Part 2
19 such as recreation, aquatic impacts, and public interest.; and (3) evidentiary/procedural
20 objections (e.g., legal arguments, conclusory testimony, policy statements).

21 Concurrently with submitting these Master Objections, DWR is providing specific
22 objections.²

23
24 DWR received 42 cases-in-chief, comprised of more than 1,700 individual files. To
25 efficiently object and facilitate review of the Part 1B cases-in-chief, DWR submits these

26
27 ¹ *Attachment A* lists the cases-in-chief that DWR received.

28 ² *Attachment B* lists the specific objections that are being filed concurrently with these Master Objections.

1 master objections to address common issues. Previous objections to these issues were
2 raised during Part 1A cross examination and were taken under submission. DWR
3 reserves the right to provide additional objections to these cases-in-chief and to further
4 respond later in this proceeding.

5 **STATEMENT OF FACTS**

6 On August 26, 2015, DWR and Reclamation filed a petition for a change to the
7 points of diversion in their water rights necessary to allow for the implementation of the
8 California Water Fix (“CWF”) program. On October 30, 2015, the Board issued a Notice
9 of Petition and Notice of Public Hearing and Pre-Hearing Conference to consider the
10 petition. The Hearing Officers later ruled on various hearing issues in letters dated
11 January 15, 2016, February 11, 2016, March 4, 2016, April 25, 2016, June 10, 2016,
12 July 22, 2016, September 9, 2016, and during the Part 1A hearing, and they issued the
13 Second Revised Notice of Rescheduled Public Hearing on May 11, 2016.
14

15 The Board separated the hearing into two parts: (1) injury to legal users of water
16 and other human uses of water; and (2) potential effects on fish and wildlife and
17 recreational uses and associated human uses. (Oct. 30, 2015 Hearing Notice, at p. 2;
18 Feb. 11, 2016 Ruling, at p. 10.) The Board structured the hearing this way so that it
19 could proceed while the California Environmental Quality Act (“CEQA”) and National
20 Environmental Policy Act (“NEPA”) processes and the compliance process for the
21 federal Endangered Species Act (“ESA”) and the California Endangered Species Act
22 (“CESA”) are being completed. (Oct. 30, 2015 Hearing Notice, at p. 2; Feb. 11, 2016
23 Ruling, at pp. 1-9.)
24
25

26 The Hearing Notice indicated that each party would be allowed up to one hour total
27 to present all of its direct testimony. (Oct. 30, 2015 Hearing Notice at p. 35.) The Hearing
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1 Notice also indicated that it may be possible for parties to have more time to present
2 their cases-in-chief, but only upon a showing of good cause. (*Ibid.*)

3 The Hearing Officers indicated that given the complexity and the number of hearing
4 participants, they intend to conduct the hearing as efficiently as possible. (January 15,
5 2016 Letter, at page 3.) After the pre-hearing conference on January 28, 2016, the
6 Hearing Officers issued a ruling on February 11, 2016 that Part 1 focuses on human
7 uses of water (water right and water use impacts) and can address human uses that
8 extend beyond the strict definition of legal users of water, including flood control issues
9 and environmental justice concerns, but if a human use is associated with the health of a
10 fishery or recreation, testimony on this matter should be presented in Part 2. (February
11 11, 2016 Ruling, at page 10.) This ruling discussed the hearing in relationship to other
12 regulatory processes³ extensively at pages 1 to 9.

14 The February 11, 2016 ruling established a February 26, 2016 deadline for Part 2
15 parties to submit a revised notice of intent to appear (NOI) if they wish to conduct cross-
16 examination in Part 1. This deadline was subsequently extended to March 16, 2016. The
17 March 4, 2016 ruling allowed Part 2 parties to submit a revised NOI by March 16 to
18 present testimony on impacts to human uses, such as flood control issues, during Part 1
19 instead of Part 2. The Hearing Officers did not otherwise permit parties to revise existing
20 NOIs or to submit new NOIs.

22 In their April 25, 2016 ruling, the Hearing Officers indicated that “it may be
23 necessary to revisit Part 1 hearing issues at the close of the hearing to the extent that
24 any substantial changes to the final CEQA document for WaterFix relative to the draft
25 document have a material bearing on Part 1 issues. . . .” (February 11, 2016 Ruling, at
26

27 ³ The other processes are CEQA, NEPA, ESA, CESA, the WQCP update, and the Water Quality
28 Certification under section 401 of the federal Clean Water Act.

1 page 3.) Also in this ruling, the Hearing Officers set September 15, 2016 as the deadline
2 for written procedural/evidentiary objections concerning Part 1B cases-in-chief. (*Id.*, at p.
3 4.)

4 On August 26, 2016, the Board's Water Fix Hearing Team e-mailed out a form for
5 parties to use to make substitutions to their witness lists, but they indicated parties may
6 not expand the scope of proposed testimony or the increase number of witnesses. On
7 September 9, 2016, the Board granted DWR's request to change the deadline for
8 motions to disqualify Protestants' witnesses or exclude testimony to
9 September 21, 2016. Some Protestants expanded their lists of witnesses and/or the
10 scope of the testimony identified in the NOIs within their cases-in-chief not consistent
11 with the previous rulings. Some of the parties have requested additional time to present
12 their cases-in-chief. According to the Hearing Notice, each party has up to one hour to
13 present all of its direct testimony, unless the party shows good cause to have more time.
14 (Oct. 30, 2015 Hearing Notice at p. 35.) Thus, requests for additional time that are not be
15 accompanied by adequate justification should be denied.
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18 **LEGAL STANDARDS**

19 As stated in the October 30, 2015 hearing notice, this is an administrative hearing
20 governed by Title 23 of the California Code of Regulations, section 648-648.8, 649.6,
21 and 760; Chapter 4.5 of the Administrative Procedure Act (commencing with 11400 of
22 the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of
23 the Government Code. (Cal. Code Regs., tit. 23, § 648, subd. (b).)
24

25 **I. RELEVANCE**

26 In this hearing, the Board shall admit any relevant evidence if it is the sort of
27 evidence on which responsible persons are accustomed to rely on in the conduct of
28 serious affairs, regardless of the existence of any common law or statutory rule which

1 might make improper the admission of the evidence over objection in civil actions. (Govt.
2 Code, § 11513 subd. (c).) However, the hearing officers have discretion to exclude
3 evidence if its probative value is substantially outweighed by the probability that its
4 admission will necessitate undue consumption of time. (Govt. Code, § 11513 subd. (f);
5 Hearing Officers' in the Fahey matter, May 23, 2016, at p. 1.⁴)

6 Adequate notice to the Petitioners and other parties of the issues to be heard,
7 however, is required. (*Bass v. City of Albany* (11th Cir. 1992) 968 F.2d 1067, 1069; *U.S.*
8 *v. Baker* (6th Cir. 1986) 807 F.2d 1315, 1323; *Carstens v. Pillsbury* (1916) 172 Cal. 572,
9 577; Govt. Code § 11425.10 subd. (a)(1); Cal Code Regs., tit. 23 § 647.2.) To the extent
10 that information brought before the State Water Board is beyond the properly noticed
11 Part 1 hearing, those matters are unable to be properly brought into the hearing at this
12 time.
13

14 **II. EXPERTS**

15 Sections 801 to 805 of the Evidence Code set requirements for expert and other
16 opinion testimony. The Hearing Officers may determine based on their review of the
17 record, after the submission of all relevant evidence, whether the expert's opinion is
18 "[b]ased on matter (including his special knowledge, skill, experience, training, and
19 education) perceived by or personally known to the witness or made known to him at or
20 before the hearing, whether or not admissible, that is of a type that reasonably may be
21 relied upon by an expert in forming an opinion upon the subject to which his testimony
22 relates...." (Evid. Code, § 801, subd.(b).)
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26 ⁴ Available at:
27 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_horuling_evidencemotion052316.pdf.
28

1 Under Evidence Code section 805, when the fact-finder is as competent as the
2 expert to consider and weigh the evidence and draw the necessary conclusions, there is
3 no need for expert testimony. (*Nevarrez v. San Marino Skilled Nursing and Wellness*
4 *Centre* (2013) 221 Cal.App.4th 102, 122.) Further, an expert may not testify about issues
5 of law or draw legal conclusions. (*Ibid.*) The manner in which the law should apply to
6 particular facts is a legal question and is not subject to expert opinion. (*Downer v.*
7 *Bramet* (1984) 152 Cal.App.3d 837, 841.)

9 III. INJURY TO LEGAL USERS AND IMPACTS ON OTHER HUMAN USES

10 Protestants' Part 1 testimony should be limited to injury to legal users of water and
11 other human uses of water. Many sections of the Water Code, including Water Code
12 section 1702 codify the "no injury" rule. (*State Water Resources Control Bd. Cases*
13 (2006) 136 Cal.App.4th 674, 738 (referred to hereafter as *Robie*.) The original common
14 law rule based on cases from 1857 and 1860 became part of the Water Commission Act
15 and then the Water Code. (*Robie, supra*, 136 Cal.App.4th 674, at p. 743; *Maeris v.*
16 *Bicknell* (1857) 7 Cal. 261, 263; *Kidd v. Laird* (1860) 15 Cal. 161, 181.) Under the "no
17 injury" rule, only those who had rights to the water involved could claim injury, and they
18 could show injury only by showing an injurious effect on their rights to the water involved
19 in the change. (*Robie, supra*, 136 Cal.App.4th 674, at p. 740.)

21 The concept of injury is a narrow one. (*Robie, supra*, 136 Cal.App.4th 674, at
22 p. 803.) One must first have a legal right to use water to oppose a change in the point of
23 diversion on the ground that the change would interfere with his or her legal right to use
24 the water involved. (*Ibid.*) Thus, only those whose rights to the water involved in the
25 change can possibly claim to be injured. In their Part 1B cases-in-chief, Protestants must
26 clearly and specifically set forth their objections to the approval of the petition with
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1 respect to injury to legal users of water and other human uses of water. Part 1B cases-
2 in-chief that do not contain this specific information should be excluded.

3 The standards for injury to legal users of water are set by the water quality
4 protective thresholds established in the WQCP. It is through this process that the Board
5 has made a determination as to what constitutes reasonable use of water and the
6 thresholds that balance all needs. These thresholds are translated into objectives
7 applicable to DWR as set forth in Water Rights Decision 1641 (D-1641). At this time,
8 there are no appropriate alternative standards that would supplant those in the WQCP.
9 Additional standards are found in other regulatory processes. Water quality constituent
10 thresholds established in these other regulatory processes are not before the Board in
11 this proceeding but will be determined, amended, and implemented through those other
12 processes. Non-regulatory standards and state policies are not a controlling threshold in
13 this proceeding. If there exist non-regulatory standards and state policies, those are
14 only appropriately brought before this board in consideration of the public interest.
15

16 Other human uses of water is undefined as is the standard for harm to other
17 human uses of water. This lack of definition from the State Water Board, however, is not
18 license to consider any and all claims of injury that fail to state the regulatory basis upon
19 which the claim is made before this Board. If a claim is made under the “other human
20 uses” rubric, it must be accompanied by evidence of the appropriately adopted and
21 germane standard that establishes the threshold of injury, along with information that
22 provides the basis upon which the Board may consider such a claim. Failing to provide
23 both bases is grounds upon which the Hearing Officers must strike the information.
24
25

26 **IV. REQUIRED CONTENT OF PART 1B CASES-IN-CHIEF**

27 Sections of the Water Code, the Board’s regulations, and the hearing notices
28 setting the requirements for protests are instructive on what should be included in the

1 Part 1B cases-in-chief. Any interested person may file with the board a written protest
2 against approval of the petition. (Wat. Code, § 1703.1.) Protestants must clearly and
3 specifically set forth their objections to the approval of the petition, and state the bases
4 for these objections, and contain other appropriate information and be in the form
5 required by applicable regulations. (Wat. Code, § 1703.2, subds. (c) & (d).)

6 The Board's regulations are also instructive on what Part 1B cases-in-chief should
7 include:

8 If the protest is based on interference with a prior right, there shall be an
9 allegation of specific injury to protestant which will result from the
10 proposed appropriation. The protest shall state the basis of protestant's
11 claim of right to use water and when the use began, the use which has
12 been made in recent years, and present use. The location of protestant's
13 point of diversion shall be described with sufficient accuracy so that the
14 position thereof relative to the point of diversion proposed by applicant
15 may be determined.

16 (Cal. Code Regs., tit. 23, §§ 745(b) & 796, emphasis added.⁵) Accordingly, the October
17 30, 2015 Hearing Notice provided that if the protest is based on injury to a legal user of
18 water, the protest must describe specifically what injury would result if the proposed
19 changes requested in the Petition were approved, and the party claiming injury must
20 provide specific information describing the basis of the claim of right, the date the use
21 began, the quantity of water used, the purpose of use and the place of use. (October 30,
22 2015 Hearing Notice, at p. 13.)

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25 ⁵ The Board's regulations are also instructive on what Part 2 cases-in-chief should include: The
26 allegation that the proposed appropriation would not be within the board's jurisdiction, would not best
27 conserve the public interest or public trust uses, would have an adverse environmental impact, or would
28 be contrary to law shall be accompanied by a statement of facts supporting the allegation. (Cal. Code
Regs., tit. 23, §§ 745(c) & 796.)

ARGUMENT

I. **PROTESTANTS RAISED MANY ISSUES THAT ARE OUTSIDE THE SCOPE OF THE HEARING.**

The Protestants have raised various issues that are outside the scope of the hearing. Testimony and exhibits that are not relevant to the noticed hearing issues should be excluded. Similarly during cross examination, Protestants raised out-of-scope issues over objections by the Petitioners.⁶ Some of the reoccurring themes of out-of-scope issues are summarized in the following sections.

A. **Funding of the Proposed Project**

Economic considerations of the CWF including the source of funding, projected costs, financial solvency or prudence, or the degree to which these factors equate to the merits of the selected project are not relevant to matters before this Board in a Change of Point of Diversion Petition. Broad assertions of the economic sustainability of Delta Agriculture or the Delta more generally are also not relevant.

B. **Damages to Property**

Some parties have raised issues of real property takings or other damages that may occur as part of the construction of the proposed project. These proceedings do not evaluate the necessity and value of personal or real property impacted, a process handled by either the courts, the California Water Commission, or the State Claims Office.

⁶ Some of the out of scope issues raised include: alleged impacts of current operations; re-initiation of consultation under the ESA for current operations; considerations of drought and new statewide baseline conditions that go beyond the considerations in the existing Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("WQCP") and are more appropriately taken up in that planning document update; the sufficiency and basis of the existing WQCP; the draft documents produced in connection with the WQCP update process; San Joaquin River Restoration Act and its implementation; South Delta salinity enforcement actions and existing Cease and Desist Order; existing operations under the approved Joint Point of Diversion; compliance with the Delta Plan and protection of the Delta as a Place; the availability and effectiveness of emergency services and historic structures; and existing operations of the Kern Water Bank.

1 **C. Water Rights Determinations**

2 Although the legal issue of whether the proposed change in point of diversion
3 creates a new water right is before the Board through this hearing, other water right
4 issues are not. Some parties raise other legal arguments challenging the underlying
5 water rights of the Petitioners, if those should be licensed, and if legal authority exists for
6 Petitioners to construct and operate new intake facilities and/or tunnels.

7 **D. Other Permits/Projects Underway Outside of These Proceedings.**

8 Numerous parties raise issues related to other regulatory processes that are not
9 before the Board in this proceeding, such as the Board's update of the WQCP, the Delta
10 Plan and related litigation, state and federal fish agencies' issuance of endangered
11 species protections, the Board's implementation of Delta flow criteria, Petitioners'
12 finalization of the draft EIS/EIR, and the long-term contract amendment project of DWR.
13 The Hearing Officers already ruled that other processes are not at issue in this
14 proceeding. (February 11, 2016 Ruling, at pp. 1-9; see also Board March 4 and April 25
15 rulings regarding lack of requirement to address Delta flow standards before beginning
16 Part 1.)
17

18 In their January 15, 2016 ruling, regarding CEQA, the Hearing Officers indicated
19 that: (1) the adequacy of DWR's EIR for CWF for purposes of CEQA compliance is not a
20 key hearing issue, and the parties should not submit evidence or argument on this issue;
21 (2) comments on the adequacy of the EIR for CEQA purposes should be submitted to
22 DWR consistent with the CEQA review process; and (3) the parties will be permitted to
23 submit evidence and argument concerning the document to the extent that the evidence
24 or argument relates to the key hearing issues. (*Id.*, at page 5.) Additionally, any
25 testimony regarding whether any other water right holders should be required to make
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1 additional flow contributions in the proceeding on the Petition is beyond the scope of this
2 hearing and should be excluded. (See Oct. 30, 2015 Hearing Notice at p. 2.)

3 California Water Code sections 1700-1706 set forth the matters that the Board
4 must consider as it rules on a change petition. Additionally, the Court of Appeal in the
5 State Water Resources Control Board Cases held that a Delta water right decision had
6 to implement any relevant existing Delta Water Quality Control Plan. (*State Water*
7 *Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 733-734.) None of these
8 authorities requires consideration of external processes.

9
10 Procedurally, the Board has retained the right to reopen the record to take
11 additional evidence as necessary, even after Part 1 of the hearings concludes. In their
12 April 25, 2016 letter, the Hearing Officers held that “it may be necessary to revisit Part 1
13 hearing issues at the close of the hearing to the extent that any substantial changes to
14 the final CEQA document for WaterFix relative to the draft document have a material
15 bearing on Part 1 issues. . . .” (April 25, 2016 Ruling, at p. 3.)

16
17 Specific to the Delta Plan and Delta flow requirements issue, the Hearing Officers
18 ruled, both on March 4, 2016 and April 25, 2016, that there is no requirement in the
19 Delta Reform Act that Delta flow standards be in place before the Part 1 hearings may
20 commence. (March 4, 2016 Ruling, at pp. 4-5; April 25, 2016 Ruling, at p. 3.) Rather, the
21 Delta Reform Act plainly states in at least two places that it does not affect the Board’s
22 authority over change petitions. Section 85031, subdivision (c) of the Water Code states
23 that “[n]othing in this division supersedes, limits, or otherwise modifies the applicability of
24 Chapter 10 (commencing with Section 1700) of Part 2 of Division 2, including petitions
25 related to any new conveyance constructed or operated in accordance with Chapter 2
26 (commencing with Section 85320) of Part 4.” Section 85032, subdivision (g) of the Water
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1 Code states that “[t]his division does not affect any of the following . . .” and specifically
2 lists Section 1702. The Board does not need to consider these other processes during
3 this hearing and any testimony and exhibits related to these processes should be
4 excluded.

5 **II. THE SCOPE OF PART 1 IS LIMITED.**

6 Any testimony or exhibits on topics other than those specifically identified in the
7 hearing notice, as subsequently modified, should be excluded.

8 The noticed issues are:

9
10 *1) Will the changes proposed in the Petition in effect initiate a new water*
11 *right?*

12 *2) Will the proposed changes cause injury to any municipal, industrial or*
13 *agricultural uses of water, including associated legal users of water?*

14 *(a) Will the proposed changes in points of diversion alter water flows in a*
15 *manner that causes injury to municipal, industrial, or agricultural uses of*
16 *water?*

17 *(b) Will the proposed changes in points of diversion alter water quality in*
18 *a manner that causes injury to municipal, industrial, or agricultural uses of*
19 *water?*

20 *(c) If so, what specific conditions, if any, should the State Water Board*
21 *include in any approval of the Petition to avoid injury to these uses?*

22 (October 30, 2015 Hearing Notice.) Additionally, in the February 11, 2016 ruling, the
23 Hearing Officers extended the scope of Part 1 by allowing information on “human uses
24 that extend beyond the strict definition of legal users of water, including flood control
25 issues and environmental justice concerns.”
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1 Topics reserved by the Hearing Officers for Part 2 and clearly outside the
2 appropriate scope of Part 1 include:

3 *1) Will the changes proposed in the Petition unreasonably affect fish and*
4 *wildlife or recreational uses of water, or other public trust resources? (Oct. 30,*
5 *2015 Hearing Notice at p.12.)*

6 *2) Are the proposed changes requested in the Petition in the public*
7 *interest? If so, what specific conditions, if any, should be included in any*
8 *approval of the Petition to ensure that the changes are in the public interest?*
9 *(Ibid.)*

10 *3) Human uses of water associated with the health of a fishery or*
11 *recreation.*

12
13 (Feb. 11, 2016 Ruling, at p. 10.) Despite the outline of key issues in the hearing notices
14 and rulings, many of the issues raised in Protestants' cases-in-chief are outside the
15 scope of Part 1. Issues outside the scope of Part 1 but applicable to Part 2, if allowed,
16 would confuse the issues and necessitate an undue consumption of time.

17
18 Protestants submitted testimony and evidence related to other Part 2 issues such
19 as flows for fish protection, cold water pool requirements, consideration of "appropriate
20 Delta flow criteria" under the Delta Reform Act (Sacramento-San Joaquin Delta Reform
21 Act of 2009, Wat. Code, § 85000, et seq.), and all aspects of recreation such as boating
22 and fishing. Testimony surrounding the availability and effectiveness of emergency
23 services and historic structures, if relevant to this hearing, are related to the public
24 interest and not injury to legal users of water, and should also be excluded until Part 2.
25 Should the Board determine that it will incorporate any aspects of the Delta Stewardship
26 Council's purview, such as protection of the Delta as a place or the co-equal goals, these
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1 issues would also fall outside the scope of Part 1. All such testimony and exhibits should
2 be excluded.

3 **III. OBJECTIONS BASED ON PROCEDURAL AND EVIDENTIARY ISSUES**

4 **A. Protestants Submitted Legal Arguments as Testimony.**

5 Testimony offered by a number of the witnesses for the Protestants includes legal
6 conclusions that should not be admitted into evidence. Testimony that includes legal
7 terms may be appropriate if it is “helpful to a clear understanding of [the witness’s]
8 testimony,” (Evid. Code, § 800), but if it does no more than make conclusory statements
9 as to what the law is, it is inappropriate. An opinion may be proper if a foundation is laid
10 by the witness as to the factors taken into account when forming the opinion on the
11 ultimate issue. (Evid. Code, § 805.) A witness may use statutory or other legal terms to
12 frame her opinion, and doing so may be helpful for the decision-maker to understand the
13 witnesses’ testimony. However, some of the testimony offered by the Protestants’
14 witnesses appears to include conclusory legal assertions that will not assist the Hearing
15 Officers in making determinations of fact. Testimony that has no bearing on the facts to
16 be determined, including conclusory testimony as to ultimate issues raised in these
17 proceedings where the testimony does not make clear the underlying factual foundations
18 for the opinion offered should be excluded.

19 Many Protestants made legal arguments in their cases-in-chief.⁷ DWR objects to
20 Protestants submitting legal arguments related to matters before this Board. Instead
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24 ⁷ Legal issues raised include: (1) the standard for determining injury to legal users of water;
25 (2) whether Petitioners have met their burden of proof; (3) the proposed changes to Petitioners’ water
26 rights violate area of origin law, the public trust doctrine, and the anti-degradation policy; (4) Petitioners’
27 proposal is a request for new water rights instead of proposed changes to their existing water rights as
28 Petitioners claim; (5) Petitioners do not have authority to proceed with the conveyance facilities; (6) the
validity of unadjudicated water rights; (7) contractual interpretation disputes between DWR and its contract
holders; (8) current compliance with Board orders, permit conditions, and water rights priority; and
(9) diligent development of the existing permits held by DWR and Reclamation.

1 legal issues related to the ruling on this petition are properly argued in closing briefs.
2 DWR intends to respond to non-procedural legal arguments in its closing brief. The
3 ultimate legal issues to be decided by the Board include whether the change in point of
4 diversion to DWR and Reclamation's water right permits result in a new water right.
5 Petitioners' testimony related to water rights has yet to begin and the Board will likely
6 consider this issue and the standard for legal injury at the close of these proceeding.
7 DWR intends to provide legal arguments in a closing brief as directed by the Hearing
8 Officer when those issues are timely.

9
10 **B. Policy Statements and Unsupported Factual Arguments Are Not**
11 **Evidence.**

12 Pervasive in the Protestants' filings is the resubmittal of policy statements and non-
13 expert or expert opinions that are purely conclusory because the statements and
14 opinions do not connect relevant facts to the ultimate conclusion. In many instances, the
15 statements and opinions are not supported by evidence, and they, therefore have no
16 evidentiary value. Another common theme is the submittal of extensive testimony and
17 exhibits attempting to prove a non-issue. For example, a number of Protestants attack
18 the proposed project's source of funding and/or raise cost-benefit challenges.

19 When an expert's opinion is purely conclusory because it does not connect the
20 relevant facts to the ultimate conclusion, the opinion has no evidentiary value. (*Jennings*
21 *v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) Under
22 Evidence Code sections 801 and 805, a doctor's explanation that his opinion of what
23 caused an infection "just sort of makes sense" was too conclusory to support a finding of
24 what actually caused the infection. (*Jennings, supra*, 114 Cal.App.4th at pp. 1119–20;
25 see Carmichael Water District testimony claiming general understanding of Petitioner's
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1 modeling and not identifying facts or information to show injury to a legal user of water
2 (CWD-1, pp. 1, 5-6).)

3 **C. Some Exhibits Were Not Submitted Properly.**

4 The October 30, 2015 Hearing Notice described the requirements that apply to
5 exhibits.⁸ Many of Protestants' exhibits do not meet these requirements. Nor are they the
6 proper subject of official notice. Title 23, California Code of Regulations, Section 648.2
7 provides the Board may take official notice of certain matters:

8 The Board or presiding officer may take official notice of such facts as
9 may be judicially noticed by the courts of this state. Upon notice to the
10 parties, official notice may also be taken of any generally accepted
11 technical or scientific matter within the Board's field of expertise,
12 provided parties appearing at the hearing shall be informed of the
13 matters to be noticed. The Board or presiding officer shall specify the
14 matters of which official notice is to be taken. Parties shall be given a
15 reasonable opportunity on request to refute officially noticed technical or
16 scientific matters in a manner to be determined by the Board or
17 presiding officer.

18 ⁸ a. Exhibits based on technical studies or models shall be accompanied by sufficient information to
19 clearly identify and explain the logic, assumptions, development, and operation of the studies or models.

20 b. The hearing officers have discretion to receive into evidence by reference relevant, otherwise
21 admissible, public records of the State Water Board and documents or other evidence that have been
22 prepared and published by a public agency, provided that the original or a copy was in the possession of
23 the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A
24 party offering an exhibit by reference shall advise the other parties and the State Water Board of the titles
25 of the documents, the particular portions, including page and paragraph numbers, on which the party
26 relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence,
27 and the specific file folder or other exact location in the State Water Board's files where the document may
28 be found.

23 c. A party seeking to enter in evidence as an exhibit a voluminous document or database may so
24 advise the other parties prior to the filing date for exhibits, and may ask them to respond if they wish to
25 have a copy of the exhibit. If a party waives the opportunity to obtain a copy of the exhibit, the party
26 sponsoring the exhibit will not be required to provide a copy to the waiving party. Additionally, with the
27 permission of the hearing officers, such exhibits may be submitted to the State Water Board solely in
28 electronic form, using a file format readable by Microsoft Office 2003 software.

26 d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished
27 technical documents are admitted as exhibits.

27 e. Parties submitting large format exhibits such as maps, charts, and other graphics shall provide
28 the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, parties
may supply, for the hearing record, a reduced copy of a large format original if it is readable.

1 (Cal. Code Regs., tit. 23, § 648.2.) Evidence Code section 451 provides a list of items
2 courts shall take notice of,⁹ and Evidence Code section 452 provides a list of items
3 courts may take notice of.¹⁰

4 Many exhibits submitted as part of a case-in-chief are not addressed as part of the
5 submitted testimony. It is the policy of the Water Board to discourage the introduction of
6 surprise testimony and exhibits. (Cal. Code Regs., title 23, section 648.4(a).) The
7 incorporation of general testimony of unknown relevance constitutes impermissible
8 surprise testimony because it is impossible to determine exactly which parts of the
9 incorporated testimony the witness actually intends to use as direct testimony, and what
10 additional conclusions are made for purposes of this hearing. Without details about what
11 the submitted information supports, Petitioners cannot evaluate the exhibits for inclusion.
12 This has created an undue burden on Petitioners and those exhibits not specifically
13 identified and relied upon in corresponding testimony should be excluded from the
14 record.
15

16 CONCLUSION

17
18 In the interest of efficiency, to avoid confusion of complex issues, and avoid
19 wasting witnesses' and parties' time dealing with extraneous information and creating a

20 ⁹ Matters of which judicial notice must be taken include: the decisional, constitutional, and public
21 statutory law of California and of the United States; rules of professional conduct for attorneys and
22 procedure for California courts adopted by the Judicial Council; rules of pleading, practice, and procedure
23 prescribed by federal courts; the accepted definitions of words, phrases, and legal expressions; and facts
24 and propositions of generalized knowledge that are so universally known that they cannot reasonably be
25 the subject of dispute. (Evid. Code, § 451.)

26 ¹⁰ Matters of which judicial notice may be taken include: the decisional, constitutional, and
27 statutory laws of other states and federal and state legislative resolutions and private acts; regulations and
28 legislative enactments issued by or under the authority of the United States or any public entity in the
United States; official acts of the legislative, executive, and judicial departments of the United States and
of any state; records of any California court or any federal court; rules of court of any California court or
any federal court; the law of an organization of nations and of foreign nations and public entities in foreign
nations; facts and propositions that are of such common knowledge that they cannot reasonably be the
subject of dispute; facts and propositions that are not reasonably subject to dispute and are capable of
immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid.
Code, § 452.)

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muddled record for Part 2 and future proceedings, DWR respectfully requests that the Hearing Officers issue an order excluding testimony and exhibits relating to issues outside the scope of this hearing, issues related to Part 2, and those that are procedurally deficient.

Dated: September 21, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

James (Tripp) Mizell
Office of the Chief Counsel

ATTACHMENT A

CASES-IN-CHIEF RECEIVED
ACID - Anderson-Cottonwood Irrigation District
Aqua Alliance, CSPA, CWIN
BALMD et al (Delta Flood Control Group)
BWD - Butte Water District
BWGWD - Biggs-West Gridley Water District
CDWA et al - South Delta Water Agency, et. al.
City of Antioch
City of Brentwood
City of Folsom
City of Roseville
City of Sacramento
City of Stockton
Clifton Ct.
COSJ et al - County of Jan Joaquin, et. al.
CWD - Carmichael Water District
Deirdre Des Jardins/California Water Research
EBMUD - East Bay Municipal Utility District
Friant Water Authority and Participating Members
GCID - Glenn-Colusa Irrigation District
Islands, Inc.
LAND - Local Agencies of North Delta
North Delta CARES/Barbara Daly
North Delta Water Agency & Member Districts
PCFFA/IFR - Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources
PCWA - Placer County Water Authority
PWMC - Plumas Mutual Water Company
RD1004 - Reclamation District 1004
ROD - Richvale Irrigation District
RTD - Restore the Delta
Sacramento Regional County Sanitation District
Sacramento Suburban Water District
Sacramento Valley Group
Sacramento Valley Water Users (<u>not a party</u>)
San Joaquin River Exchange Contractors Water Authority
San Juan Water District
Save the California Delta Alliance, et al's
SCWA - Sacramento County Water Agency
Snug Harbor Resorts, LLC
South Valley Water Association
Tehama-Colusa Canal Authority & water service contractors in its

ATTACHMENT A

CASES-IN-CHIEF RECEIVED
service area
Western Canal Water District
Westlands Water District

ATTACHMENT B

SPECIFIC OBJECTIONS FILED CONCURRENTLY WITH DWR'S MASTER OBJECTIONS

Biggs-West Gridley Water District
Butte Water District
Carmichael Water District
City of Folsom
City of Roseville
City of Sacramento
Placer County Water Authority
Richvale Irrigation District
Sacramento Suburban Water District
Sacramento Valley Group
San Juan Water District
Tehama-Colusa Canal Authority Group
City of Brentwood
Delta Flood Control Group
Local Agencies of the North Delta (LAND) group
CSPA, et al.
Deirdre Des Jardins (a.k.a. CA Water Research)
City of Antioch
City of Stockton
County of San Joaquin, et al.
North Delta CARES
PCFFA / IFR
Restore the Delta
Sacramento Regional Sanitation District
Save the California Delta Alliance
Snug Harbor Resort
South Delta Water Agency, et al.
Clifton Court, LP