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

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

**CALIFORNIA DEPARTMENT OF  
WATER RESOURCES' RESPONSE TO  
JOINT MOTION TO STRIKE PORTIONS  
OF THORNBERG TESTIMONY  
(DWR-84)**

15 **INTRODUCTION**

16 California Department of Water Resources ("DWR") hereby responds to the Joint  
17 Motion of Protestants California Sportfishing Protection Alliance et al. (Group 31), LAND  
18 et al. (Group 19), County of San Joaquin et al. (Group 24 ), and Snug Harbor Resorts,  
19 LLC (Group 41) (collectively "protestants") to strike portions of the testimony of Dr.  
20 Christopher Thornberg, DWR-84. Protestants claim that portions of Dr. Thornberg's  
21 rebuttal testimony: (1) respond to testimony of Dr. Jeffrey Michael's (SDWA-134-R  
22 [showing strikeout]) that were struck from the record; and (2) do not respond to rebuttal  
23 testimony provided by protestants. As more fully stated below, protestants' motion lacks  
24 merit because Dr. Thornberg's testimony specifically responds to evidence admitted into  
25 the record in protestant's cases-in-chief.  
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## STATEMENT OF FACTS

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2 On August 26, 2015, DWR and U.S. Bureau of Reclamation (“USBR”) filed a  
3 petition for a change to the points of diversion in their water rights necessary to allow for  
4 the implementation of the California Water Fix (“WaterFix”) program. On October 30,  
5 2015, the State Water Resources Control Board (“Water Board” or “Board”) issued a  
6 Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference to consider  
7 the petition. In the Notice of Public Hearing, the Water Board separated the hearing into  
8 two parts: (1) injury to legal users of water and other human uses of water; and (2)  
9 potential effects on fish and wildlife and recreational uses and associated human uses.  
10 (Oct. 30, 2015 Hearing Notice, at p. 2; Feb. 11, 2016 Ruling, at p. 10.)

12 The Hearing Officers issued rulings on evidentiary and procedural issues on  
13 October 7, 2016, February 21, 2017 and March 15, 2017. In its October 7, 2016 ruling,  
14 the Hearing Officers determined that the issue of economic feasibility of the WaterFix  
15 was outside the scope of Part 1 of the proceeding and directed parties to submit revised  
16 testimony for particular witnesses, one of which was Dr. Jeffrey Michael on behalf of  
17 South Delta Water Agency et al. Dr. Michael’s revised testimony, SDWA-134-R, was  
18 admitted into evidence by ruling dated February 21, 2017.

## LEGAL STANDARDS

21 As stated in the October 30, 2015 hearing notice, this is an administrative hearing  
22 governed by Title 23 of the California Code of Regulations, sections 648-648.8, 649.6,  
23 and 760; Chapter 4.5 of the Administrative Procedure Act (commencing with 11400 of  
24 the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of  
25 the Government Code. (Cal. Code Regs., tit. 23, § 648, subd. (b).)  
26  
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1 In this hearing, any relevant evidence is admissible if it is the sort of evidence on  
2 which responsible persons are accustomed to rely on in the conduct of serious affairs.  
3 (Govt. Code § 11513 subd. (c).) However, the hearing officers have discretion to  
4 exclude evidence if its probative value is substantially outweighed by the probability that  
5 its admission will necessitate undue consumption of time. (Govt. Code, § 11513 subd.  
6 (f).)

7 The scope of rebuttal is limited: “[r]ebuttal evidence is limited to evidence that is  
8 responsive to evidence presented in connection with another party’s case-in-chief, and it  
9 does not include evidence that should have been presented during the case-in-chief of  
10 the party submitting rebuttal evidence.” (October 30, 2015 Hearing Notice at p. 36.)

## 12 RESPONSE

### 13 I. **Dr. Thornberg’s Rebuttal Testimony Directly Responds to Specific** 14 **Assertions in the Admitted Case-In-Chief Testimony of Dr. Ed Whitelaw and** **Dr. Jeffrey Michael**

15 Protestants move to strike portions of Part 3 of Dr. Thornberg’s testimony on the  
16 grounds that his testimony is responsive to evidence that was struck from the record as  
17 being outside the scope of Part 1. (See Motion to Strike, p. 3:1-9.) In Part 3 (Section IV)  
18 of his testimony, Dr. Thornberg presents testimony rebutting claims made regarding  
19 non-agricultural economic impacts of the California Water Fix. (DWR-84, p. 33:23-25.)  
20 On page 34, Dr. Thornberg briefly summarizes the five points he intends to rebut,  
21 identifying the corresponding witnesses who made the assertions (Dr. Michael or Dr.  
22 Whitelaw). In subsequent pages of his testimony, Dr. Thornberg then goes into more  
23 detail on each point, providing exact citations in footnotes to the testimony being  
24 rebutted.

25 From the identified, challenged testimony, it appears that protestants are  
26 cherry-picking phrases from Dr. Thornberg’s testimony that merely reference economic  
27 benefit, impacts, or feasibility without placing the testimony in the context of the  
28 testimony being rebutted. All of the challenged testimony is part of Dr. Thornberg’s

1 rebuttal testimony clearly referencing the protestant case-in-chief testimony it is intended  
2 to rebut, all of which has been admitted into the record.

3 **1. Thornberg Testimony, DWR-84, page 34, lines 2-3**

4 Nonsensically, protestants seek to strike an introductory sentence to Dr.  
5 Thornberg's summary of the claims by Drs. Whitelaw and Michael that he addresses in  
6 his rebuttal testimony, merely because the sentence includes the words "economic  
7 benefits of the WaterFix." Dr. Thornberg's testimony rebuts claims admitted into  
8 evidence within the testimony of Dr. Michael and Dr. Whitelaw. In particular, Dr.  
9 Michael's testimony expressly concerns broader negative economic impacts of the  
10 California WaterFix on the Delta including those caused by purported decreased  
11 agricultural production and impacts to infrastructure (see SDWA-184-R, pp. 7: 4- 8:12).  
12 Addressing arguments concerning negative economic impacts, it is understandable that  
13 Dr. Thornberg would start a contrary opinion with a statement that Dr. Michael  
14 underestimates the economic benefits of the WaterFix.

15 **2. Thornberg Testimony, DWR-84, page 34, lines 5-8, and page 35,**  
16 **lines 9-17**

17 Protestants challenge Dr. Thornberg's testimony on page 34, lines 5-8 that  
18 summarizes his first point, which is discussed in more detail on pages 34, line 26  
19 through page 35, line 21. As shown by the citations and the references to Dr. Michael's  
20 assertions in the text, this testimony directly responds to Section I.B of Dr. Michael's  
21 testimony, which is entitled "Decreased revenue from Delta farming has broader  
22 negative economic impact on Delta Counties, especially San Joaquin County," a section  
23 that was not struck from his case-in-chief testimony. (See DWR-84, pp. 34:4-8 and  
24 34:26-35:21; SDWA-134-R, p. 7:4-27.) Dr. Michael's testimony in this section discusses  
25 the broader economic impacts to the Delta community, including estimates of impacts to  
26 agricultural employment, agricultural revenue, and income in the Delta. (SDWA-134-R,  
27 p. 7:4-27.) Dr. Thornberg's testimony responds directly to Dr. Michael's assertions and  
28 provides his opinion that the negative impact to the Delta would be very small and the

1 reasons why the California WaterFix would generate a net positive economic impact on  
2 the Delta. Because the challenged testimony is directly responsive to Dr. Michael's  
3 admitted testimony, SDWA-134-R, p. 7, lines 4-27, it is proper rebuttal testimony within  
4 the scope of this proceeding.

5 **3. Thornberg Testimony, DWR-84, page 34, lines 13-14, page 38, lines**  
6 **15-17 and page 39, lines 12-14**

7 As shown by citations in Dr. Thornberg's testimony, the challenged testimony  
8 responds directly to Section II.A of Dr. Michael's revised testimony in which he asserts  
9 that construction of the Water Fix could reduce future funding for levee maintenance and  
10 improvement and increase the risk of a large economic loss from factors such as  
11 earthquakes. (See SDWA-134-R, pp. 8:16-9:8.) Protestants seek to strike three  
12 isolated sentences of Dr. Thornberg's rebuttal to this section of Dr. Michael's revised  
13 testimony. The first two are isolated sentences that reference "funding" of the California  
14 WaterFix in the context of rebutting Dr. Michael's assertions regarding reduced funding  
15 for levee maintenance. (DWR-84, pp. 34:13-14 and 38:15-17.) As part of his larger  
16 discussion, Dr. Thornberg merely points out that the funds for the WaterFix are  
17 completely separate from those for levee maintenance and upkeep. (*Id.*) The third  
18 sentence protestants seek to strike is a concluding sentence, after a longer discussion,  
19 providing Dr. Thornberg's opinion that the California WaterFix would lessen the impacts  
20 from a huge seismic event, which responds directly to Dr. Michael's assertion that the  
21 WaterFix is likely to increase the risk of a large economic loss in the Delta (DWR-84,  
22 p. 39:12-14; SDWA-134-R, pp. 8:14-10:11.) Each of the challenged sentences form  
23 part of a larger section of testimony directly responsive to Dr. Michael's revised  
24 testimony, and thus constitute proper rebuttal testimony.

25 **4. Thornberg Testimony, DWR-84, page 34, lines 15-17 and page 39, line**  
26 **15 through page 42, line 4.**

27 Dr. Thornberg's challenged testimony addresses claims made by Dr. Michael in  
28 Sections I.B. and II.C. of his revised testimony concerning purported broader negative  
economic impacts on Delta counties from decreased agricultural revenue, including

1 those from job loss and reduced income, and impacts to infrastructure-dependent  
2 business in the Delta counties because of transportation impacts. (See SDWA-134-R,  
3 pp. 7:4-27, 8:1-12; and 11:9-21.) In the challenged rebuttal testimony, Dr. Thornberg  
4 lays out his opinion that Dr. Michael overestimates the cost of traffic congestion and lost  
5 agricultural output in the Delta region relative to the highly positive benefits of job growth,  
6 economic output, and water supply reliability from WaterFix. (See DWR-84, pp. 39:15-  
7 42:4.) Dr. Thornberg clearly references exactly which of Dr. Michael's assertions he is  
8 addressing in this section, all of which assertions were admitted into evidence as part of  
9 Dr. Michael's revised testimony. As with the other challenged testimony addressed in  
10 this response, protestants' claim that Dr. Thornberg is responding to testimony that was  
11 struck from the record outside the scope of Part 1 of the proceeding is incorrect.

12 **5. Thornberg Testimony, DWR-84, page 42, line 5 through page 43,**  
13 **line 12.**

14 The challenged testimony expressly refers to and rebuts Dr. Whitelaw's discussion  
15 of the "No Injury Rule" from an economic perspective as discussed in C-WIN-6-revised,  
16 p. 4, Section B, which remains unchanged from the earlier version of Dr. Whitelaw's  
17 testimony. Neither the challenged testimony, nor Dr. Whitelaw's direct testimony  
18 addresses the feasibility of the WaterFix. For these reasons, the grounds asserted by  
19 protestants in their motion to strike are inapplicable to the challenged testimony.

20 **6. Thornberg Testimony, DWR-85, page 43, line 24-26**

21 Protestants mislabeled the page as 39, but appear to have intended page 43,  
22 referring to language within the conclusion section of Dr. Thornberg's testimony. As a  
23 generalized concluding paragraph, Dr. Thornberg refers to Dr. Michael's testimony that  
24 analyzed negative impacts of the WaterFix on Delta farmland, crop yields, and a flawed  
25 economic model. Then Thornberg summarizes that Dr. Michael also underestimated the  
26 positive effects of the WaterFix for the Delta region. These summary statements are  
27 supported by prior rebuttal testimony on positive economic effects of the WaterFix in  
28 response to protestants' submitted testimony claiming significant economic harm to

1 Delta farmers from implementing WaterFix. (DWR-84, page 3, line 22; SDWA-134-R,  
2 SDWA-135-R, RTD-305, RTD-30 Erratum, RTD-31, and CWIN-6). Throughout his  
3 testimony, Dr. Thornberg provides specific citations to protestants' rebuttal testimony,  
4 indicating that it is necessary to counter assertions by protestants with which DWR  
5 disagrees.

### 6 CONCLUSION

7 For the foregoing reasons, Petitioners respectfully request that the Hearing Officers  
8 deny protestants' motion to strike the portions of Dr. Thornberg's rebuttal testimony as it  
9 specifically rebuts protestants' case-in-chief testimony that has been admitted into  
10 evidence. In addition, as Dr. Thornberg's testimony is submitted to rebut protestants'  
11 cases-in-chief, protestants' assertion that it is not responsive to their rebuttal testimony is  
12 a misstatement of the purpose of rebuttal testimony and is an irrelevant argument.  
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14  
15 Dated: May 12, 2017

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES

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19 \_\_\_\_\_  
Robin McGinnis  
Office of the Chief Counsel

**STATEMENT OF SERVICE**

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

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**CDWR's Response to Joint Motion to Strike Portions of Thornberg Testimony**

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated March 30, 2017, posted by the State Water Resources Control Board at

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml):

*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

**For Petitioners Only:**

	I caused a true and correct <b>hard copy</b> of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:
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	Method of Service: <u>U.S. Postal</u>
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I certify that the foregoing is true and correct and that this document was executed on May 12, 2017  
Date

Signature: 

Name: Valentina German

Title: Legal Analyst

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