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19 Mokelumne River Water and Power Authority

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

23 HEARING IN THE MATTER OF ) JOINT PROPOSAL OF THE SAN JOAQUIN  
24 CALIFORNIA DEPARTMENT OF WATER ) COUNTY PROTESTANTS, LAND, ET AL.  
25 RESOURCES AND UNITED STATES ) PROTESTANTS, AND ISLANDS, INC. RE:  
26 BUREAU OF RECLAMATION REQUEST ) ISSUES APPROPRIATELY ADDRESSED IN  
27 FOR A CHANGE IN POINT OF ) CLOSING BRIEFS AT THE CONCLUSION  
28 DIVERSION FOR CALIFORNIA WATER ) OF THE PART 1 REBUTTAL CASES AND  
FIX ) SUR-REBUTTAL PRESENTATIONS  
\_\_\_\_\_ )

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1 Protestants County of San Joaquin, San Joaquin County Flood Control and Water Conservation  
2 District, and Mokelumne River Water and Power Authority (“San Joaquin County Protestants”), the  
3 Local Agencies of the North Delta, Bogle Vineyards/Delta Watershed Landowner Coalition, Diablo  
4 Vineyards and Brad Lange/Delta Watershed Landowner Coalition, Stillwater Orchards/Delta  
5 Watershed Landowner Coalition (“LAND, et al. Protestants”), and Islands, Inc. (collectively, “San  
6 Joaquin County/LAND/Islands, Inc. Protestants”) jointly submit this Proposal Re: Issues  
7 Appropriately Addressed in Closing Briefs for Part 1 of this hearing, in response to the Hearing  
8 Officers’ Ruling of December 19, 2016.

## 11 I. INTRODUCTION

12 Earlier in this proceeding – prior to hearing the testimony unfold and prior to several  
13 evidentiary rulings – the San Joaquin County/LAND/Islands, Inc. Protestants expressed their intent to  
14 file a closing brief at the end of Part 1. Since then, several proffered evidentiary presentations have  
15 been moved into Part 2 as a result of the Hearing Officers’ rulings. Also, as a result of the Part 1  
16 evidentiary presentations, rulings on a number of objections, and several colloquies between the  
17 Hearing Officers and counsel, the distinction between Part 1 issues and Part 2 issues, always  
18 problematic, has become even more uncertain. Further, it appears that several parties will present  
19 rebuttal cases responsive to assertions, conclusions and positions advanced by the Petitioners in Part  
20 1.

23 Other related processes, such as those surrounding the WaterFix FEIR/S and the Water Quality  
24 Control Plan, have also generated additional uncertainty with respect to both Part 1 and Part 2 issues.  
25 For example, the 2016 FEIR/S, released after the San Joaquin County/LAND/Islands, Inc. Protestants  
26 presented their cases in chief, admitted that model WaterFix simulations indicate up to a “5-foot  
27 episodic lowering” of groundwater levels beneath the Sacramento River due to lower flows in the  
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1 river as a result of diversions at the north Delta intakes that result in a reduction in river flows and  
2 elevations.” (2016 FEIR/S, pp. 7-117, 7-118, 7-119.) This is a significant change from the 2014  
3 RDEIR/S discussion about rising groundwater levels, one that would have been addressed in the  
4 groundwater interference component of the San Joaquin County/LAND/Islands, Inc. Protestants’ Part  
5 1 cases in chief had the 2016 FEIR/S been available at the time.

7 In light of the foregoing considerations, the San Joaquin County/LAND/Islands, Inc.  
8 Protestants now doubt the efficacy of a “closing” brief limited to Part 1 issues. At the very least, any  
9 Part 1 “closing” brief schedule should not set filing deadlines until after the close of the rebuttal cases  
10 and any sur-rebuttal presentations. To avoid further confusion of issues and duplication of efforts, the  
11 San Joaquin County/LAND/Islands, Inc. Protestants now believe the most sensible path forward  
12 would be to submit all “closing” briefs at the end of Part 2 if Part 2 is allowed to proceed at all.

14 That said, none of the foregoing considerations obviate or diminish the Board’s independent  
15 duty to conduct its own rigorous and unbiased analysis to determine whether Petitioners have met their  
16 heavy burden in Part 1 of establishing that the proposed WaterFix will not “operate to the injury of  
17 any legal user of the water involved.” (Water Code § 1702.) The San Joaquin  
18 County/LAND/Islands, Inc. Protestants believe that if the Board does conduct such an analysis of  
19 Petitioners’ Part 1 presentations there is a high likelihood that the WaterFix Hearing will not proceed  
20 to Part 2.

23 Further, we recommend that the Hearing Officers not rule on the parties’ proposed issues for  
24 briefing, or on any of the closing brief requirements (e.g., deadlines, length of briefs) until after Part  
25 1 rebuttal and sur-rebuttal cases are completed. As a result of the rebuttal cases, the parties may  
26 identify additional issues that should be addressed in closing briefs; therefore, the San Joaquin  
27 County/LAND/Islands, Inc. Protestants recommend that the Hearing Officers accept additional closing  
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1 brief proposals following the completion of the rebuttal cases and any sur-rebuttal presentations.

2 **II. PROPOSED ISSUES APPROPRIATE FOR “CLOSING” BRIEFS AT THE END OF THE**  
3 **PART 1 REBUTTAL AND SUR-REBUTTAL CASES**

4 Should the Hearing Officers proceed with Part 1 “closing” briefs, the San Joaquin  
5 County/LAND/Islands, Inc. Protestants recommend that briefing be accepted on the following issues.

6 **Issue 1: Is the Petition for Change in the Point of Diversion Incompatible with the Petitioners’**  
7 **Identified Water Rights and/or Otherwise Defective?**

8 The October 30, 2015 Notice of Public Hearing identifies as a “key issue” for this Hearing:  
9 “Will the changes proposed in the Petition in effect initiate a new water right?” (Notice, p. 11.)  
10 Ample evidence offered in Part 1 – reviewed against the backdrop of the pertinent statutory and case  
11 law and prior rulings of the SWRCB itself – confirms that the answer to this question is “yes.” A  
12 new water right, for which Petitioners have not applied, would be required to go forward with the  
13 twin tunnel project as proposed. Further, as result of omissions of information essential to a legally  
14 or technically sufficient consideration of the Petition, the Petition is defective and should therefore be  
15 denied. These threshold issues could appropriately be addressed prior to Part 1, though, as discussed  
16 above, the blurred lines between Part 1 and Part 2 and seemingly inevitable overlap would also make  
17 this issue appropriate for a closing brief at the end of Part 2, assuming Part 2 is allowed to proceed at  
18 all.  
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22 **Issue 2: Have Petitioners Met Their Burden of Proof in Establishing That the Petition, If**  
23 **Granted, Would Not “Operate to the Injury of Any Legal User of the Water**  
24 **Involved”?**

25 A core issue identified in the October 30, 2015 Notice is whether the Petition’s “proposed  
26 changes [will] cause injury to any municipal, industrial or agricultural uses of water, including  
27 associated legal users of water.” (Notice, p. 11.) In the February 11, 2016 Pre-Hearing Conference  
28 Ruling, the Hearing Officers clarified that the water use injuries that are issues appropriate for Part 1

1 include injuries to “human uses that extend beyond the strict definition of legal users of water . . . .”  
2 (Pre-hearing Conference Ruling, p. 10; see, also, October 7, 2016 Ruling, p. 2.)

3  
4 Having reviewed the Petition and the evidence submitted in support of the Petition, the San  
5 Joaquin County/LAND/Islands, Inc. Protestants have concluded that the Petitioners failed to meet  
6 their burden of proof on this critical issue. Among other fatal deficiencies, Petitions failed to define  
7 the project, relying instead on an impossibly uncertain “boundary” approach and a purported  
8 “adaptive management” program which, lacking meaningful science-based safeguards, amounts to no  
9 more than a wink, a nod and vague assurance that the same agencies that have presided over the  
10 Delta’s dramatic collapse over the past fifty years will do better in the distant future. As proposed,  
11 the adaptive management program offers no protection against inevitable political and economic  
12 pressure to maximize water exports in the future with little or no regard to the health of the Delta or  
13 the welfare of Delta communities.  
14

15  
16 More specific to the San Joaquin County/LAND/Islands, Inc. Protestants’ cases in chief, the  
17 Petition and evidence presented in Petitioners’ case in chief fail to address the proposed project’s  
18 likely injury to legal users of water as a result of: interference with groundwater flows; exacerbation  
19 of the conditions that promote proliferation of harmful algal blooms and the neurotoxin, microcystin;  
20 and adverse economic impacts for Delta agriculture, especially in San Joaquin County, stemming from  
21 the resulting increase in salinity.  
22

23 The question of whether Petitioners have met their burden of proof under Water Code § 1702  
24 also implicates Petitioners’ misplaced reliance on existing water quality standards, especially D-1641.  
25 Tunnel proponents’ speculative projections about future compliance with D-1641 and other water  
26 quality standards in no way meet Petitioners’ burden of proving that the proposed project will not  
27 result in injury to legal users of water. Even if such speculation about compliance with D-1641 were  
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1 accepted, compliance with D-1641 is not a proxy for establishing no “injury” under Water Code §  
2 1702. The two are separate and distinct; Petitioners’ attempt to use a projected compliance with D-  
3 1641 as a stand-in for proof of the relevant and broader requirement – no “injury” to legal users of  
4 water – fails both as a practical matter and as a matter of law.

6 **Issue 3: Should the Petition for Change be Denied or Dismissed Because of the Lack of a**  
7 **Corollary Petition for Extension of Time?**


8 The San Joaquin County/LAND/Islands, Inc. Protestants believe the legal and practical  
9 consequences of the Petitioners’ failure to submit a corollary petition for extension of time could also  
10 be appropriately addressed in closing briefs at the conclusion of the Part 1 rebuttal and sur-rebuttal  
11 cases, though, as noted, it could also be addressed at the end of Part 2.

13 **III. CONCLUSION**

14 The San Joaquin County/LAND/Islands, Inc. Protestants thank the Hearing Officers for their  
15 consideration of the above comments and suggestions regarding Part 1 closing briefs.

16 Dated: January 30, 2017

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19 By:   
THOMAS H. KEELING

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Water and Power Authority

23 Dated: January 30, 2017

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Diablo Vineyards and Brad Lange/DWLC

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Stillwater Orchards/DWLC

Dated: January 30, 2017

HANSON BRIDGETT LLP

By:   
MICHAEL J. VAN ZANDT  
Attorneys for Protestants Islands, Inc.



**STATEMENT OF SERVICE**

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

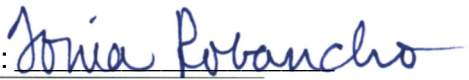
I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**JOINT PROPOSAL OF THE SAN JOAQUIN COUNTY PROTESTANTS, LAND, ET AL. PROTESTANTS, AND ISLANDS, INC. RE: ISSUES APPROPRIATELY ADDRESSED IN CLOSING BRIEFS AT THE CONCLUSION OF THE PART 1 REBUTTAL CASES AND SUR-REBUTTAL PRESENTATIONS**

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 January 13, 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)

I certify that the foregoing is true and correct and that this document was executed on January 30, 2017.

Signature:   
Name: Tonia Robancho  
Title: Legal Assistant for Thomas H. Keeling  
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Party/Affiliation:  
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