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7 Party to the WaterFix Hearing  
8 Principal, California Water Research

9  
10 **BEFORE THE**  
11 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

19 RESPONSE TO CALIFORNIA  
20 DEPARTMENT OF WATER  
21 RESOURCES' MASTER OBJECTIONS TO  
22 PROTESTANTS' CASES-IN-CHIEF  
23 COLLECTIVELY

24 Deirdre Des Jardins, principal at California Water Research, ("California Water  
25 Research"), hereby provides this response to "California Department Of Water Resources'  
26 Master Objections To Protestants' Cases-In-Chief Collectively."

27 In Part 1A of the Hearing, the Department of Water Resources' ("DWR")  
28 "Master Response to Objections Made by Protestants Collectively," filed on July 20, 2016,  
clearly stated that this is not a civil or criminal trial, nor even a formal adjudicative hearing  
(5:15-22.) Yet in Part 1B of the Hearing, DWR has submitted objections to almost all exhibits  
submitted by the protestants, based on standards used in civil trials. Further, the objections  
themselves are broad, unsupported, and overly general. Many objections simply state that  
exhibits lack relevance and foundation. The statements amount to a blanket request that the  
Hearing Officers either exclude all of protestants' exhibits, or discount them as hearsay under

1 Govt. Code § 11513(d). Responding to these overly broad objections has been a significant  
2 burden on the protestants. California Water Research notes that in the Rialto Perchlorate  
3 Contamination matter, the Hearing Chair ruled:

4 As Hearing Officer, I have flexibility to admit evidence and make the determination as to its  
5 credibility. Similarly, I will also make all determinations as to its relevancy to the issues in  
6 the proceedings. There is no requirement under State Water Board regulations or Chapter 4.5  
of the APA that a proper triallike foundation be made for exhibits and evidence.

7 (Tam M. Doduc, Final Ruling on Outstanding Motions in the Board’s A-1824 – Rialto  
8 Perchlorate Contamination matter, Aug. 11, 2007 10:1.)<sup>1</sup>

9 The Department of Water Resources referred to the August 11, 2007 Rialto Perchlorate Matter  
10 ruling in a filing in the Byron-Bethany Irrigation District ACL Hearing.<sup>2</sup>

11 DWR seeks to exclude all documents that are not referenced in testimony by protestants’  
12 expert witnesses, on the basis that the documents may constitute “surprise testimony”:

13 It is the policy of the Water Board to discourage the introduction of surprise  
14 testimony and exhibits. (Cal. Code Regs., title 23, section 648.4(a).) The incorporation of  
15 general testimony of unknown relevance constitutes impermissible surprise testimony  
16 because it is impossible to determine exactly which parts of the incorporated testimony  
17 the witness actually intends to use as direct testimony, and what additional conclusions  
are made for purposes of this hearing. (...)This has created an undue burden on  
18 Petitioners and those exhibits not specifically identified and relied upon in corresponding  
19 testimony should be excluded from the record.

20 (Master Objections to Protestants, 19:5.)

21 This argument is meritless. Documents are not testimony, but do offer information that is  
22 helpful for fact-finding in the hearing. Given the volume and complexity of Petitioners’  
23 submitted exhibits,<sup>3</sup> it would be manifestly unjust if protestants were not allowed to submit

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24 <sup>1</sup> Available at  
25 [http://www.swrcb.ca.gov/public\\_notices/petitions/water\\_quality/docs/a1824rialto/a1824\\_final\\_ruling\\_motions\\_081107.pdf](http://www.swrcb.ca.gov/public_notices/petitions/water_quality/docs/a1824rialto/a1824_final_ruling_motions_081107.pdf).

26 <sup>2</sup>

27 <sup>3</sup> Petitioners’ two CEQA/NEPA documents alone consist of over 40,000 pages for the BDCP  
28 Draft EIR/EIS, and over 48,000 pages for the WaterFix Recirculated Draft EIR/EIS.<sup>3</sup> There are  
also tens of thousands of pages of documents that were originally submitted as part of  
Petitioners’ cases in chief on May 31, 2016.

1 responsive documents. This is particularly important given that the Petitioners are continuing to  
2 develop the information supporting the Petition during the Hearing process.

3 An important category of exhibits are those that have been introduced in cross-  
4 examination and elicited testimony. The testimony that documents elicited on cross-examination  
5 is in the Hearing record, and so by definition those exhibits are relevant.

6 Petitioners have raised a large number of technical objections to exhibits submitted by  
7 protestants. California Water research notes that formal authentication of documents is not  
8 required under the Board's adopted regulations, (Cal. Code Regs. Tit. 23 § 648.5.1, Govt. Code §  
9 11513 (c)). It has been the practice of the Board in past hearings to admit public agency reports  
10 and records, scientific journal publications, newspapers and other articles, and published maps  
11 on prima facie considerations.<sup>4</sup> For this reason, these categories of documents should be  
12 generally admitted into evidence without requiring further foundation.

13 To the extent that testimony is required to authenticate other kinds of exhibits that were  
14 introduced on cross-examination, California Water Research notes that the Hearing Officers'  
15 August 5, 2016 Hearing Ruling stated that protestants may submit exhibits introduced in cross-  
16 examination after introduction during cross-examination, and if they are not admitted then, in  
17 their case in chief, and in rebuttal (p. 2.)<sup>5</sup> Since this was the procedural ruling at the time that  
18 protestants were required to submit their cases in chief, California Water Research requests that  
19 it not be changed retroactively.

20 California Water Research provides general argument on foundation for the following  
21 categories of documents. The general arguments are numbered and are referenced with respect  
22 to California Water Research's exhibits in the table included in Appendix A.

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24 \_\_\_\_\_  
25 <sup>4</sup> The Department of Water Resources, apparently relying on this practice, responded to a  
subpoena by PCFFA/IFR in part with links to DWR's and USBR's website to download  
documents.

26 <sup>5</sup> The Hearing Officers August 18, 2016 oral ruling on protestants' requests for extension of time  
27 to present cases in chief also stated that information elicited in cross-examination could be  
addressed in rebuttal testimony.

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4 **1. Public agency publications & records**

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6 In California courts, Evidence Code § 1280 provides that statements in official records of  
7 a public agency are not hearsay, as long as the following conditions are met:

- 8 (a) The writing was made by and within the scope of duty of a public employee.  
9 (b) The writing was made at or near the time of the act, condition, or event.  
10 (c) The sources of information and method and time of preparation were such as to  
11 indicate its trustworthiness.

12 Thus statements in official publications or records of public agencies are not hearsay,  
13 under Govt. Code 11513(b), and the Board should disregard objections to such reports as lacking  
14 foundation or testimony by the public agencies.

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16 **2. Scientific Journal Articles**

17 DWR objects to submissions of scientific journal articles as lacking foundation or  
18 relevance. Scientific journal articles have been found to be self-authenticating by federal courts  
19 under Rule 902(6). They have also been accepted on prima facie considerations for past Board  
20 proceedings.

21 To the extent that scientific journal articles, technical reports, or other publications of are  
22 referenced in testimony by expert witnesses, they are part of the information supporting the  
23 expert's opinion, and would be admissible in civil trials. California law allows an expert to base  
24 his or her opinion upon technical reports and scientific literature, provided the matter is "of a  
25 type that reasonably may be relied upon by an expert in forming an opinion upon the subject to  
26 which his testimony relates." (Evid. Code, § 801(b); *People v. Bui* (2001) 86 Ca1.App.4th 1187,  
27 1196.) Furthermore, an objection on the grounds that an expert has relied on inadmissible  
28 material to form an opinion (for example, hearsay) goes "only to the purpose for which the

1 challenged statements may be received. The correct ruling is not to exclude them...the trial court  
2 need only confirm that it is not accepting the challenged statements as proof of the matters  
3 asserted, but only as a foundation for the accompanying opinions." (Cole v. Town of Los Gatos  
4 (2012) 205 Cal.App.4th 749, 766.)

5 California law also provides that other party's experts to be cross-examined on technical  
6 reports and scientific literature that are the foundation for their testimony. Evidence Code §  
7 721(b)(1) and (3) allows such cross-examination if the documents were either referenced or  
8 consulted by the expert, or were recognized as a "reliable authority," either by the expert or by  
9 other experts in the proceeding. The Hearing Chair has allowed this use in the hearing, and such  
10 documents, having been allowed in cross-examination, should also be accepted as evidence so  
11 that the Hearing Record is complete.<sup>6</sup>

12 In sum, scientific journal articles, technical reports, and other publications are both  
13 relevant and admissible if they were either referenced in testimony by a party's expert witnesses,  
14 or introduced in cross-examination of another party's expert witnesses. All such documents  
15 should be admitted when submitted by the parties.

### 16 **3. Newspapers and other periodicals**

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18 Information from newspapers and other periodicals can be relevant to provide  
19 contemporaneous accounts. To the extent they have been introduced in direct testimony or on  
20 cross-examination, or will be discussed on rebuttal, they are relevant to the proceeding and  
21 should be admitted. They have also been accepted by the Board in past proceedings on prima  
22 facie considerations.

### 23 **4. Prior statements, including letters and presentations**

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27 <sup>6</sup> This is especially important given the instructions by the Hearing Chair to not read the relevant excerpts from the  
technical reports or scientific literature on cross-examination. (Tr August 26, 2016, xx:xx.)

1 Introduction of prior statements during cross-examination is part of a party's right to  
2 impeachment under Govt Code § 11513. To the extent that witnesses recognized the prior  
3 statement, letter or presentation, it should not require further authentication. Under California  
4 Evidence Code § 1414 (a), the statement, letter, or presentation is not hearsay if it has been  
5 recognized by the witness. Such exhibits should be admitted.

### 6 **5. Published Maps**

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8 Testimony of some protestants relies on published maps or charts. To the extent that the  
9 maps or charts are published by a public agency, they are admissible as publications or records  
10 of the agency. Maps or charts published by other entities are also admitted by courts under  
11 California Evidence Code § 1341 without supporting testimony, as long as they are made by  
12 "persons indifferent between the parties," and are "offered to prove facts of general notoriety and  
13 interest." Such documents have normally been accepted by the Board under prima facie  
14 considerations, and should be admitted.

### 15 **6. Official Data**

16 Protestants have relied on data from the sensors in the Delta, as distributed by the  
17 California Data Exchange Center, and other official data published by the Department of Water  
18 Resources, for testimony, and it has also been introduced in cross-examination. The Department  
19 of Water Resources has also referred to data from the U.S. Geological Survey sensors in Exhibit  
20 DWR-324, and it has also been introduced in cross-examination. To the extent that such data is  
21 presented without further manipulation, it would be admissible as Official Records, addressed in  
22 section (1), or under Evidence Code § 1340.

### 23 **7. Board orders, decisions, and other records**

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25 Board orders and decisions, and rulings in prior hearings are suitable for acceptance by official  
26 notice (Cal. Code Regs. Tit. 23 § 648.2). Other records are also acceptable for acceptance into  
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1 evidence by reference. (Cal. Code Regs. Tit. 23 § 648.3.) To the extent that the records are  
2 referenced in testimony, were introduced in cross-examination, or are offered to provide facts of  
3 general relevance to the hearing, they can and should be admitted. Admission should also be  
4 allowed to rebut filings by an adverse party who referenced the order, decision, or ruling.  
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6 Respectfully submitted,  
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10 Deirdre Des Jardins  
11 Principal, California Water Research  
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2 **STATEMENT OF SERVICE**

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

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

9 **Response to DWR's Master Objections**

10 to be served **by Electronic Mail** (email) and **by reference to the FTP site** per the  
11 Hearing Rulings, in parts due to server limitations, upon the parties listed in Table 1 of  
12 the **Current Service List** for the California WaterFix Petition Hearing, dated November  
13 15, 2016, posted by the State Water Resources Control Board at  
14 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)  
15 [waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

16 I certify that the foregoing is true and correct and that this document was  
17 executed on December 12, 2016.

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Signature:



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