

1 THOMAS H. KEELING (SBN 114979)
FREEMAN FIRM
2 1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207
3 Telephone: (209) 474-1818
Facsimile: (209) 474-1245
4 Email: tkeeling@freemanfirm.com

5 J. MARK MYLES (SBN 200823)
Office of the County Counsel
6 County of San Joaquin
7 44 N. San Joaquin Street, Suite 679
Stockton, CA 95202-2931
8 Telephone: (209) 468-2980
Facsimile: (209) 468-0315
9 Email: jmyles@sigov.org

10 Attorneys for Protestants County of San Joaquin,
11 San Joaquin County Flood Control and
Water Conservation District, and
12 Mokelumne River Water and Power Authority

13 [ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

14
15 **BEFORE THE**
16 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

17 HEARING IN THE MATTER OF
18 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
19 BUREAU OF RECLAMATION
20 REQUEST FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
21 FIX

**RESPONSE OF THE SAN JOAQUIN
COUNTY PROTESTANTS AND THE
LOCAL AGENCIES OF THE NORTH
DELTA, ET AL. TO CALIFORNIA
DEPARTMENT OF WATER RESOURCES'
OBJECTIONS TO EXHIBITS SUBMITTED
IN SUPPORT OF PROTESTANTS'
CASES-IN-CHIEF**

1 JENNIFER SPALETTA (SBN 200032)
2 SPALETTA LAW PC
3 P.O. BOX 2660
4 LODI, CA 95241
5 Telephone: (209) 224-5568
6 Facsimile: (209) 224-5589
7 Email: jennifer@spalettalaw.com

8 Attorneys for Protestants County of San Joaquin,
9 San Joaquin County Flood Control and
10 Water Conservation District, Mokelumne River
11 Water and Power Authority and the North San Joaquin Water
12 Conservation District

13 OSHA R. MESERVE (SBN 204240)
14 SOLURI MESERVE, A LAW CORPORATION
15 1010 F Street, Suite 100
16 Sacramento, CA 95814
17 Telephone: (916) 455-7300
18 Facsimile: (916) 244-7300
19 Email: osha@semlawyers.com

20 Attorneys for Protestants
21 Local Agencies of the North Delta
22 Bogle Vineyards / Delta Watershed Landowner Coalition
23 Diablo Vineyards and Brad Lange / Delta Watershed Landowner Coalition
24 Stillwater Orchards / Delta Watershed Landowner Coalition
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1 **I. INTRODUCTION**

2 The California Department of Water Resources (“DWR”) asserts that a large number of
3 exhibits submitted by the County of San Joaquin, the San Joaquin County Flood Control and
4 Water Conservation District, and Mokelumne River Water and Power Authority (collectively, the
5 “San Joaquin County Protestants”¹) and by the Local Agencies of the North Delta, Bogle
6 Vineyards/Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange/Delta
7 Watershed Landowner Coalition, Stillwater Orchards/Delta Watershed Landowner Coalition
8 (collectively, “LAND, et al.”²) and Islands, Inc. are irrelevant and/or lack foundation. Based
9 thereon, DWR seeks to exclude those exhibits. (DWR Objections to Exhibits, etc., dated
10 12/30/16 [“DWR Objections”].)

11 As a preliminary matter, with respect to many of the challenged exhibits, DWR has not
12 identified with any specificity the portions of the challenged documents that it contends lack
13 foundation or contain irrelevant information.

14 Further, the challenged exhibits are all relevant to Part 1 of the WaterFix Hearing, and
15 all were supported by adequate foundational testimony under the rules governing this
16 proceeding. All were relied on by the witnesses, were part of the direct testimony of the
17 witnesses and/or incorporated into the witnesses’ written and oral summaries of testimony, and
18 submitted in compliance with the Hearing Officers’ procedural requirements for the presentation
19 of testimony in this Hearing. All were subject to cross-examination during the course of the
20 witnesses’ oral summaries of testimony.

21 Insofar as DWR’s Objections challenge the exhibits on foundational grounds, the
22 Objections go to the weight of the evidence, not to admissibility.

23 For these reasons, the San Joaquin County Protestants, LAND, et al., and Islands, Inc.
24 respectfully request that the Hearing Officers overrule the DWR Objections in their entirety.

25 **II. BACKGROUND**

26 The Hearing Notice issued on October 30, 2015 (“Notice”) directed the parties to
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¹ The San Joaquin County Protestants was designated Group 24 in Part 1 of the WaterFix Hearing.

² The LAND, et al. protestants, and Islands, Inc., were designated as Groups 19 and 20.

1 submit their “testimony on factual or other evidentiary matters” in writing, including sufficient
2 information in support of technical evidence to “clearly identify and explain the logic,
3 assumptions, development, and operation of the studies or models.” (Notice, Enclosure D, at
4 33.) Parties were directed to provide PowerPoint presentations or other visual aids that
5 witnesses intended to use while summarizing their testimony with their other exhibits, together
6 with a written summary of each witness’s direct testimony. (January 15, 2016 Ruling Letter Re:
7 Service List of Participants, List of Interested Parties, and Pre-Hearing Conference Agenda, pp.
8 5-6.) The Notice prohibited parties from reading their written testimony directly into the record,
9 directing them, instead, to use their time on direct examination “to summarize or emphasize
10 their written testimony.” (Notice, Enclosure D, at 35.) The Notice confirmed that “written
11 testimony affirmed by the witness is direct testimony.” (*Ibid.*)

12 In compliance with the directions set forth in the Notice and other rulings and orders of
13 the Hearing Officers, on September 2, 2016 the San Joaquin County Protestants and LAND, et
14 al. filed and served written summaries of testimony and statements of qualifications for their
15 expert and non-expert witnesses, PowerPoint presentations to be used in conjunction with the
16 witnesses’ oral testimony, and a number of exhibits, some of which provided additional
17 evidentiary support for the testimony and some of which constituted demonstrative evidence,
18 i.e., material prepared to illustrate and explain the testimony rather than as underlying
19 evidentiary support.

20 Direct and cross-examination of witnesses on the Salinity Injuries and Ryer Island Focus
21 Panel, the Physical Injuries Focus Panel, and the San Joaquin County and Harmful Algal Bloom
22 Focus Panel took place in November, 2016. At the direction of the Hearing Officers, the San
23 Joaquin County Protestants and LAND et al. later timely offered into evidence all of the
24 testimony and exhibits submitted in connection with those Focus Panels.

25 **DWR’s Objections**

26 On December 30, 2016, DWR filed written objections to the following exhibits on the
27 following grounds:
28

	Exhibit	Objection
1		
2	LAND-5 Map – Bogle Water Rights Injuries from CWF Tunnels	Relevance; Foundation; Not Utilized in Testimony
3	LAND-6 Map – LangeTwins Water Rights Injuries from CWF Tunnels	Relevance; Foundation; Not Utilized in Testimony
4	LAND-50 Russell Van Loben Sels Water Rights associated with S021406	Relevance; Foundation; Not Utilized in Testimony
5	LAND-51 Warren Bogle water rights as described in the protest filed on January 5, 2016	Relevance; Foundation; Not Utilized in Testimony
6	LAND-52 Daniel Wilson water rights as described in the protest filed on January 5, 2016	Relevance; Foundation; Not Utilized in Testimony
7	LAND-53 Richard Elliot water rights as described in the protest filed on January 5, 2016	Relevance; Foundation; Not Utilized in Testimony
8	LAND-54 Diablo Vineyards water rights as described in the protest filed on January 5, 2016	Relevance; Foundation; Not Utilized in Testimony
9	LAND-55 LAND member agency property owners' water rights as described in the protest filed on January 5, 2016	Relevance; Foundation
10	LAND-58 Map- Sacramento County Wells in Vicinity of Tunnels	Foundation
11	LAND-59 Map – San Joaquin County Wells in Vicinity of Tunnels	Foundation
12	LAND-66 2002, CCF DWR Correspondence	Foundation
13	II-04 2014-7-28 SWRCB Ltr re: Water Quality Response Plan	Relevance; Foundation
14	II-26 Historical Freshwater & Salinity Conditions Report Highlights, Contra Costa County Water District 2009	Foundation
15	II-27 Historical Freshwater & Salinity Conditions. Contra Costa County Water District, 2010	Foundation
16	II-33 Bulletin 76-Appendix-Salinity__1962 Mod	Relevance; Foundation
17	SJC-17 SWAMP Freshwater CyanoHABs Program	Relevance
18	SJC-18 CA Dept of Public Health Blue-Green Algae	Relevance
19	SJC-19 June 6, 2016 Email from CVWB	Relevance
20	SJC-20 June 6, 2016 Email from Environmental Health Dept.	Relevance
21	SJC-21 June 6, 2016 Email from CVWB to EHD	Relevance
22	SJC-22 June 7, 2016 Email from CVWB to Lisa Medina	Relevance
23	SJC-23 June 7, 2016 Email from CVWB	Relevance
24	SJC-24 June 8, 2016 Email from EHD to CVWB Press Release	Relevance
25	SJC-25 June 8, 2016 Email from CVWB to EHD re Dog Deaths	Relevance
26	SJC-26 June 17, 2016 Email from SVWB to EHD re Additional Info	Relevance
27	SJC-27 June 22, 2016 Email from CVWB to EHD re CDC Website	Relevance
28	SJC-28 July 6, 2016 Email from CVWB to EHD	Relevance
	SJC-29 July 8, 2016 Email from CVWB to EHD	Relevance

1	SJC-30 July 28, 2016 from CVWB to EHD re Microcystis Update	Relevance
2	SJC-31 July 28, 2016 Email from EHD to CVWB	Relevance
3	SJC-32 August 3, 2016 Email from CVWB, with attachments	Relevance
4	SJC-33 August 4, 2016 Email from CVWB	Relevance
5	SJC-34 August 11, 2016 CA Water Quality Monitoring Council Email to EHD	Relevance
6	SJC-35 August 16, 2016 CA Water Quality Monitoring Council Web Portal	Relevance
7	SJC-36 August 17, 2016 Email from CVWB to EHD	Relevance
8	SJC-37 August 22, 2016 Email from CVWB to EHD	Relevance
9	SJC-38 August 24, 2016 CAHAN Health Notification	Relevance
9	SJC-39 August 29, 2016 Email from CVWB to EHD	Relevance

10 **III. STANDARDS APPLICABLE TO THIS PROCEEDING**

11 This administrative hearing is governed by Title 23 of the California Code of Regulations,
12 § 648 et seq.; Chapter 4.5 of the Administrative Procedure Act (commencing with Gov. Code §
13 11400); Evidence Code §§ 801-805; and Gov. Code § 11513, (Cal. Code Regs, tit. 23, § 648,
14 subd. (b).) As DWR itself reminded this Board earlier in this proceeding:

15 This is not a civil or criminal trial, nor even a formal adjudicative hearing under
16 Chapter 5 of the Administrative Procedures Act. The Board is not required to
17 conduct adjudicative hearings according to the technical rules relating to evidence
18 and witnesses in trial court (Cal. Gov. Code, § 11513, subd.(c)). **Instead, “[a]ny
19 relevant evidence will be admitted if it is the sort of evidence on which
20 responsible persons are accustomed to rely in the conduct of serious affairs,
21 regardless of the existence of any common law or statutory rule which might
22 make improper the admission of the evidence over objection in civil actions.”**
23 (*Id.*)

24 (DWR’s Master Responses to Objections, filed herein on July 20, 2016, at p. 5, emphasis
25 added; see, also, p. 17 [DWR explaining: “The Board is not bound to conduct this evidentiary
26 hearing using technical rules related to evidence and witnesses. . . . Any relevant evidence is
27 admissible as long as it is the sort of evidence on which responsible persons are accustomed
28 to rely in the conduct of serious affairs.” (Citations omitted.)].)

29 The Board has recognized that the Gov. Code § 11513, subd. (c) standard is more
30 permissive than that applied in civil actions, observing that “hearing officers generally prefer to
31 admit evidence that would be admissible under the State Water Board’s regulations, using the
32 more liberal standards applicable to administrative proceedings.” (SWRCB Ruling on Joint

1 Objections to Truckee-Carson Irrigation District's Exhibits in the Truckee River Hearing (Aug.
2 11, 2010, p. 1).)

3 DWR underscored the relaxed standard applicable in this proceeding. Said DWR:

4 The goal of any adjudicative hearing is to gain information without undue expense
5 to the parties, and thus the Hearing Officers may "exclude evidence is its probative
6 value is substantially outweighed by the probability that its admission will
necessitate undue consumption of time." ([Cal. Gov. Code], § 11513, subd.(f)).

7 (DWR's Master Responses to Objections, filed herein on July 20, 2016, at pp. 5-6.)

8 In a general response to protestants' objections based on lack of foundation, DWR
9 explained:

10 The Protestants' expert witness objections are barely-concealed attacks on the
weight of DWR's testimony rather than on the admissibility of the testimony or the
11 qualifications of the expert. The question here is whether the testimony should
be admitted at all, and under the standards governing admissibility in these
12 proceedings, all of DWR's written testimony and exhibits should be admitted. The
parties will have ample opportunity to argue the weight of the evidence.

13 (DWR's Master Responses to Objections, filed herein on July 20, 2016, at p. 11.) DWR's point,
14 in short, was that the foundational objections to its testimony and exhibits actually went to the
15 weight of the evidence in this proceeding, not to admissibility.

16 The same is true of the foundational objections DWR has asserted against the testimony
17 and exhibits submitted by the San Joaquin County Protestants and LAND, et al.

18 Board orders and decisions, as well as other records and rulings in prior hearings, may
19 be accepted into evidence either by reference or by official notice. (Cal. Code Regs. Tit. 23, §§
20 648.2 and 648.3.)

21 Further, formal authentication of documents is not required under the Board's adopted
22 regulations. (Cal. Code Regs. Tit. 23 § 648.5.1, Gov. Code § 11513(c).) The Board's practice
23 in prior hearings has been to admit public agency reports and records, scientific journal
24 publications, and publish maps based on prima facie considerations.

25 **IV. ARGUMENT**

26 The challenged exhibits were submitted as part of the written testimony in this Hearing.
27 At the direction of the Hearing Officers, that testimony was summarized during the witnesses'
28 oral presentations. DWR's Objections, submitted long after the witnesses presented their

1 testimony, are deficient in that they lack specificity and are not timely. Substantively, the
2 Objections fail because all of the challenged exhibits are relevant to issues within the scope of
3 Part 1 and/or because sufficient foundational testimony was presented in compliance with the
4 rules and practices governing this proceeding.

5 **A. The Objections Should Be Overruled Because They Lack the Required**
6 **Specificity and Are Not Timely.**

7 General evidentiary objections such of those submitted by DWR are not sufficient as a
8 basis for excluding evidence “without specific identification of the evidence to which the party
9 objects and the reason for that objection.” (SWRCB Order WR 2012-0012, p. 11, fn. 28.) With
10 the exception of its objections to Exhibits II-26, II-27, LAND-58 and LAND-59 – all of which are
11 addressed in sections IV. E and IV. F, below – DWR failed to specify the grounds for its
12 relevancy and foundational objections with sufficient particularity to enable the protestants to
13 respond with any particularity.

14 DWR’s objections are also untimely. DWR had ample opportunity to test the
15 admissibility, validity, and credibility of these exhibits. The objections, insofar as they seek to
16 exclude evidence, should be overruled for that reason as well.

17 **B. Under Government Code Section 11513, DWR’s Objections Should be**
18 **Overruled.**

19 Government Code § 11513, sub. (c) unambiguously provides: where evidence is
20 “relevant and such as could be relied on by responsible persons,” there exists a “statutory
21 mandate” that it be admitted. (*Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573, 582.)
22 All of the exhibits DWR challenges – maps, reports, scientific studies, communications between
23 the County and State entities, etc. – are plainly admissible under Section 11513 (see discussion
24 of the Section 11513 standards, *supra*).

25 Insofar as any question may exist concerning foundational information – i.e., indicia of
26 reliability either on the face of the exhibit or from other sources – DWR’s objections go to the
27 weight of the evidence, not to its admissibility.

28 ///

1 **C. The Challenged Exhibits Are the Type of Materials Commonly and Properly**
2 **Relied Upon by Expert Witnesses.**

3 The exhibits at issue here were used in the witnesses' written and/or oral summaries of
4 testimony. The Hearing Officers have already considered and rejected a claim that exhibits
5 submitted by parties are not properly considered part of those parties' testimony. (See October
6 20, 2016 Hearing, at 00:57:37 through 00:100.)

7 The exhibits challenged by DWR were mainly introduced in support of expert opinion
8 testimony. Because an expert's opinion "is no better than the facts on which it is based" (*People*
9 *v. Gardeley* (1996) 14 Cal.4th 605, 618), experts are allowed to testify to all the facts upon
10 which they base their opinions. (See *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324-
11 1325.)

12 Again, DWR's objections based on foundation go to the weight of the evidence, not to
13 its admissibility.

14 **D. DWR's Objections to the SJC Exhibits Supporting Testimony About Harmful**
15 **Algal Blooms in San Joaquin County are Without Merit.**

16 DWR objected to many SJC exhibits on the ground of relevance. "Relevance" means
17 that the evidence has a tendency in reason to prove or disprove any disputed fact of
18 consequence to the determination of the action. (Evid. Code § 210.) To be relevant in this
19 proceeding, the evidence must relate to some matter raised in the Petition, in the Protests, or
20 to some issue pertinent to this Board's decision-making as a matter of law.

21 San Joaquin County's case-in-chief included a Focus Panel on the problem of Harmful
22 Algal Blooms ("HABs") and *microcystis* in San Joaquin County and the Delta generally, the
23 threat to humans and animals posed by the resulting neurotoxin, *microcystin*, and the effect of
24 the WaterFix project, as currently proposed, which will be to exacerbate the Delta water
25 conditions that promote the proliferation of HABs. Linda Turkatte, Director of the San Joaquin
26 County Environmental Health Department, testified about the County's public health and safety
27 efforts with respect to the growing problem of HABs in San Joaquin County. Erik Ringelberg,
28 an expert in watershed ecology and microbiology, then explained why the proposed project is

1 likely to exacerbate the conditions that promote development of HABs and the resulting
2 neurotoxin, *microcystin*.

3 In short, Ms. Turkatte’s HABs testimony, including all of the exhibits upon which it was
4 based, was directly relevant to the issues in Part 1 of this Hearing (injury to legal users of water)
5 and provided essential foundational and contextual support for the equally relevant expert
6 testimony of Erik Ringelberg. Given the obvious relevance of the HABs Panel’s testimony to
7 the core Part 1 issue – whether the proposed project meets the “no injury” test – the San Joaquin
8 County Protestants were surprised when DWR objected, on the basis of irrelevance, to Ms.
9 Turkatte’s testimony, focusing on the many exhibits that constitute the substantive core of her
10 testimony.

11 Virtually all of the exhibits DWR now asserts are “irrelevant” are communications
12 between the San Joaquin County Environmental Health Department and such State entities as
13 the California Cyanobacteria and Harmful Algal Bloom (CCHAB) Network, HABs alerts and
14 HABs public health-related information from the State and County. DWR complains that these
15 exhibits do not address the WaterFix itself or impacts of the proposed project.

16 The objection is devoid of merit. Ms. Turkatte’s testimony focused on communications
17 between the State of California and San Joaquin County concerning blue-green algae,
18 cyanobacteria and *microcystis*, and San Joaquin County’s response to HABs, the incidence of
19 which increased alarmingly in 2016. As reflected in statements from the State itself and in the
20 County’s public health outreach efforts, HABs in the Delta present a significant hazard to
21 humans in the Delta, as well as to pets and fisheries.

22 Ms. Turkatte’s testimony, submitted as a key part of the San Joaquin County Protestants’
23 Delta HABs case, was one of the predicates for the testimony of Erik Ringelberg, the watershed
24 ecology and microbiology expert who explained why the proposed project is likely to exacerbate
25 the conditions that promote development of HABs and the resulting neurotoxin.

26 The State’s alerts and communications to the County elucidate and highlight the threat
27 to humans and human users of water posed by HABs. (See, e.g., SJC-018, p. 1 [noting the
28 risk HABs pose to humans], SJC-025, pp. 7, 8-25 [concerning measures by CDC to address

1 HABs concerns]; SJC-027, p. 1 [CDC launches reporting system for harmful algal blooms];
2 SJC-028, pp. 7-8 [re: CDC website on HABs]; SJC-033, p. 11 [regarding toxins produced by
3 algae blooms; SJC-035, pp. 2 and 4 [threat to human health posed by cyanobacteria and
4 harmful algae and symptoms of exposure, including rashes and allergic reactions, liver damage
5 and even death; and noting that HABs present serious challenges to recreational water uses,
6 drinking water providers and water body managers].) As Ms. Turkatte explained, residents and
7 visitors in San Joaquin County use the Delta for fishing, swimming and a variety of recreational
8 activities, in addition to diversion of water for agricultural and Municipal and Industrial uses.
9 The Panel witnesses explained that HABs directly and adversely impact the continued use of
10 the waters of the Delta channels for these purposes; these are plainly proper issues to address
11 in Part 1, as they go directly to the question of injury to humans and human uses of water.

12 Ms. Turkatte's testimony, which included, and was organized around, the exhibits DWR
13 now objects to as irrelevant, was given as part of a Panel presentation focusing on the problem
14 of HABs in the Delta and the likely exacerbation of the current HABs problem by the proposed
15 WaterFix project. In this context, DWR's objections to Exhibits SJC-16 through SJC-39 are
16 plainly misplaced, without merit, and should be overruled.

17 **E. DWR's Objections to the LAND Exhibits Supporting Testimony of Witnesses**
18 **on the Physical Injuries Focus Panel are Without Merit.**

19 DWR objected to LAND exhibits submitted in support of testimony from witnesses on the
20 Physical Injuries Focus Panel. These objections are also without merit.

21 DWR's foundational objections are baseless. Each witness for LAND, et al. compiled a
22 list of references upon which they relied in forming their opinions, and those materials were
23 properly included as exhibits to assist the parties and the Hearing Officers. As reference
24 material for the witnesses' testimony, these exhibits are plainly relevant to the proceedings.
25 Further, with very few exceptions, DWR has not explained why these exhibits should be
26 excluded on foundational grounds. Under the Evidence Code, the opinion testimony of an
27 expert may be based on matter personally perceived by or known to the expert or any matter
28 "made known" to the expert, provided such matter is "of a type that reasonably may be relied
upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid.
Code section 801, subd. (b); *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.)

1 DWR objects to LAND-05, LAND-06, LAND-50, LAND-51, LAND-52, LAND-53, LAND-
2 54 and LAND-55 -- all of which address protestants' water rights and show associated locations
3 -- on both foundational grounds and relevance. However, LAND-50, LAND-51, LAND-52, and
4 LAND-55 are all descriptions of water rights contained in the LAND, et al. protests, submitted
5 January 4, 2016. These water rights are also included on a list of potentially injured water rights
6 that DWR attached as Exhibit C to its September 15, 2015 Addendum to its August 25, 2015
7 Petition, thereby confirming their relevance to this proceeding. LAND-5 and LAND-6 were also
8 submitted as part of those protests as maps of the protestants' water rights diversions.

9 Further, Exhibits LAND-50-55 were submitted in this proceeding expressly by reference
10 to 23 CCR § 648.3, and, based thereon, are plainly the type of evidence this Board would
11 normally admit under the standards established by Gov. Code § 11513(b) and prior rulings of
12 the Board.

13 Given the focus of Part 1 on injuries to legal users of water and holders of water rights,
14 the suggestion that the existence and location of protestants' water rights are somehow
15 "irrelevant" is perplexing and absurd.

16 DWR also objects to LAND-58 and LAND 59 on the ground that these maps of
17 Sacramento County and San Joaquin County well sites in the vicinity of the proposed tunnels
18 lack foundation. Mr. Tootle, who testified at length about the physical injuries of the project,
19 including injury to groundwater flows and related private and public facilities, did not prepare
20 these maps or independently verify the locations. However, based on his extensive experience
21 with such matters as groundwater issues in the Delta, Mr. Tootle decided that these maps –
22 prepared by sources he considered reliable -- manifest sufficient indicia of reliability to support
23 a small portion of his testimony. Given the latitude afforded expert witnesses with respect to
24 secondary sources, as well as the relaxed evidentiary standards governing this Hearing under
25 Gov. Code § 11513, that is sufficient to withstand an objection based on lack of foundation. To
26 the extent any reservations about these exhibits or the testimony based thereon may remain,
27 those reservations again go to the weight to be accorded the exhibits, not to their admissibility.³

28 _____
³ With respect to such foundational and other objections, LAND, et al. and the San Joaquin

1 **F. DWR’s Objections to the Islands, Inc. (“II”) Exhibits Supporting Testimony**
2 **of Witnesses on the Salinity Injuries and Ryer Island Focus Panel are**
3 **Without Merit.**

4 DWR also objected to four “II” exhibits submitted in support of testimony from witnesses
5 on the Salinity Injuries and Ryer Island Focus Panel. These objections, too, are without merit
6 and should be overruled for the following reasons.

7 DWR also objects to II-26 and II-27 as lacking foundation. These are the 2009 and 2010
8 Contra Costa Water District reports and, as reports issued by a Delta-based public entity, on
9 their face they manifest sufficient indicia of reliability to withstand any objection based on an
10 alleged lack of foundation. DWR does not contend that they are irrelevant; DWR does not
11 contend that they are forged or manufactured documents; and DWR does not argue with the
12 substance of those reports. What DWR does say is that they have not been adequately
13 authenticated (i.e., that they may not be true and correct copies) and that there is no testimony
14 confirming that the reports “represent the current opinions of Contra Costa Water District” (that
15 entity having withdrawn from the WaterFix Hearing).

16 Whether or not the 2009 and 2010 Contra Costa Water District Reports represent the
17 “current opinion” of the District is of no consequence; that has nothing to do with the question
18 of whether there are sufficient indicia, either on the face of the documents or elsewhere in the
19 record taken as a whole, to give the Hearing Officers reasonable assurance that the documents
20 are what they purport to be.

21 If any question remains concerning the authenticity of the 2009 and 2010 Contra Costa
22 Water District Reports, notwithstanding the obvious indicia of genuineness, such questions
23 would go to the weight of testimony based on those reports, but not to whether they should be
24 admitted into evidence in this proceeding.

25 Exhibit II-33, the Salinity Appendix to Bulletin 76, is also a public document and, in fact,
26 a document generated by DWR itself. In 1960, when DWR embarked on the State Water
27 Project, it provided in Bulletin 76 a written interpretation of Water Code section 12200 et seq.,
28 confirming not only that the project had an obligation to provide water supply and salinity control

_____ County Protestants previously responded by way of their “Responses” filed herein on or about
November 2, 2016. That Response is hereby incorporated herein by this reference.

1 to the Delta, but also that the diversion of water upstream of the Delta (as proposed now in
2 WaterFix) would make this obligation more difficult. Said DWR in Bulletin 76:

3 Further increase in water use in areas tributary to the Delta will worsen the salinity
4 incursion problem and complicate the already complex water rights situation. To
5 maintain and expand the economy of the Delta, it will be necessary to provide an
6 adequate supply of good quality water and protect the lands from the effects of
7 salinity intrusion. In 1959 the State Legislature directed that *water shall not be
diverted from the Delta for use elsewhere unless adequate supplies for the Delta
are first provided.*

8 (December 1960 Bulletin 76, DWR Report to the Legislature pg. 12 – at l246). DWR’s
9 interpretation was confirmed by the judiciary in 1986. (*United States v. SWRCB* (1986) 182
10 Cal.App.3d 82, 139.) Against this backdrop, it comes as no surprise that DWR would now like
11 to disavow some of the fundamental admissions it made in the iterations of, and supplements
12 to, Bulletin 76. However, DWR has not explained why the Salinity Appendix to Bulletin 76 (1962
13 Mod.) lacks sufficient indicia of reliability to be admitted under the evidentiary rules and
14 standards applicable in this proceeding. Nor has DWR explained why salinity in the Delta, and
15 the history of State and local agencies’ research into and discussions of salinity in the Delta is
16 somehow “irrelevant” to the question of “injury” in Part 1.

17 Finally, DWR objects to II-4 – a July 28, 2004 letter from the SWRCB itself (Division of
18 Water Rights) to DWR and Reclamation re: “Water Quality Response Plan Pursuant to Decision
19 1641” on the grounds of relevance and lack of foundation. Merely to restate these objections
20 to II-4 is to debunk them. Does DWR seriously contend that this document – a public document
21 from the SWRCB itself to DWR itself – lacks sufficient facial indicia of reliability to withstand a
22 foundational objection? No.

23 Does DWR explain why this document is not admissible in the context of this proceeding,
24 in which, under Cal. Gov. Code, § 11513, subd.(c), “[a]ny relevant evidence will be admitted if
25 it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of
26 serious affairs, regardless of the existence of any common law or statutory rule which might
27 make improper the admission of the evidence over objection in civil actions”? No.
28

1 And does DWR – which has based much of its own case on D-1641 and water quality
2 compliance based on D-1641 -- even attempt to explain why this letter from the SWRCB itself
3 concerning an application of D-1641 to water quality issues is somehow “irrelevant”? No.

4 In short, DWR’s objections to the Islands Inc. exhibits are as lacking in merit as its
5 objections to the SJC and LAND exhibits.


6 **V. CONCLUSION**

7 In sum, the DWR Objections lack the required specificity and are untimely. The
8 challenged exhibits are all relevant – indeed, *obviously* relevant -- to matters within the scope
9 of Part 1. DWR’s foundational objections also lack merit for the reasons set forth herein. To
10 the extent that any foundational questions remain, however, DWR’s objections go to weight,
11 not admissibility. Accordingly, DWR’s Objections should be overruled.

12 Respectfully submitted,


13 Dated: January 6, 2017

FREEMAN FIRM,

14
15 By: 
16 THOMAS H. KEELING
17 Attorneys for Protestants County of San
18 Joaquin, San Joaquin County Flood Control
19 and Water Conservation District, and
Mokelumne River Water and Power
Authority

20 Dated: January 6, 2017

SPALETTA LAW PC,

21
22 By: 
23 JENNIFER L. SPALETTA
24 Attorneys for Protestants County of San
25 Joaquin, San Joaquin County Flood Control
26 and Water Conservation District, and
27 Mokelumne River Water and Power Authority
28 and North San Joaquin Water Conservation
District

1 Dated: January 6, 2017

2 **SOLURI MESERVE,**
3 **A LAW CORPORATION**

4 By: 

5 OSHA R. MESERVE
6 Attorneys for Protestants
7 Local Agencies of the North Delta,
8 Bogle Vineyards/DWLC,
9 Diablo Vineyards and Brad Lange/DWLC,
10 Stillwater Orchards/DWLC

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STATEMENT OF SERVICE

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

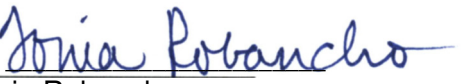
I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

RESPONSE OF THE SAN JOAQUIN COUNTY PROTESTANTS AND THE LOCAL AGENCIES OF THE NORTH DELTA, ET AL. TO SAN LUIS & DELTA-MENDOTA WATER AUTHORITY'S OBJECTIONS TO EXHIBITS SUBMITTED FOR ADMISSION BY GROUPS 18, 19, 21, 24, 27, 31, 32, 37, 38, 39 INTO EVIDENCE AT CLOSE OF PART 1B CASES IN CHIEF

RESPONSE OF THE SAN JOAQUIN COUNTY PROTESTANTS AND THE LOCAL AGENCIES OF THE NORTH DELTA, ET AL. TO CALIFORNIA DEPARTMENT OF WATER RESOURCES' OBJECTIONS TO EXHIBITS SUBMITTED IN SUPPORT OF PROTESTANTS' CASES-IN-CHIEF

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 November 15, 2016, 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

I certify that the foregoing is true and correct and that this document was executed on January 6, 2017.

Signature: 
Name: Tonia Robancho
Title: Legal Assistant for Thomas H. Keeling
Freeman Firm

Party/Affiliation:
County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority

Address:
Freeman Firm, A Professional Law Corporation
1818 Grand Canal Blvd., Suite 4, Stockton, CA 95207

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