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 9 RECLAMATION DISTRICT 2067,
 10 RECLAMATION DISTRICT 317,
 11 RECLAMATION DISTRICT 551,
 RECLAMATION DISTRICT 563,
 RECLAMATION DISTRICT 150,
 RECLAMATION DISTRICT 2098,
 RECLAMATION DISTRICT 800 (BYRON
 TRACT)

12 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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 14
 15 In the matter of Hearing re California
 16 WaterFix Petition for Change

**DELTA FLOOD CONTROL GROUP'S
 RESPONSE TO DEPARTMENT OF
 WATER RESOURCES' DECEMBER 30,
 2016 OBJECTION**

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1 The objection raised in the Department of Water Resources' ("DWR") December 30,
2 2016 Objection to Exhibits Submitted in Support of Protestants' Case-in-Chief ("Objection") to
3 the admission of Exhibits DFCG-8 through DFCG-11 are entirely without merit. Those exhibits
4 are plainly relevant to the issues before the Hearing Officers in this proceeding, and the Objection
5 is not timely. Accordingly, Brannan-Andrus Levee Maintenance District; Reclamation District
6 407, Reclamation District 2067, Reclamation District 317, Reclamation District 551, Reclamation
7 District 563, Reclamation District 150, Reclamation District 2098, and Reclamation District 800
8 (Byron Tract) (collectively, "DFCG"), respectfully request that the Hearing Officers overrule the
9 Objection in its entirety.

10 **I. PROCEDURAL BACKGROUND**

11 In Part 1 of this hearing, parties were directed or address two issues: (1) whether the
12 changes proposed to Petitioners' water rights would in effect initiate a new water right, and (2)
13 whether the proposed changes would cause injury to any municipal, industrial or agricultural uses
14 of water, including associated legal users of water. October 30, 2015 Notice of Hearing
15 ("Notice"), p. 11. In its February 11, 2016 Pre-Hearing Conference Ruling, the SWRCB ruled
16 that parties to Part 1 of the WaterFix change petition hearing could "address human uses that
17 extend beyond the strict definition of legal users of water, including flood control issues and
18 environmental justice concerns." February 11th Ruling, p. 10. The SWRCB later elaborated that
19 DWR and the Bureau of Reclamation could choose to address issues concerning potential
20 construction impacts during their case in chief or wait until rebuttal. March 4th Ruling, p. 6.

21 Consistent with the SWRCB's rulings on the scope of Part 1, DFCG submitted evidence
22 in support of its case in chief consisting of written testimony and exhibits prepared by Gilbert
23 Cosio of MBK Engineers (DFCG-1 through DFCG-11) on September 1, 2016. Mr. Cosio's
24 written testimony explained, in part, that:

25 My experience in the Delta has shown that lowering the water table, and thus disturbing
26 the equilibrium, results in subsidence of the levee that leads to cracks that create seepage
27 paths through the levee. This subsidence is similar to subsidence caused by over drafting
28 of groundwater. Attached as Exhibits DFCG-8 through DFCG-10, are photos of levee
cracking caused by tree roots searching for water while water surface levels were lowered
during the recent drought. Exhibit DFCG-11 shows this effect on the cross-section of a

1 levee. In addition to levee damage, structures built on the levee will likely experience
2 damage due to the lowering of the water table as well. Also, a home near the levee in this
area suffered foundation damage.

3 DFCG-1, ¶ 52. The deadline for the written procedural or evidentiary objections to exclude such
4 testimony was September 21, 2016 at noon. Co-Hearing Officer's Ruling on Department of
5 Water Resources' Request for Time, Sept. 9, 2016 ("September 9th Ruling"); *see also* Ruling on
6 Submittal Deadlines, Rebuttal Process, and Scheduling, December 19th, 2016 ("December 19th
7 Ruling") (confirming that further objections seeking exclusion would be rejected "unless they are
8 based on new information that was presented during cross-examination.").

9 On September 21, 2016, DWR filed a "Master Objection" generally requesting that the
10 Hearing Officers refuse to admit certain unspecified exhibits, on the grounds that that "Protestants
11 have raised various issues that are outside the scope of the hearing." Master Obj., p. 11.¹ DWR
12 also specifically objected to the admission of photographs of a cracking levee on Grand Island
13 (DFCG-8 through DFCG-10) and an accompanying report prepared by DWR (DFCG-11) on
14 relevance grounds, requesting that the exhibits and related testimony be excluded because they
15 fail to "show damage due to construction of the WaterFix" and "add nothing to the issue of
16 whether the proposed changes will cause injury to any human uses of water...." September 21st
17 Objection to DFCG Exhibits, p. 4:6-13.

18 On October 7, 2016, the Hearing Officers ruled that they "will permit all testimony
19 concerning construction-related impacts to be presented in Part 1B, provided that it does not
20 concern potential impacts to fish, wildlife, recreation, or other public trust uses." October 7th
21 Ruling, p. 2. The October 7 Ruling included a list of parties whose testimony was deemed
22 outside the scope of Part 1 by the Hearing Officers. DFCG was not included on this list.

23 On October 19, 2016, DFCG responded to DWR's initial objection, explaining that the
24 exhibits are consistent with the SWRCB's October 7th Ruling because they "illustrate the precise
25 type of impacts" that will likely occur once dewatering of the groundwater tables surrounding the

26 _____
27 ¹ At the time of filing of this response, no final ruling had been issued on DWR's Master Objection. DFCG
28 previously responded to the Master Objection, and to the extent that DWR intends by this December 30 filing to
incorporate the arguments contained in the Master Objection, DFCG incorporates by reference its prior response to
that objection.

1 intake sites commences. October 19th Response, p. 7:8-10. On October 28, 2016, DWR
2 submitted a list of parties whose exhibits, in the opinion of DWR, were still beyond the scope of
3 Part 1. Letter from Mr. Tripp Mizell to Hearing Officers, Re: List of Testimonies that are Outside
4 the Scope of Part 1 Hearing and More Applicable for Part 2, October 28, 2016. No exhibit from
5 DFCG was identified on this list.

6 On October 28, 2016, Mr. Gilbert Cosio offered testimony regarding the potential impacts
7 of the changes requested by Petitioners on the DFCG. On cross examination, counsel for DWR
8 asked Mr. Cosio about written testimony that he had offered in DFCG-1 regarding levee
9 instability associated with tree roots at Grand Island:

10 MR. BERLINER: And you stated at the conclusion of your discussion of this that what
11 happened to knock this area out of historic equilibrium is unknown and could not have
12 been predicted...that sentence is accurate as of today; right? That what happened to
13 knock the area out of historic equilibrium is unknown and could not have been predicted.

14 WITNESS COSIO: Well, it was unknown to us that those trees were drawing the water
15 table down.

16 MR. BERLINER: And, in your view, the trees drawing the water down was what -- Is
17 that what knocked it out of historic equilibrium?

18 WITNESS COSIO: Yes. And it was not our opinion; it was actually the opinion of the
19 Geotechnical Engineer hired by the landowner. But it's a phenomenon we've seen in the
20 past, that these trees do cause problems by lowering the water table.

21 Hearing Transcript, Vol. 25, 230:12-233:21 (Oct. 28, 2016). At the conclusion of Mr. Cosio's oral
22 testimony on October 28, 2016, DFCG offered all of its exhibits into evidence.

23 On December 19, 2016, the Hearing Officers directed parties to submit any additional
24 objections by December 30, 2016, and again confirmed that they would not accept objections that
25 seek to exclude a witness's testimony, in whole or in part, unless that objection was based on new
26 information presented during cross-examination. On December 30, 2016, DWR again objected to
27 DFCG-8 through DFCG-11, claiming that Mr. Cosio confirmed during cross-examination that the
28 cracks in Grand Island levee are "due to trees and not construction." Objection, 6:10-19.

29 **II. ARGUMENT**

DWR's objection does not comply with the Board's requirements, and the subject exhibits

1 are plainly relevant to the issues before the SWRCB in Part 1 of this Hearing. Accordingly, this
 2 objection must be overruled in its entirety.

3 **A. The Objection Does Not Comply With the Board’s Requirements, And May**
 4 **Be Rejected On Those Grounds Alone.**

5 The deadline for written objections seeking to exclude testimony passed on September 21,
 6 2016, and the Hearing Officers confirmed that further objections to testimony seeking exclusion,
 7 “in whole or in part,” would be rejected “unless they are based on new information that was
 8 presented during cross-examination.” December 19th Ruling, p. 1. DWR attempts to evade the
 9 September 21 deadline for objecting to these exhibits by asserting that on cross-examination,
 10 “Mr. Cosio confirmed that the levee cracking on Grand Island was due to trees and not
 11 construction.” Objection, 6:14-16. Yet, this information is not new, as it was readily available in
 12 Mr. Cosio’s written testimony. (*See* DFCG-1, ¶ 52 (“Attached as Exhibits DFCG-8 through
 13 DFCG-10, are photos of levee cracking caused by tree roots searching for water while surface
 14 levels were lowered during the recent drought.”).) The information revealed in Mr. Cosio’s cross
 15 examination merely confirmed Mr. Cosio’s written testimony: where water levels drop, whether
 16 as a result of tree roots or some other cause, there is a risk that levees will crack or experience
 17 seepage. *See* DFCG-1, ¶¶ 8, 48-52; Hearing Transcript, Vol. 25, 230:12-233:21 (Oct. 28, 2016).

18 DWR previously raised essentially the same objection to these exhibits on September 21,
 19 2016. *Compare* September 21st Obj., 4:1-13 (seeking the exclusion of DFCG-8 through DFCG-
 20 11 because they purportedly depicted levee damage caused by trees rather than “purport to show
 21 damage due to construction of the WaterFix (which has yet to be built)” with Objection, 6:16-18
 22 (“[e]xamples of levee cracking due to trees are irrelevant the [sic] issue of potential impacts of the
 23 WaterFix, and exhibits DFCG-8 through DFCG-11 should be excluded as irrelevant.”).
 24 Duplicative objections have no place in this proceeding. *See* Ruling on Evidentiary Objections
 25 and Other Procedural Matters, July 22, 2016 (“July 22nd Ruling”), p. 3 (“These arguments have
 26 been reviewed and considered in our [previous] ruling, and will not be reexamined.”).

27 Although DWR attempts to frame its Objection as a new development, no new
 28 information was revealed during its cross-examination that would justify the reiteration of a

1 previously rejected objection. Thus, it is duplicative, untimely, and should be overruled.

2 **B. Exhibits DFCG-8 Through DFCG-11 Are Relevant to Part 1 Issues and**
3 **Admissible in this Proceeding.**

4 Government Code section 11513, which governs this proceeding, requires that any
5 relevant, reliable evidence be admitted. Evidence is relevant if it has “any tendency in reason to
6 prove or disprove any disputed fact that is of consequence to the determination of the action.”
7 Evid. Code, § 210.

8 Here, the SWRCB must determine whether Petitioners have met their burden of
9 demonstrating that the changes they have requested will not operate to cause injury to a legal user
10 of water. Water Code, § 1702. To make that determination, the Hearing Officers directed parties
11 to prepare testimony related to human uses of water (including flood control and construction
12 impacts) in Part 1 of the Hearing. Oct. 7th Ruling, p. 2.

13 As a Delta district engineer “responsible for all aspects of levee rehabilitation and
14 maintenance,” Mr. Cosio is uniquely situated to provide reliable testimony regarding flood
15 control concerns and potential construction impacts relevant to Part 1 of this proceeding. *See*
16 DFCG-1, ¶ 3. In that role, Mr. Cosio offered his expert opinion that the Petitioners had
17 “underestimated the scope and severity of potential impacts” that construction activities would
18 have on levee integrity and flood control efforts. DFCG-1, 8:13-14. At the Hearing on October
19 28, 2016, Mr. Cosio testified in detail about the potential destabilizing impacts on Delta levees
20 caused by pile driving, channel obstructions, truck traffic, and dewatering, all of which are part of
21 the WaterFix construction process. *See* WaterFix Hearing Transcript, Vol. 25, 221:20-222:4
22 (Oct. 28, 2016). DWR suggests that Mr. Cosio’s testimony regarding cracks in levees associated
23 with tree roots is irrelevant because those cracks were not a result of WaterFix’s construction.
24 Objection, 6:14-18. This position mischaracterizes Mr. Cosio’s testimony, and overlooks what
25 Mr. Cosio identified as the main point of his testimony—that the Petitioners have not adequately
26 analyzed how these construction activities will destabilize Delta levees. *See* WaterFix Hearing
27 Transcript, Vol. 25, 222:1-4 (Oct. 28, 2016). It is elementary that the DFCG cannot produce
28 photographic evidence of damage caused by WaterFix construction, because that construction has

1 not yet occurred. Indeed, the burden is on Petitioners to demonstrate that such harm will *not*
2 occur, not on DFCG to demonstrate conclusively that it will. *See* Water Code, § 1702; SWRCB
3 Order No. 95-6, at p. 7 (observing that section 1702 “places a burden on the DWR and the USBR
4 to prove that the proposed changes will not operate to the injury of other legal users of the
5 water.”).

6 Furthermore, with respect to dewatering, Mr. Cosio described how lowering groundwater
7 around intake construction areas will “disturb[] the equilibrium” which in turn “results in
8 subsidence of the levee that leads to cracks that create seepage paths through the levee.” DFCG-
9 1, ¶ 52. DFCG-8 through DFCG-11, which illustrate the kind of damage that may result from
10 levee cracks associated with water level changes, are directly relevant to Mr. Cosio’s contention
11 that the water level changes associated with the WaterFix will result in injury to a legal user of
12 water, or to the public interest, and therefore relevant to the issues before the SWRCB in this
13 proceeding. *See* DFCG-1, ¶ 52 (“This subsidence is similar to subsidence caused by over drafting
14 of groundwater.”) Because these exhibits are both relevant and reliable, DWR’ Objection should
15 be overruled.

16 **III. CONCLUSION**

17 For the reasons outlined herein, DWR’s objection to the exhibits presented by DFCG
18 should be overruled in its entirety.

1 DATED: January 6, 2017

DOWNEY BRAND LLP

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3
4 By: 

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DOWNEY BRAND LLP

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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);

**DELTA FLOOD CONTROL GROUP'S RESPONSE TO DEPARTMENT OF
WATER RESOURCES' DECEMBER 30, 2016 OBJECTIONS**

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 of Water Resources Control Board at
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 hard copy 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: Method of Service: _____
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I certify that the foregoing is true and correct and that this document was executed on January 6, 2017.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814