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SOUTH DELTA WATER AGENCY,

9 CENTRAL DELTA WATER AGENCY,

HERITAGE LAND COMPANY INC.,

10 LAFAYETTE RANCH, RUDY M. MUSSI

INVESTMENT LP, and BERT BACCHETTI FARMS, INC.

11  
12 STATE OF CALIFORNIA

13 STATE WATER RESOURCES CONTROL BOARD

14  
15 In the matter of DWR and USBR )  
Petition For Change of Point )  
16 of Diversion )  
\_\_\_\_\_ )

**PROTEST OF PETITION**

17  
18 The CENTRAL DELTA WATER AGENCY, a body politic and corporate of the State  
19 of California, SOUTH DELTA WATER AGENCY, a body politic and corporate of the State  
20 of California, HERITAGE LAND COMPANY INC., a California corporation and  
21 LAFAYETTE RANCH, a California corporation, RUDY M. MUSSI INVESTMENT LP, a  
22 California Limited Partnership, and BERT BACCHETTI FARMS, INC., a California  
23 Corporation, herein protest the above-named Petition Requesting Change in Point of Diversion  
24 for Certain Water Rights of the Department of Water Resources and the Bureau of Reclamation  
25 and in support of this Protest respectfully allege and state as follows:

26 **BACKGROUND**

27 Protestant SOUTH DELTA WATER AGENCY ("SDWA") is a body politic and  
28 corporate of the State of California created by Chapter 1089 of the Statutes of 1973 of the State

1 of California (South Delta Water Agency Act). The boundaries of SDWA are described in  
2 Section 9.1 of the South Delta Water Agency Act (Stats. 1973, c. 1089). The area included  
3 within SDWA is located within the Sacramento-San Joaquin Delta as defined in California  
4 Water Code Section 12220 and is generally referred to as the southern Delta. The purposes  
5 and powers of the SDWA are set forth in Article 4 of the South Delta Water Agency Act. The  
6 principal purposes of SDWA are to protect the water supply of the lands within its boundaries  
7 against intrusion of ocean salinity and to assure those lands a dependable in-channel supply of  
8 water of suitable quality sufficient to meet present and future needs.

9       Regarding the areas within its boundaries, SDWA is a partial successor in interest of  
10 the Delta Water Agency, a body politic and corporate of the State of California.

11       The area within the boundaries of SDWA is approximately 148,000 acres in size, is  
12 primarily devoted to agriculture and is dependent on the in-channel water supply in the  
13 southern Delta for irrigation water and other beneficial uses. The in-channel water supply in  
14 the southern Delta is a mixture from all the sources to the Delta including the inflow of the San  
15 Joaquin and Sacramento River systems.

16       Protestant SDWA's boundaries encompass some municipal use, but mostly agricultural  
17 diversions. These diversions include riparian, appropriative and salvage rights. The United  
18 States Bureau of Reclamation, California Department of Water Resources, and the State Water  
19 Resources Control Board have all previously assumed that all lands within the Delta lowlands  
20 are riparian to the channels of the Delta (see Central Valley Project California, Delta  
21 Lowlands Service Area Investigations January 1964). Attached hereto is a 1964 USBR listing  
22 of then current permit holders within the portions of SDWA which are lowlands indicating that  
23 virtually all land within the South Delta has appropriative water rights. The SWRCB's  
24 records contain the current information. The SDWA's authorizing statutes in combination with  
25 the Delta Protection Act (Water Code § 12200 et seq.) require that sufficient water of  
26 sufficient quality be maintained in the Delta channels to support current and future beneficial  
27 uses. The agency may assist landowners, districts and water right holders within the agency in  
28 the protection of vested water rights and may represent those parties in water right proceedings

1 and related proceedings before the State Water Resources Control Board and the courts of the  
2 State of California and United States to carry out the purposes of the agency.

3 Protestant CENTRAL DELTA WATER AGENCY ("CDWA") is a political  
4 subdivision of the State of California created by the California Legislature under the Central  
5 Delta Water Agency Act, chapter 1133 of the statutes of 1973. The CDWA came into  
6 existence under this act in 1974. The CDWA encompasses approximately 120,000 acres  
7 within San Joaquin County, all of which is within the Sacramento-San Joaquin Delta. The  
8 lands within the CDWA's jurisdiction are primarily agricultural but also contain recreational  
9 developments, significant wildlife habitat areas and some urban areas. The lands within the  
10 CDWA jurisdiction are dependent upon the water supply in the channels of the Delta ("in-  
11 channel" water supply) for irrigation and other beneficial uses. The CDWA's in-channel  
12 water supply is a mixture of water from many sources including the flow and quality of both  
13 the Sacramento and San Joaquin River systems, which are the principle focus of the BDCP  
14 process, as explained below. All of the lands within the CDWA are contiguous to the channels  
15 within the CDWA and/or to the underground flow of water of those channels. The water rights  
16 pertaining to those lands include riparian, pre-1914 appropriative and salvage rights. In many  
17 instances, the water rights are also covered by permits and licenses for appropriation. The  
18 water rights of those lands in every case known to Protestants are considered "prior vested"  
19 water rights in relationship to the water rights of the United States Bureau of Reclamation and  
20 Department of Water Resources. CDWA is empowered to assist landowners to protect and  
21 assure a dependable supply of water of suitable quality sufficient to meet present and future  
22 needs. The agency may assist landowners, districts and water right holders within the agency  
23 in the protection of vested water rights and may represent those parties in water right  
24 proceedings and related proceedings before the State Water Resources Control Board and the  
25 courts of the State of California and United States to carry out the purposes of the agency.

26 Protestant LAFAYETTE RANCH is a California corporation which owns  
27 approximately 340 acres on Union Island in San Joaquin County. This acreage abuts Middle  
28 River and is located within Sections 25 of Township 1 South, Range 5 East, Mount Diablo

1 Base and Meridian. Protestant LAFAYETTE RANCH farms said property which has in the  
2 past included row crops and alfalfa. Such land is riparian to Middle River, and Protestant  
3 claims riparian and pre-1914 rights (S019353) and also has appropriative rights under license  
4 3677 (Application #11694). The land has been under irrigation for most of the 20<sup>th</sup> Century  
5 and through the present. Protestant is already being damaged by reduced water levels, flows  
6 and quality in the Delta channels and may suffer further injury in reduced crop values and  
7 impaired land as further alleged herein if the Petition is granted.

8 Protestant BERT BACCHETTI FARMS, INC. is a California Corporation which owns  
9 approximately 150 acres on Fabian Tract in San Joaquin County. This acreage abuts Grant  
10 Line Canal and is located within Section 25 of Township 1 South, Range 4 East, Mount Diablo  
11 Base and Meridian. Protestant BERT BACCHETTI FARMS, INC. farms said property which  
12 in the past includes various row crops and alfalfa. Such land is riparian to Grant Line Canal,  
13 and Protestant claims riparian and pre-1914 rights (S017218) and also has appropriative rights  
14 under license 1252 (Application #4275). The land has been under irrigation for most of the  
15 20<sup>th</sup> century and through present. Protestant is already being damaged by reduced water levels,  
16 flows and quality in the Delta channels and may suffer further injury in reduced crop values  
17 and impaired land as further alleged herein if the Petition is granted.

18 Protestant RUDY M. MUSSI INVESTMENT LP is a California Limited Partnership  
19 which owns approximately 77 acres on Roberts Island in San Joaquin County. This acreage  
20 abuts Middle River and is located within Section 1 of Township 1 South, Range 5 East, Mount  
21 Diablo Base and Meridian. Protestant RUDY M. MUSSI INVESTMENT LP farms said  
22 property which currently includes walnuts. Such land is riparian to Middle River, and  
23 Protestant claims riparian and pre-1914 rights (S019740) and also has appropriative rights  
24 under license 859 (Application #4979). The land has been under irrigation for most of the 20<sup>th</sup>  
25 century and through present. Protestant is already being damaged by reduced water levels,  
26 flows and quality in the Delta channels and may suffer further injury in reduced crop values  
27 and impaired land as further alleged herein if the Petition is granted.

28 Protestant HERITAGE LAND COMPANY INC. is a legal user of water and will suffer

1 injury due to increased salinity in water used to irrigate crops. Salt builds up in the root zone  
2 adversely affecting crop production and increasing the need for artificial leaching. The cost of  
3 additional leaching will make production of some crops uneconomical. Increased  
4 contamination of the irrigation water with Methyl Mercury, Boron and other contaminants  
5 could result in greater restrictions on the drainage of the land which is necessary to  
6 economically continue the agricultural use. The land is located in the Delta Primary Zone  
7 where land use is greatly restricted. Increased Microcystis in the water adjacent to the  
8 riparian land and in the water diverted onto the land creates a health risk to farmers, farm  
9 workers, their families, pets, livestock, visitors and fish and wildlife. The present purpose of  
10 diversion is agricultural for growing crops. There is incidental contact, ingestion and  
11 consumption by people, pets, livestock, fish and wildlife. The primary claimed rights injured  
12 by the subject change are riparian, pre-1914 appropriative and salvage rights. The claimed  
13 date of priority for the riparian right is prior to the date of the Certificate of Purchase which is  
14 May 27, 1860. The date of first use is claimed to be on or about the date of the first payment  
15 for the land which was June 5, 1858. The date of Patent is December 1, 1876. The quantity of  
16 water diverted and used varies with the crop and climate. The annual quantity can currently be  
17 expected to be in the range of 116 to 185 acre feet. All water not consumed is recycled to the  
18 Delta. The place of use is in San Joaquin County on McDonald Island adjacent to the portion  
19 of the San Joaquin River that passes through and mixes with water in what is known as the  
20 Sacramento San Joaquin River Delta. The Assessor Parcel Number for the place of use and  
21 point of diversion is 129-080-61.

22 The Protestants have read the notice of the DWR and USBR Petition for Change of  
23 Point of Diversion and may be contacted at the address listed on the Protest form.

24 The proposed changes to in the Petition could delay or preclude remediation of the  
25 present degradation of water levels, supply and quality (described below), cause further  
26 degradation, and damage to the public trust, the public interest and the above listed public uses  
27 of Protestants. Damage to the public trust and public interest thereby will include damage to  
28 fish populations and migration, fishing, hindrance of boating and other recreational uses,

1 damage to commercial uses protected by the public trust, including the agricultural economy  
2 which sustains the surrounding area, and damage to public health and safety.

### 3 **BENEFICIAL USES IN THE DELTA AREA**

4 From time immemorial, the flows of both the San Joaquin River System and the  
5 Sacramento River System have varied greatly from year to year and from season to season  
6 within each year. In the late summer and early fall, the flow is usually low and it rises in the  
7 winter, spring, and early summer as a result of rains and run-off from the melting snow.

8 All of the lands within the boundaries of the CDWA and SDWA are riparian to the  
9 channels of the Sacramento-San Joaquin Delta and the Sacramento and San Joaquin Rivers.  
10 The individual Protestants and the owners of the land contained in and represented by CDWA  
11 and SDWA claim the right to the waters flowing into the Delta from the west including water  
12 flowing with the tides, water flowing from the Sacramento and San Joaquin Rivers and water  
13 from all other tributaries and other sources. The claims are based on riparian rights,  
14 prescriptive rights, pre-1914 rights, salvage rights, overlying rights, statutory rights, rights to  
15 recycled and recaptured water, rights to artesian flow and appropriative rights based on  
16 applications made and permits granted. These landowners and the individual Protestants also  
17 claim vested rights in the underground water supply where it is available and which is fed by  
18 the rivers, channels, canals and sloughs in the Delta Area. If the surface water quality is  
19 degraded, the ground water is also gradually degraded. A change in the flows in the rivers,  
20 channels, canals and sloughs in or tributary to the Delta Area will have a material effect on the  
21 farming operations conducted on the lands irrigated from these sources. At times of low flows,  
22 the source of irrigation water may become degraded because of (1) the poor quality drainage  
23 water from lands lying upstream and (2) the incursion of salt water from San Francisco Bay.  
24 At such times, the poor quality causes reduction in crop yields and values and increased  
25 leaching costs.

### 26 **CURRENT STATUS OF UPSTREAM WATERSHEDS**

27 The operation of the Friant Unit of the Central Valley Project ("CVP") severs the  
28 hydraulic connection between the upper San Joaquin River and the lower San Joaquin River

1 and Sacramento-San Joaquin Delta (“Delta”) for much of the year. The Friant Unit stores and  
2 diverts water from the upper San Joaquin River for delivery to places such as Kern County  
3 which is outside the watershed of the San Joaquin River.

4 These diversions and deliveries reduce the average annual flow into the Delta by  
5 approximately 544-943 TAF, with reductions in April-September of 347-526 TAF. This  
6 decrease in flow deprives downstream riparian and senior appropriators of water which  
7 would improve quality and mitigate export project adverse impacts to water quality water  
8 levels and circulation.

9 In addition, the Friant Unit makes no downstream releases towards meeting project  
10 obligations for enhancing salinity control for the Delta, meeting fish obligations or meeting  
11 Water Quality Objectives for Agricultural Beneficial Uses on the San Joaquin River or in the  
12 Delta as set forth in the 1995 Water Quality Control Plan. This results in the burden of meeting  
13 such Objectives on the lower San Joaquin being in great part shifted to New Melones  
14 Dam/Reservoir which is incapable of meeting those Objectives on a regular and sustained  
15 basis.

16 Further, the operation of the Friant Unit deprives the San Joaquin River below Friant  
17 Dam of sufficient, and in some cases all, flow to sustain indigenous fisheries, including  
18 anadromous fish, especially in that portion of the river above the Mendota pool.

19 Other dams and reservoirs on tributaries to the Sacramento and San Joaquin Rivers  
20 also decrease flows entering the Delta which adversely affects in-Delta quality by among other  
21 things, precluding net flows in Delta channels.

22 The operation of the CVP causes other adverse effects in the South Delta. The  
23 operation of the CVP export pumps and the State Water Project (SWP) diversions to Clifton  
24 Court Forebay if not carefully controlled, substantially decreases the height of the water levels,  
25 especially the low tide level to the point where local syphons and pumps are sometimes  
26 incapable of operating.

27 The operation of the CVP and SWP export facilities also alters the flow in the channels  
28 creating reverse flows and stagnant zones. This results in insufficient flushing of Delta waters

1 and the concentration of all constituents, including municipal effluent and salts from upstream  
2 return flows.

3 The CVP by delivering Delta water to its San Joaquin Valley service area results in the  
4 importation thereto of upwards of 1,000,000 tons of salt into the San Joaquin Valley. After this  
5 exported water is used, much of the salt is delivered to the San Joaquin River in concentrations  
6 which exceed downstream Water Quality Objectives. This drainage also includes high levels  
7 of other constituents such as selenium and boron.

### 8 BASIS OF PROTEST

9 The San Joaquin and Sacramento River systems are interconnected in the San Joaquin-  
10 Sacramento River Delta by a myriad of rivers, channels, canals, and sloughs. By means of  
11 those interconnecting channels, rivers, canals, and sloughs, and through the operation of the  
12 tides, the waters of the San Joaquin and Sacramento River systems and other sources are co-  
13 mingled and mixed.

14 Altering the current points of diversion for the SWP and CVP will fundamentally  
15 change the hydro-dynamics of the Delta to the detriment of the water users of SDWA, CDWA,  
16 the individual Protestants, and the owners of land lying within the Delta Area of valuable  
17 property and water rights.

18 Petitioners' proposed changes, unless properly conditioned, would adversely affect  
19 and therefore injure riparian, prior appropriative, salvage and other water rights of the  
20 individual Protestants and the water users and land owners within in the CDWA and SDWA as  
21 established by California law, and would further violate the Delta Protection Statutes (Water  
22 Code § 12200-12205) and the Statutes protecting the San Joaquin River and its tributaries  
23 (Water Code §§ 12230-12232).

24 Current Water Quality Objectives require upstream releases to meet the 1.0/0.7 EC  
25 water quality standard at Vernalis and the three interior South Delta locations. Releases by the  
26 USBR to meet the Objectives are and have been inadequate, and no releases are made to  
27 protect prior vested rights in portions of the southern Delta or upstream including those of the  
28 individual Protestants. In addition, the Bureau and DWR have refused to continue settlement

1 negotiations with SDWA or CDWA regarding the issue of San Joaquin River flows. [Issues of  
2 flows, quality, channel levels, reverse flows, etc., were raised in the suit SDWA brought in  
3 1982 against USBR & DWR.] Thus, the prior vested rights of SDWA and CDWA members  
4 are injured. In addition, said change and increased diversions by Petitioners will cause further  
5 injury to the prior vested water and statutory rights of Protestants. Reservation of Board  
6 jurisdiction over said Petition would not prevent present and immediate damage to prior  
7 vested rights by said proposed changes of use.

8 Although the tidal barrier program in the southern Delta can address some of the harm  
9 caused by the State and Federal projects, those barriers are not allowed to operate at all times  
10 needed. The barrier project is also subject to State and Federal funding and permitting.

11 The Sacramento-San Joaquin system is currently over-committed and unable to provide  
12 all legal users with the amount of water desired or needed, and granting the Petition will  
13 decrease the supply. This will necessarily cause harm to other legal users. Pursuant to the  
14 requirements of the Water Code, the Petition cannot be granted if such harm will occur.

15 The continued flows of the San Joaquin River System and the Sacramento River  
16 System, and their respective tributaries, uninterrupted and without diminution by the proposed  
17 diversions for which the above Petition has been made, is essential to the continued prosperity  
18 and welfare of the owners and operations of land in the San Joaquin and Sacramento River  
19 Delta Area, and to the individual Protestants.

20 **PROTEST AGAINST PETITION**

21 This protest is based upon the resulting degradation of water quality, the detrimental  
22 changes to the hydro-dynamics, the attendant violations of law, damage to the public trust, harm  
23 to public health and safety and other injury to prior water rights and the public interest  
24 including the following.

- 25 (a) The proposed changes will fundamentally alter the current hydro-dynamics of  
26 the Delta such that there will be a decrease in net flows in various channels  
27 which will result in salts and other contaminants concentrating and collecting in  
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1 Central and Southern Delta channels. Such increased collection and  
2 concentration will cause applied water to be more salty which in turn will  
3 result in increased root zone salinities. This will harm agricultural activities by  
4 decreasing crop production and increasing leaching costs. The DWR and  
5 USBR do not currently meet the water quality standards (for salinity) in the  
6 southern Delta and have no plan by which to meet them. Those projects are  
7 also in violation of the operative Cease and Desist Order (WR 2010-0002)  
8 issued by the SWRCB regarding compliance with those standards. Granting the  
9 Change Petition will specifically exacerbate the current problem and no  
10 conditions for mitigation of compliance will be effective in light of the  
11 projects' lack of efforts to meet their permit obligations and their intentional  
12 violation of the CDO.

13 (b) The proposed changes have not been subject to adequate CEQA review and  
14 thus cannot be granted. As fully described in the Protests of the City of Antioch  
15 and others, the Petition is supported by a DEIR/S which does not examine the  
16 conditions of the project; it uses model runs from the prior BDCP DEIR/S  
17 which do not accurately describe the baseline and understate the impacts of the  
18 project specified under the Petition. The DEIR/S does not include specific  
19 operations of the project whereby it or the public can adequately examine the  
20 impacts of the Change Petition and thus the determination of injury to legal  
21 users and other harm is premature and unexamined. The DEIR/S also uses  
22 models which do not accurately describe current operations or proposed  
23 operations and contain assumptions which negate their use as planning tools.

24 (c) The Petitioners' analysis does not accurately evaluate the actual changes in in-  
25 Delta flows and quality because the operations used in the analysis do not  
26 reflect actual or likely operations by Petitioners.

27 (d) The proposed changes will adversely affect flows at times of the year when in-  
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1 Delta senior right holders need an adequate quality of water to divert. In  
2 addition, those decreased flows will adversely affect the flushing of salts from  
3 Delta lands and will necessarily increase the intrusion of ocean salts.

4 (e) The analysis of the proposed changes fails to examine the project as a whole,  
5 rather it anticipates future operational and other changes and thus is a piecemeal  
6 analysis which will mask the effects. The SWRCB proposes a hearing which  
7 includes portions of its ongoing development of a new Water Quality Control  
8 Plan, which is itself being done piecemeal. Such incremental analysis and  
9 action violates CEQA and other statutes. [See attached CEQA comments  
10 submitted to Water Fix DEIR/S.]

11 (f) The analysis of the proposed changes does not address the SWRCB's  
12 conclusions in D-1641 regarding how changes in operations can adversely  
13 affect legal users. It anticipates approval of conditions that will in fact deprive  
14 in-Delta users of water of sufficient quality for reasonable use.

15 (g) The Proposed changes constitute a violation of Water Code §§ 1392 or 1629,  
16 which adversely affect the availability of water for the environment and other  
17 potential water users.

18 (h) The proposed changes will contribute to reducing and altering the direction of  
19 the flows in the rivers, channels, canals and sloughs in the Delta Area, thereby  
20 reducing the levels and thus quantity of irrigation water available and adversely  
21 affecting the distribution of good quality water available in the Delta.

22 (i) The proposed changes, by reducing the water levels in the channels, rivers,  
23 canals, and sloughs in the Delta Area will endanger the remaining water supply  
24 by (I) permitting the incursion of salt water from San Francisco Bay, (ii) by  
25 permitting a deterioration in the quality of the water in the rivers, channels,  
26 canals, and sloughs in the Delta Area, and (iii) altering flows from the drainage  
27 from lands upstream to the Delta Area and affecting flows into the Delta needed  
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1 to dilute and flush the salts in that drainage.

2 (j) The proposed changes will constitute an infringement upon and a violation of  
3 water and property rights of the individual Protestants and of owners and  
4 operators of lands in the SDWA and CDWA and of lands lying generally within  
5 the Delta Area.

6 (k) The approval of the proposed changes would impermissibly authorize  
7 violations of sections 12230 through 12232, sections 12200-12205, and 1200,  
8 et seq. of the Water Code. Specifically, the projects are not entitled to export  
9 any water unless the Delta is first provided an adequate quantity of water of  
10 sufficient quality for reasonable use.

11 (l) The proposed changes or additional diversion and resulting increase in  
12 consumptive use would reduce the downstream flow of the San Joaquin River  
13 into the Delta and at times adversely affect downstream flow through Delta  
14 channels and past lands of the individual Protestants, and lands within the  
15 Agencies.

16 (m) The approval of the changes and resulting increase in consumptive use would  
17 be detrimental to the public interest, be in violation of and detrimental to the  
18 uses protected by the public trust, and cause damage to the environment.

19 (n) The proposed changes are improper without any determination of the water  
20 availability for the CVP and SWP. The projects failed to develop adequate  
21 water to meet both export needs and the reasonable terms and conditions placed  
22 upon them by regulators and are often without any supply to export. The  
23 projects have failed to adequately mitigate their impacts to both fisheries and  
24 other legal users. As a result, the projects have regularly exported water which  
25 is necessary to meet senior rights, fishery and mitigation needs resulting in the  
26 destruction of the various Delta-related fisheries, and continue to violate  
27 numerous water quality standards, and cause harm to in-Delta farmers and  
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1 others. Said export of non-surplus waters directly violates numerous laws,  
2 including the Delta Protection Act of 1959 (Water Code §§ 12200 et seq.) and  
3 the Watershed Protection Act (Water Code §§ 11460 et seq.).

4 (o) The projects fail to operate their various dams, reservoirs, pumps and canals in  
5 a manner that would allow them to comply with water quality standards,  
6 objectives and state and federal law. No conditions placed upon them would  
7 be effective in mitigating or avoiding adverse effects as shown by recent  
8 regulatory actions including the SWRCB or its Executive Director granting  
9 urgency change petitions which alter and relax existing permit terms and  
10 conditions and in effect amend Water Quality Control Plans without proper  
11 prior public hearing.

12 (p) The SWRCB hearing proposes to delegate to the SWRCB Executive Director  
13 the authority to approve Sections 401 and 404 water quality certifications for  
14 purposes of compliance with federal law administered by the US Army Corps  
15 of Engineers. Said Executive Director has previously acted to approve urgency  
16 changes to DWR and USBR without public input, which changes in effect alter  
17 water quality standards and objectives. He has also agreed in writing to not  
18 enforce other permit terms and conditions after being notified the projects will  
19 not meet such terms or conditions. The Executive Director is therefore biased in  
20 favor of the projects with regard to at least their obligations to maintain, protect  
21 and improve Delta and other water quality.

22 (q) The projects have failed to act in a diligent manner on their underlying  
23 applications (supporting their current permits) which applications have now  
24 expired and should be cancelled until such time as the projects can show when  
25 and how much water can be exported without adversely affecting fisheries, the  
26 environment and other legal users.

27 (r) The proposed changes are in fact an application for a new water right not only  
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1 due to said expiration of their existing applications, but also due to the fact that  
2 by taking water from the Sacramento River it will fundamentally alter the  
3 hydro-dynamics of the Delta and adversely affect the water quality in all areas  
4 of the Delta. The change in points of diversion cannot be done without injuring  
5 other legal users.

6 (s) The proposed changes will result in decreased channel flows and increased  
7 residence time for water. This will result in increased temperatures and  
8 increased residence times of in-Delta water which will adversely affect fish  
9 and will also increase and promote the growth of toxic substances such as  
10 microcystis. This will adversely affect not only public trust needs but also  
11 impair riparian, appropriative and other water right holders.

12 (t) The proposed changes as Noticed by the SWRCB are in violation of Water  
13 Code Sections 85086 et seq. in that the SWRCB has failed to develop new,  
14 necessary flows to protect fish and wildlife beneficial uses in the Delta. The  
15 SWRCB seeks to combine the two processes instead of developing the fishery  
16 flows first. The fishery flows are statutorily mandated to be done first in order  
17 that a Change Petition, such as the subject one, would then be forced to show  
18 how a project would be operated to meet the new flow standards. By rushing  
19 forward with the Change Petition without requiring DWR and USBR to  
20 describe how they will meet the not-yet-developed flow standards, the SWRCB  
21 has eviscerated the water quality control plan process and will violate the  
22 mandates set forth in the *Racanelli* case.

23 (u) The proposed changes lack an adequate economic analysis and it has not  
24 demonstrated that the changes can be undertaken or completed. The project  
25 lacks specified funding and even lacks a basic agreement among its proponents  
26 as to funding. Being without funding it cannot be approved.

27 (v) The projects are not in compliance with federal laws including the CVPIA (e.g.  
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1 fish doubling standard) and HR-2828 (e.g. implementing a plan to meet all  
2 water quality obligations and other state and federal laws). Absent a showing  
3 of how they intend to meet such obligations and fully mitigate their adverse  
4 impacts to the environment and other legal users, the Change Petition cannot be  
5 granted.

6 (w) The proposed changes will violate the Delta Protection Act of 1959 which  
7 finds that the maintenance of a “common source of fresh water” in the Delta for  
8 in-Delta uses and, to the extent of any surplus to such uses, for export to areas  
9 of water deficiency, “is necessary to the peace, health, safety and welfare of the  
10 people of the State . . . .” (Water Code, § 12201.) The proposed export of  
11 water from the northernmost tip of the Delta via the proposed isolated facilities  
12 is directly contrary to that declaration of necessity because it circumvents the  
13 maintenance of that common source of fresh water and deprives essentially the  
14 entirety of the Delta of the common benefits that such water would provide if  
15 such water flowed into the Delta before being exported. Moreover, the  
16 projects have a duty under Water Code section 12205 to integrate their releases  
17 from storage into the Delta “to the maximum extent possible” to provide that  
18 “common source of fresh water.” Diverting any amount of such releases into  
19 isolated facilities as proposed herein would entirely bypass that common  
20 supply and, hence, would be squarely contrary to the duty to maximize that  
21 common supply.

22 (x) The proposed changes will violate the co-equal goals set forth in Water Code  
23 section 85054 because the construction and footprint of the new points of  
24 diversion, in addition to the operation of the proposed points of diversion, will  
25 not achieve those goals “in a manner that protects and enhances the unique  
26 cultural, recreational, natural resource, and agricultural values of the Delta as  
27 an evolving place.” Instead, the proposed changes will substantially impair,  
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1 and in many cases destroy, those values. Such impairment and destruction also  
2 violates numerous provisions of the Delta Protection Act of 1992, including  
3 Public Resources Code sections 29701, 29702 and 29703 which similarly  
4 recognize the local, state, national and international significance of those values  
5 and resources and similarly require their protection, maintenance and, where  
6 possible, enhancement rather than their destruction or substantial impairment.

7 (y) The proposed changes will violate the declaration in Water Code section  
8 12981, subdivision (b), "that, in order to preserve the delta's invaluable  
9 resources, which include highly productive agriculture, recreational assets,  
10 fisheries, and wildlife environment, the physical characteristics of the delta  
11 should be preserved essentially in their present form; . . ." Neither the  
12 construction of the massive facilities to effectuate the proposed changes in  
13 points of diversion, nor any of the related intakes, forebays, vertical shafts, etc.,  
14 nor the diversion of fresh water inflows into such an isolated facility, will in  
15 any manner come remotely close to "preserv[ing]" "the physical characteristics  
16 of the delta . . . in their present form." Instead, such construction and operation  
17 will bring about a substantial and destructive alteration of those physical  
18 characteristics.

19 (z) Additional grounds for protesting the proposed changes (some of which may  
20 overlap in part with one or more of the foregoing grounds):

- 21 (1) The proposed diversion facilities lack statutory and other authorization.
- 22 (2) The application for, and SWRCB's consideration of, the proposed  
23 changes and water quality certification are premature and constitute an  
24 unlawful predetermination of a project in violation of NEPA and  
25 CEQA.
- 26 (3) The project is being piecemealed by separating the Ecofix's impacts  
27 from the Waterfix's impacts.

- 1 (4) The projects have been violating the conditions of their permits and no  
2 changes in points of diversion or water quality certification should be  
3 considered until the projects can demonstrate that water standards will  
4 be met and assurances are in place to assure the same.
- 5 (5) The projects have failed to diligently proceed to develop surplus water  
6 to support their desired level of exports from the Delta and other  
7 commitments and no changes in points of diversion or water quality  
8 certification should be considered until the projects demonstrate the  
9 actual availability of water and their permits are adjusted accordingly.
- 10 (6) The projects have not proceeded in good faith to comply with permit  
11 conditions and legal mandates and instead have operated to maximize  
12 exports ignoring project planning in anticipation of six year droughts.
- 13 (I) The projects have exported water from the Delta without first  
14 providing an adequate supply for the Delta. (Water Code §  
15 12200 et seq.)
- 16 (ii) The USBR has failed to comply with PL 99-546, PL 108-361  
17 and PL 102-575.
- 18 (iii) The USBR, DWR and State and Federal fish agencies have  
19 collaborated to favor exports from the Delta to the detriment of  
20 the public trust and senior vested water rights.
- 21 (iv) The proposed habitat restoration in the Delta which is  
22 substituted for needed fish flow results in a wasteful and  
23 unreasonable use and loss of water.
- 24 (7) The proposed changes will increase rather than reduce reliance on  
25 exports from the Delta in violation of Water Code section 85201.
- 26 (8) The proposed changes will degrade rather than protect and enhance the  
27 cultural, recreational and agricultural values of the Delta in violation of  
28

1 Water Code section 85020.

2 (9) The proposed changes will degrade rather than restore the Delta  
3 ecosystem, including its fisheries and wildlife, as the heart of a health  
4 estuary and wetland ecosystem in violation of Water Code section  
5 85020.

6 (10) The proposed changes will degrade water quality in violation of Water  
7 Code section 85020 (and numerous other laws including the state and  
8 federal anti-degradation polices and other laws referenced herein)  
9 thereby injuring legal users of water, public health and the public trust.  
10 Among other impairments, the proposed changes will result in:

11 (I) Increases in salinity in the Delta.

12 (ii) Increases in concentration of methyl mercury and other  
13 contaminants in the Delta.

14 (iii) Increases in Microcystis in the Delta.

15 (11) The proposed changes lack reliable measures and assurance for  
16 maintenance of the Delta levee system which is an integral part of the  
17 project to facilitate the planned use of the through Delta conveyance for  
18 increased exports from the Delta. Without the same there is an  
19 increased risk of the wasteful loss of fresh water due to levee failure.

20 Typically projects may be altered or conditioned to avoid harm to third parties.

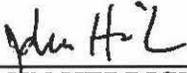
21 However, in this case, the project proposes to export water in direct violation of the mandates  
22 of Water Code Sections 12200 et seq., specifically Section 12205. In addition, recent history  
23 shows that the projects will not plan for, nor attempt to meet, their obligations to protect Delta  
24 water quality, area origin or other state and federal statutes allocating water. SDWA, CDWA  
25 and the individual Protestants do not propose any conditions under which the Change Petition  
26 should be granted.

27 WHEREFORE, Protestants pray that the Petition be denied unless and until  
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1 comprehensive conditions to protect downstream beneficial uses are adopted and compliance  
2 with the law is assured.

3 Respectfully submitted,

4 Dated: January 5, 2016

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7 JOHN HERRICK, Attorney for Protestants

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