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8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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10 HEARING IN THE MATTER OF
11 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
12 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
13 DIVERSION FOR CALIFORNIA WATER
FIX

**DEPARTMENT OF WATER
RESOURCES' OBJECTIONS TO
TESTIMONY AND EXHIBITS
SUBMITTED BY PLACER COUNTY
WATER AUTHORITY AND MOTION TO
STRIKE**

14
15 **INTRODUCTION**

16 California Department of Water Resources ("DWR") submits these objections,¹ to
17 the Part 1B testimony and exhibits (case-in-chief) submitted by Placer County Water
18 Authority in the matter of DWR and U.S. Bureau of Reclamation's (collectively
19 "Petitioners") Request for a Change in Point of Diversion for California Water Fix. DWR
20 also concurrently moves to strike the same written testimony and exhibits. Where
21 applicable in these objections, DWR cites to its concurrently-filed Objections to
22 Protestants' Cases-In-Chief Collectively ("Collective Objections"), which also provides a
23 common Statement of Facts and Legal Standards for DWR's separate responses to
24 Protestants' cases-in-chief.

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27 ¹ DWR reserves the right to make additional evidentiary/procedural objections to
evidence and exhibits submitted by Protestants in support of their cases-in-chief.

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1 **OBJECTIONS/REQUESTS TO EXCLUDE**

2 **I. The Testimony of Einar Maisch (DFCG-1) Lacks Foundation, Constitutes**
3 **Surprise Testimony and is Not Expert Opinion on Which a Responsible**
4 **Person Would Rely**

5 On behalf of the Placer County Water Agency, Mr. Maisch provides expert opinion
6 testimony concerning the potential effects of the WaterFix. (PCWA-1, p. 22-23.) Mr.
7 Maisch fails to specifically support his conclusions about actual impacts of the WaterFix,
8 and therefore lacks sufficient bases or citation to supporting evidence.

9 Expert testimony is required when related to a “subject that is sufficiently beyond
10 the common experience that the opinion of an expert would assist the trier of fact.”
11 (Evidence Code § 801; see also *Miller*, 8 Cal.3d at 702.) However, “[a]n expert opinion
12 has no value if its basis is unsound.” (*In re Lockheed Litigation Cases* (2004) 115
13 Cal.App.4th 558, 564.) “Expert opinion based on speculation or conjecture is
14 inadmissible.” (*Id.*)

15 Mr. Maisch’s testimony regarding impacts of the WaterFix project is wholly
16 conclusory lacking sufficient bases or citation to any supporting evidence or independent
17 analysis other than his own general personal experience. His testimony conclusions on
18 the impacts of the WaterFix is entirely premised upon the following statement:

19 Based upon the work and testimony by MBK Engineers on behalf of the
20 Sacramento Valley Water Users (SVWU), it is my understanding that, with
21 the WaterFix project constructed and operating, Reclamation will have
22 more opportunities to divert water at the new North Delta intakes,
23 including natural flows and water that was previously stored in Folsom
24 Reservoir. It is also my understanding, based upon the testimony
25 submitted on behalf of the City of Roseville and the American River Water
26 Agencies (ARWA), that the capacity of the municipal intakes at Folsom
27 Dam diminishes as water levels decline.. (PCWA-1, p. 22, In. 17-24.)

28 Other paragraphs in Mr. Maisch’s testimony may contain similar unsupported
29 opinion testimony. As is evident from the sentences cited above, Mr. Maisch’s
30 conclusion are merely conjecture about possible or potential impacts given his personal
31 experience rather than reasoned conclusions of likely adverse impacts based on specific
32 evidence or site-specific conditions. Mr. Maisch generally references the work of others
33 without citing specifically the evidence he relies upon to draw his conclusions. He also

1 cites to no independent analyses he performed to support his conclusions. It is the
2 policy of the Water Board to discourage the introduction of surprise testimony and
3 exhibits. (23 CCR 648.4(a).) The incorporation of general testimony of unknown
4 relevance constitutes impermissible surprise testimony because it is impossible to
5 determine exactly which parts of the incorporated testimony the witness actually intends
6 to use as direct testimony, and what additional conclusions are made for purposes of this
7 hearing.

8 Because Mr. Maisch's expert opinions lack foundation, and constitutes surprise
9 testimony, it is not testimony on which a responsible person would rely in the conduct of
10 serious affairs and should be excluded in its entirety. (Government Code § 11513(c).)

11 **II. The Testimony of Einar Maisch (DFCG-1) Materially Misstates Petitioners'
12 Testimony**

13 Mr. Maisch mischaracterizes the testimony of the Petitioners by stating, "the
14 overarching goal of the WaterFix project to attenuate the existing disparity between
15 North of Delta and South of Delta CVP M&I allocations." (PCWA-1, p. 23, ln. 2-6.) Mr.
16 Maisch fails to cite to where this characterization of the overarching goal is found within
17 the materials and testimony presented by the Petitioners. This mischaracterization of
18 the evidence is objectionable and the Petitioners' testimony should speak for itself.
19 Thus, this testimony should be excluded and stricken.

20 **CONCLUSION**

21 For the foregoing reasons, Petitioner DWR respectfully requests that the Water
22 Board exclude the testimony.

23 Dated: September 21, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

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25 

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