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15 Lafayette Ranch, Heritage Lands,  
16 Mark Bachetti Farms and Rudy Mussi Investments L.P.

17 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

18 In the matter of Hearing re California  
19 WaterFix Petition for Change

20 **OBJECTION OF THE SOUTH DELTA  
21 WATER AGENCY, CENTRAL DELTA  
22 WATER AGENCY, LAFAYETTE  
23 RANCH, HERITAGE LANDS, MARK  
24 BACHETTI FARMS, AND RUDY MUSSI  
25 INVESTMENTS L.P. TO WRITTEN  
26 TESTIMONY AND EXHIBITS  
27 SUBMITTED BY PETITIONERS U.S.  
28 BUREAU OF RECLAMATION AND  
CALIFORNIA DEPARTMENT OF  
WATER RESOURCES**

29 **I. INTRODUCTION**

30 South Delta Water Agency (“SDWA”), Central Delta Water Agency (“CDWA”),  
31 Lafayette Ranch (“Lafayette”), Heritage Lands (“Heritage”), Mark Bachetti Farms (“Bachetti”),  
32 and Rudy Mussi Investments (“Mussi”), collectively sometimes herein referred to as (“Delta  
33 Protestants”) herein object to the written testimony and exhibits submitted by Department of

1 water Resources (“DWR”) and the United States Bureau of Reclamation (“BOR”), collectively  
2 referred to as (“Petitioners”) in support of Part IA of the California WaterFix (“CWF”) hearing  
3 for change in point of diversion, (“Change Petition”).

4 Petitioners rely on testimony and exhibits grossly lacking in foundation and detail to  
5 support improperly asserted legal conclusions that the Change Petition will not cause injury to  
6 other legal users of water. Petitioners have been working on the BDCP, the failed precursor of  
7 the CWF, for over seven years. Petitioners were granted multiple extensions of time to submit  
8 their case in chief for Part 1A. As part of its prehearing rulings the State Board directed  
9 Petitioners to submit succinct and identifiable evidence. Nevertheless, the testimony and  
10 exhibits submitted by Petitioners generally fail to satisfy even the less exacting evidentiary  
11 standards applied to administrative proceedings. Consequently, as set forth below, much of  
12 Petitioners’ testimony and exhibits must be excluded.

## 13 14 **II. PROCEDURAL OBJECTIONS**

### 15 **A. The Change Petition Proceeding is Premature and Should Not Commence** 16 **Until the Final CWF EIR/EIS Has Been Completed and The Delta Protestants Have Not** 17 **Had an Opportunity to Comment Upon Same.**

18 In the fall of 2015 the Delta Protestants, along with other Protestants, submitted  
19 significant and specified comments on the partially recirculated Draft Environmental Impact  
20 Report/Supplemental Draft and Environmental Impact Statement (“RDEIR/SDEIS”). The Delta  
21 Protestants, along with other Protestants have consistently asserted that the Change Petition  
22 cannot go forward in advance of the certification of the RDEIR/SDEIS. It appears clear that  
23 without final EIR/EIS Petitioners cannot satisfy Water Code section 1702.2(d) which mandates  
24 that the Change Petition provide enough information to demonstrate a reasonable likelihood that  
25 the request will not injure any other legal users of water.

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1           **B.     The Change Petition Should Not Proceed until the State Board has Updated**  
2 **the Bay Delta Water Quality Control Plan.**

3           The triannual review is long since overdue. Consequently, D1641 is long overdue for an  
4 update. Therefore, it is grossly premature for the Change Petition to proceed before the Bay  
5 Delta Water Quality Control Plan is fully updated. Due process is often inconvenient.  
6 Nevertheless, Petitioners are proceeding without a valid legal basis at this juncture.

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8           **C.     The CWF and the Subject Change Petition Should Not Proceed Because**  
9 **There Has Been No Economic and Financial Feasibility Analysis Showing the Project is**  
10 **Viable or Realistic**

11           Both economic and financial feasibility are always a critical part of this feasibility  
12 analysis. Per DWR and federal guidelines, minimal elements of these are a financial plan that  
13 includes a cost allocation, and evidence that the petitioners can meet the financial requirements  
14 of the plan under the proposed operations. Benefit-cost analysis is also typically included in  
15 feasibility studies, although guidelines do not require the choice of the project with the highest  
16 net benefits or benefit-cost ratio, especially if there are financial constraints.

17           None of the BDCP/WaterFix documents submitted as evidence in this proceeding  
18 include a complete financial plan. In the limited economic and financial modeling completed in  
19 documents not submitted as evidence it is clear that the project is not feasible at the minimal  
20 water yields included in the EIR/EIS.

21           In addition, the evidence and testimony submitted to date have ignored whether the  
22 proposed drought year operations are financially feasible. Key to the environmental approval of  
23 the proposal is that it will not take any additional water, and potentially less, in dry years. Dry  
24 years place water agencies under considerable financial stress because their revenue from water  
25 sales drops precipitously. Because of this, the key question in the financial plan and feasibility  
26 analysis is the ability of the petitioners to meet their financial obligations under severely  
27 constrained dry year operations. Failure to submit adequate financial evidence and testimony  
28

1 preclude the Change Petition from moving forward as the Petitioners have failed to show the  
2 project is feasible as required by the State Board.

### 3 4 **III. EVIDENTIARY OBJECTIONS**

5 Administrative hearings and discovery procedures are governed by the Water Code  
6 (Wat. Code, § 1075 et seq.) And SWRCB regulations (Cal. Code Regs., tit. 23, §§ 648 et seq.),  
7 which incorporate portions of the Administrative Procedure Act (Gov. Code, § 11400 et seq.),  
8 Evidence Code sections 801-805 and the Civil Discovery Act (Code Civ. Proc., § 2016.010 et  
9 seq.). Government Code section 11513 provides that administrative hearings are not conducted  
10 according to technical rules relating to evidence and witnesses, but relevant evidence must be  
11 "the sort of evidence on which responsible persons are accustomed to rely in the conduct of  
12 serious affairs." (Gov. Code, § 11513(c).) Under administrative standards of admissibility, "the  
13 evidence must be relevant and reliable." (Aengst v. Board of Medical Quality Assurance (1980)  
14 110 Cal.App.3d 275, 283.)

15 California Code of Regulations Title 23 sections 794(a)(6) and 794(a)(9) requires  
16 Petitioners submit adequate information to fully explain proposed diversion, release and return  
17 flow schedules and the identification "in quantitative" terms of any projected change in water  
18 quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in  
19 return flows, or reduction in the availability of water within the streams affected by the  
20 proposed change(s). Moreover, in their February 11, 2016 pre-hearing ruling, the hearing  
21 officers reiterated Petitioners' obligation to provide said information "in a succinct and easily  
22 identifiable format." (Feb 11, 2016 Ruling at P. 7). The hearing officer's admonishment was  
23 not the first directive issued to Petitioners regarding the submission of exhibits and testimony.  
24 The Notice of Petition ("Change Petition") issued by the State Board on October 30, 2015  
25 provided that all parties' exhibits based on technical studies or models be accompanied by  
26 sufficient information to clearly identify and explain the logic, assumptions, development, and  
27 operation of the studies or models." (See Change Petition at p. 33.)  
28

1           **A.     Petitioners Did Not Submit Complete Computer Modelling or Sufficient**  
2 **Information upon Which Key Witness Testimony is based.**

3           The Petitioners have provided several models as evidence to part 1A of the hearing.  
4 They claim that this set of models will allow for a thorough evaluation of the analysis that was  
5 conducted of the Preferred Alternative, 4A. This set of models is (1) incomplete, and (2)  
6 insufficiently documented, and (3) has not been peer reviewed by the scientific community to  
7 determine the accuracy or the appropriateness of the models as modified for CWF. Required  
8 components of the DSM2 model were not provided in the exhibits by the Petitioners. Requests  
9 made to DWR have resulted in the receipt of files that will allow the models to run, but there is  
10 no easy way to verify that these were the versions of the files that were used in the Petitioners  
11 analysis. The Variable Infiltration Capacity hydrology model and input data that was used to  
12 evaluate the future scenarios for climate change conditions was not included in the model  
13 exhibit. This hydrology model provided the input to the CALSIM II model. The UnTRIM  
14 model that was used in the analysis of tidal influence and salinity relationships at the Delta  
15 boundary was also not provided in the exhibits. It is a proprietary model and is not available to  
16 the public, so therefore the results from that analysis cannot be verified.

17           The analysis of the CFW was conducted for the No Action Alternative, and 4 separate  
18 scenarios, H3, H4, Boundary 1 and Boundary 2. Although those scenarios are loosely defined  
19 in the documentation provided by the Petitioners, there is insufficient information provided to  
20 independently recreate the conditions for those 4 scenarios. Boundary 1 and Boundary 2 are  
21 supposed to provide upper and lower ranges for the model operating scenario, yet there is no  
22 documentation provided to verify that those scenarios truly represent the upper and lower  
23 operational extremes. With the above models, and model components, being omitted from the  
24 evidence submitted by Petitioners, there cannot be a true evaluation of a modeling system that  
25 was used in the analysis of the CWF. Without being able to independently evaluate all of the  
26 models used in the analysis, the Delta Protestants cannot verify that the Petitioners evaluation of  
27 the different alternatives is correct. Thus there is no way to independently evaluate the potential  
28 for injury to existing water users in the Delta.

1 The Delta Protestants requested that Petitioners provide sufficient documentation to  
2 allow for the full understanding of the input data that is used in the models. Providing the data  
3 is helpful, and providing a description of its intent is helpful, but without a full description of  
4 what the data represents, and how it was created, severely hinders the Delta Protestants  
5 evaluation of its appropriateness. Without adequate documentation, the Delta Protestants are  
6 forced to reverse engineer, and make a significant number of guesses about how the input data  
7 to the models were constructed.

8 Based on the models that Petitioners entered into exhibit, the CALSIM II model was run  
9 over an 82 year period of record (1922-2003), but the DSM2 model was only evaluated for an  
10 18 year period (1975-1991). The shorter 18 year period is too short to provide for an accurate  
11 statistical analysis of the high and low water year extremes. For example, the 10% exceedance  
12 flow for the 8-river water index is 11.2 MAF for the 1920-2015 periods. The 10% exceedance  
13 flow for the 8-River flow index is 9.5 MAF for the 1975-1991 periods. That is a 16%  
14 difference in that low flow statistic using the two different periods. For those same two periods,  
15 the 90% exceedance high flow statistic differs by 19%. The period of analysis for the DSM2  
16 model that the DWR has provided into evidence is not long enough to provide for accurate  
17 results to represent low and high flow conditions.

18 Petitioners attempt to summarize the complicated results and assumptions of the  
19 modelling through the testimony of Armin Munevar through (DWR 71 and DRW 514.)  
20 However, in addition to the fatal flaws in the modeling provided as described above, neither of  
21 these exhibits or testimony is supported or explained by a report or memorandum describing the  
22 modelling assumptions, approaches, methodology used to determine impacts on storage levels,  
23 channel elevations or water quality. By failing to submit complete modeling as evidence, or to  
24 include necessary supporting reports or memorandums associated with same, Petitioners have  
25 not complied with the requirements of the Notice of Petition, subsequent pre-hearing rulings or  
26 with section 794 as set forth above. Any of Petitioners testimony which relies in whole or in  
27 part on the modelling should be excluded.

1 The testimony of Armin Munevar (DWR 51) is central to Petitioners' case in chief.  
2 However, said testimony acknowledges that the subject modeling does not reflect the actual  
3 operations which will occur pursuant to the Change Petition and the CWF. Thus, there is no  
4 basis upon which Petitioners can base their claim that injury will not result to other legal users  
5 of water.

6 Moreover, the modeling prepared to support Petitioners' case in chief does not represent  
7 the best available science. As been pointed out by other Protestants the past several months,  
8 there has been no comprehensive formal review of the CalSim II or DSM2. In 2006 the model  
9 was peer reviewed by an assembled panel of modeling experts. The panel ultimately declined to  
10 approve use of the model and pointed out significant needed changes. The Delta Protestants are  
11 informed that such changes have not been made and to the extent the model has been adjusted it  
12 has not subsequently been peer reviewed. Consequently, the model simply does not represent  
13 the use of best available science.

14  
15 **B. The Modeling Information Submitted by Petitioners Does Not Satisfy the**  
16 **Kelly/Frye Rule or Any Meaningful Less Exacting Standard.**

17 Expert testimony must be excluded if it is not based on principles or procedures that  
18 have gained general acceptance in their field. (Frye v. United States (D.C. Cir. 1923) 293 F.  
19 1013; People v. Kelly (1976) 17 Cal.3d 24. Under California law the Kelly rule is commonly  
20 known as the "general acceptance test" and requires that in order for expert testimony to be  
21 admissible it must be grounded in scientific theory or technique if that theory or technique is  
22 generally accepted as reliable and relevant in the scientific community. This rule requires that  
23 1) the technique has gained general acceptance in the field; 2) the witness furnishing the  
24 testimony is qualified to give evidence on the acceptance of the technique; and 3) correct  
25 scientific procedures were used. (See People v. Diaz (1992) 3 Cal. 4<sup>th</sup> 495, 526).

26 While the State Board has recently taken the position that the Kelly/Frye rule should not  
27 be applied to administrative proceedings, prevailing recent case law provides otherwise. (See  
28 Seering v. Department of Social Sciences (1987) 194 Cal. App.3d 298; Harris Transportation

1 Co. Air Resources Control Board (1995) 32 Cal.App.4<sup>th</sup> 1472, 1478 [ “We agree as a general  
2 matter the Kelly standard is applicable to administrative proceedings.”]. The Kelly Rule should  
3 be applied to the Change Petition. However, under this standard or any other less exacting  
4 standard, the modelling evidence and information submitted by Petitioners is so significantly  
5 incomplete that it cannot be deemed relevant or even practically useful. As such the testimony  
6 of Petitioners which relies upon the modeling as the basis of expert opinions must be excluded.

7  
8 **C. Opinion Testimony Contending the Change Petition Will Not Cause Injury**  
9 **to Other Legal Users of Water is Improper and Must Be Excluded.**

10 An expert's opinion may be based on his or her own observations and examinations, or  
11 on matters “made known to him at or before the hearing, *whether or not admissible*, that is of a  
12 type that *reasonably may be relied upon*” by experts in forming opinions on the particular  
13 subject ... “unless an expert is precluded by law from using such matter as a basis for his  
14 opinion.” (*California Evidence Code § 801*)

15 Although experts are given considerable leeway concerning the matters on which they  
16 may rely, they may not rely on *speculation or conjecture*. (*Korsak v. Atlas Hotels, Inc.* (1992) 2  
17 Cal.App.4<sup>th</sup> 1516, 1526; *Sargon Enterprises, Inc. v. University of Southern Calif.* (2012) 55  
18 [Cal.4th 747, 769-772, 781](#) —“trial court properly acted as a gatekeeper to exclude speculative  
19 expert testimony” (emphasizing trial courts' “substantial ‘gatekeeping’ responsibility” in  
20 excluding inadmissible expert testimony under [Ev.C. § 801\(b\)](#), governing judicial review of  
21 type of matter and [§ 802](#), governing review of reasons for expert's opinion); *Corenbaum v.*  
22 *Lampkin* (2013) 215 Cal.App.4<sup>th</sup> 1308, 1331 “(W)hen an expert's opinion is purely conclusory  
23 because unaccompanied by a reasoned explanation connecting the factual predicates to the  
24 ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no  
25 more than the reasons upon which it rests.” (*Jennings v. Palomar Pomerado Health Systems,*  
26 *Inc.* (2003) 114 Cal.App.4<sup>th</sup> 1108, 1117 (internal quotes omitted))

27 Expert opinion testimony must be excluded if the matter relates to an issue of law, such  
28 as the proper interpretation of a deed, contract, statute, etc. (*Summers v. A.L. Gilbert Co.* (1999)



1 69 Cal.App.4th 1155, 1178 —whether duty exists; see *Howard Jarvis Taxpayers Ass'n v. City of*  
2 *Riverside* (1999) 73 Cal.App.4th 679, 689 —whether tax assessment exempt from Prop. 218)

3 Petitioners' conclusions that CWF will not result in injury to other legal uses of water is  
4 wholly lacking in foundation and an improper attempt to influence the hearing offices with legal  
5 opinion testimony. Maureen Sergent (DWR 53) testifies on several occasions that the Change  
6 Petition does not represent a new water right and that the operation of the CWF will not injure  
7 other legal users of water (See DWR 53 P. 3). These are both ultimate questions of law for the  
8 hearing officers to decide and Ms. Sergent's opinions should be excluded. Moreover, Ms.  
9 Sergent is an engineer. She does not have the expertise to support her opinions related to these  
10 highly involved legal issues.

11 Even if the hearing officers were for some reason inclined to allow such testimony from  
12 a proffered engineering expert on the ultimate legal questions, Ms. Sergent's testimony must be  
13 excluded because it admittedly is built upon the testimony of Mr. Leahigh (DWR 61), Dr.  
14 Nader-Tehrani (DWR) and Mr. Munevar (DWR). Mr. Leahigh's testimony describing  
15 decisions related to the timing and quantities of water deliveries is based on speculative  
16 projected hydrologic and hydrodynamic information rather than actually known proposed  
17 operations. Thus, Mr. Leahigh's testimony is too speculative and uncertain to be relevant and  
18 useful. The testimony of Dr. Nader-Tehrani and Mr. Munevar is based on CalSim II and DSM2  
19 modeling which lacks proper verification, validation, accreditation and peer review. Therefore,  
20 the legal conclusions and opinions asserted by Ms. Sergent are built upon evidence which itself  
21 must be excluded.

22 John Leahigh is the Chief of the State Water Project Operations Office and his expertise  
23 is in civil engineering. Nevertheless, he testifies that it is his opinion that the Projects will  
24 continue to meet existing Delta water quality and fishery objectives and any additional  
25 regulatory requirements related to the CWF at a similar rate demonstrated historically. This  
26 opinion testimony is beyond this witness's expertise and thus there is no legal basis for same.  
27 Said testimony is purely speculative and assumes facts not in evidence and therefore must be  
28 excluded. Mr. Leahigh further testifies on several occasions that "My opinion is that regulatory

1 compliance with the CWF will be at least as good, if not better, as today given that CWF will  
2 add infrastructure flexibility to the system operations.” (DWR 61 p. 7 and 17). This testimony  
3 assumes facts not in evidence, offers an improper legal opinion, is gratuitous, speculative, and  
4 highly irrelevant and must be excluded. This witness’s testimony also relies on the testimony of  
5 Dr. Nader-Tehrani and Mr. Munevar, which in addition to the reasons set forth above, is  
6 irrelevant because Mr. Munvear acknowledges that the models cannot “reliably predict specific  
7 operations.” Unfortunately, Petitioners are making a specific and monumental request for a  
8 Change Petition and if they can’t provide modeling information with minimum specificity, they  
9 cannot meet their legal obligation to demonstrate no injury to other legal user of water.

10 Mr. Leahigh and Mr. Nader-Tehrani also opine that small changes in Delta salinity will  
11 not have any effect on agricultural beneficial uses. However, neither witness recognizes that  
12 southern Delta water quality objectives are regularly exceeded nor neither have any expertise as  
13 to what effects result from differing water quality. Further, testimony by DWR witnesses,  
14 including, Mr. Leahigh, that Petitioners will continue to meet existing Bay-Delta water quality  
15 standards assumes facts not in evidence, is speculative, and irrelevant.

16 Moreover, testimony by witnesses regarding their opinions that Petitioners will continue to meet  
17 existing Bay-Delta requirements is wholly inadequate and squarely contradicted by Petitioners  
18 own testimony. Pursuant to the Biological Statement submitted by Petitioners as part of the  
19 concurrent Biological Assessment process, Petitioners anticipate seeking relief from any  
20 existing permit conditions/Bay-Delta standards after one year of dry or critical conditions  
21 followed by four months of dry or critical conditions (see Section 3.7.2). This situation has  
22 occurred approximately 16 times between 1922 and 2015, which is 17% of the years. Hence the  
23 Petitioners in their own submittal tell the Board that 17% of the time they will operate in some  
24 unspecified manner and other than what their evidence, testimony and modeling set forth.  
25 Without knowing how they plan to operate during approximately 17% of the time, there is  
26 simply no basis by which to judge if the project will injure any other legal user of water.

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1 Based on the foregoing, the Delta Protestants object to the following testimony and  
2 exhibits submitted by Petitioners:

- 3 1. DWR 3 pp. 7-9
- 4 2. DWR 4 pp. 37-38
- 5 3. DWR 5 pp.15-17, 27-81
- 6 4. DWR 51 (Jennifer Pierre) pp.10, 13:16-48, p. 14: 8-9
- 7 5. DWR 53 (Maureen Sergent) pp3:20-25, 8:14-19, p. 10-15:11
- 8 6. DWR 61 (John Leahigh) pp. 5:23-25, 6:6-8, 7:17-23, 8:3-8, p. 16, 17:5-11, 17:23- p.  
9 18, pp. 19-20
- 10 7. DWR 114 (Alternatives Comparison)
- 11 8. DWR 117 (Adaptive Management Framework)
- 12 9. DWR 71 (Armin Munevar) pp. 2:18-23, 12:15-18, 12:27-13, 15-17, 19:10-24
- 13 10. DWR 66 (Dr.Parviz-Nader-Tehrani)
- 14 11. DWR 513 (DSM2 Modeling Results)
- 15 12. DWR 514 (CalSim II Modeling Results)
- 16 13. DWR 515 (Modeling Assumptions Table)
- 17 14. DWR 413 (South Delta Compliance)
- 18 15. DOI 7 (Ron Milligan) p. 4

19  
20 **Petitioners Failed to Submit Testimony for Eight of Their Witnesses by the May 31,**  
21 **2016 Deadline.**

22 On April 25, 2016 the CWF hearing officers issued a ruling requiring that all of  
23 Petitioners' proposed testimony be submitted in writing by May 31, 2016. Petitioners failed to  
24 submit any meaningful testimony for the following twelve witnesses:

- 25 • Steve Centerwall, DWR-52
- 26 • Michael Anderson, DWR-64
- 27 • Eric Reyes- DWR67
- 28 • Michael D. Bryan, DWR-73

- 1 • Jamie Anderson, DWR- 69
- 2 • Tara Smith, DWR-70
- 3 • Kristen Whit, DWR-DOI-6
- 4 • Gwendolyn Bucholz, DWR-72
- 5 • Mark A. Holderman, DWR-62
- 6 • Shanmugam Praba Pirarooban, DWR-54
- 7 • Sergio Valles, DWR- 58
- 8 • Robert Cooke, DWR-60

9 The Delta Protestants should not be required to speculate as to what the above witnesses  
10 will testify. As such, the above witnesses should not be allowed to testify at the hearing.

#### 11 **IV. JOINDER IN OTHER PROTESTANTS' WRITTEN OBJECTIONS**

12 The Delta Protestants also join in, adopt, and incorporate by reference the objections and  
13 motions to exclude evidence submitted by other Protestants as identified below. The Delta  
14 Protestants expressly reserve their rights to object to additional evidence Petitioners may later  
15 offer in connection with Part 1A of the hearing as well as to any evidence Petitioners submit in  
16 support of Part 2 of the CWF Hearing. Further, the Delta Protestants' reserve their express right  
17 to lodge additional objections and to make further motions at the time of the hearings for Part  
18 1A of the CWF Proceedings. Finally, while some of the objections set forth herein, as well as  
19 those herein incorporated by reference, might go to the weight of the testimony as opposed to  
20 strictly pertaining to exclusion of evidence, the Delta Protestants reserve their right, consistent  
21 with the June 10, 2016 ruling, to submit objections pertaining strictly to the weight of the  
22 evidence at a later time.

- 24 • The County of San Joaquin;
- 25 • Sacramento Valley Water Users;
- 26 • Save the California Delta Alliance;
- 27 • Friends of the River;
- 28 • Sierra Club California;

