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13 On behalf of South Delta Water Agency,
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15 Heritage Lands, Mark Bachetti Farms
16 and Rudy Mussi Investments L.P.

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18 **STATE OF CALIFORNIA**

19 **STATE WATER RESOURCES CONTROL BOARD**

20 Hearing in the Matter of California
21 Department of Water Resources and
22 United States Department of the
23 Interior, Bureau of Reclamation
24 Request for a Change in Point of
25 Diversion for California Water Fix

26 **PROTESTANTS SDWA PARTIES AND
27 LOCAL AGENCIES OF THE NORTH
28 DELTA'S MOTION FOR PROTECTIVE
ORDER REGARDING DWR'S SUBPOENA
DUCES TECUM TO DR. MICHELLE
LEINFELDER-MILES**

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1 Protestants South Delta Water Agency, Central Delta Water Agency, Lafayette
2 Ranch, Heritage Lands, Mark Bachetti Farms And Rudy Mussi Investments L.P.
3 (“SDWA Parties”) and Protestants Local Agencies of the North Delta (“LAND et al.”)
4 herein request that the Hearing Officers issue an order pursuant to Governmeent
5 Code, section 11450.30, subdivision (b), protecting the above named protestants from
6 the untimely and unreasonable demands in the Department of Water Resources’
7 (“DWR’s”) subpoena duces tecum (“Subpoena”) issued to Dr. Michelle Leinfelder-
8 Miles on June 29, 2017. The Subpoena is untimely, seeks cumulative information that
9 is unnecessary to the hearing process, would impose an undue burden on Dr.
10 Leinfelder-Miles, and does not conform with the laws and regulations applicable to this
11 proceeding. Thus, the Hearing Officers should issue a Protective Order and vacate the
12 Subpoena.

14 I. STATEMENT OF FACTS

15 The Subpoena seeks location and raw data related to Exhibits II-13, LAND-78,
16 LAND-79, SDWA 139, SDWA-140, and SDWA-263. As described below, DWR has
17 had Dr. Leinfelder-Miles’ testimony and alfalfa project report since September 2016.
18 Though DWR cross-examined Dr. Leinfelder-Miles three times over the past eleven
19 months, it was not until June 29, 2017, that DWR issued the subject Subpoena. The
20 date of production requested in the Subpoena is July 26, 2017. Presentation of sur-
21 rebuttal testimony for Part I of the California Water Fix (“CWF”) proceedings
22 concluded on July 11, 2017. No further testimony for Part 1 is scheduled, and DWR
23 itself has requested that the Hearing Officers “proceed with closing Part 1 of the
24 hearing.” (See DWR’s Opposition to SWWU’s Request to Keep Open Part 1 of the
25 Hearing [July 17, 2017], p. 7, bold added.) Thus, as explained more fully below, the
26 Subpoena has no utility in this proceeding and is improper.

1 **A. Case-in-Chief Phase**

2 On September 1, 2016, the SDWA Parties submitted SDWA-139 and SDWA-
3 140 as part of their case-in-chief Exhibits. SDWA-139 is Dr. Leinfelder-Miles' February
4 2015, the Project report on her study describing the leaching fractions being achieved
5 in south Delta alfalfa soils and how rainfall and water quality affect those fractions.
6 (SDWA-139, p. 1); SDWA-140 is an August 2016 project report update. The "update"
7 was not based on additional sampling data, but rather included additional analysis of
8 the data that had already been collected. (SDWA-139, p. 16, SDWA-140, p. 14; see
9 also Declaration of Dr. Michelle Leinfelder-Miles ("Leinfelder-Miles Decl."), ¶¶ 2, 3.)
10 Protestants Islands, Inc. and LAND et al. submitted the case-in-chief written testimony
11 of Dr. Leinfelder-Miles, which included information describing the alfalfa study, among
12 other relevant information, pertaining to the effect on soils from elevated salinity in
13 applied irrigation water in the Delta. (II-13, p. 4:4-26.)

14 The SDWA Parties also submitted the written testimony of Terry Prichard
15 (SDWA-92), which made specific reference to and generally relied on SDWA-139 and
16 SDWA-140. (SDWA-92, p. 3:23.) Mr. Prichard's direct testimony was presented by
17 the SDWA Parties on November 17, 2016 (November 17, 2016 Transcript, pp. 192-
18 207), and was the subject of extensive cross examination by DWR attorneys
19 (November 18, 2016 Transcript, pp. 4-60). DWR asked Mr. Prichard some questions
20 regarding SDWA-140, but made no inquiry about the location of the sampling sites at
21 that time. (November 18, 2016 Transcript, pp. 21:17-23:9.)

22 Dr. Leinfelder-Miles' direct case-in-chief testimony for Islands, Inc. and LAND et
23 al. was presented on November 3, 2016. (November 3, 2016 Transcript, pp. 149-
24 167.) During her testimony Dr. Leinfelder-Miles provided background on salinity in soil
25 and water and discussed each of her in-Delta studies, including the alfalfa study that is
26 the focus of the Subpoena. Thereafter, two DWR attorneys cross-examined Dr.
27 Leinfelder-Miles (November 4, 2016 Transcript, pp. 51-64, 66-70), questioning her
28 about each of her Delta studies. While cross-examination included questions related

1 to specific characteristics of the sampling sites in her one-time sampling of soil salinity
2 on Ryer Island (see, e.g. November 4, 2016 Transcript, pp. 55:5-22 [asking the age of
3 the pear orchard where soil samples were taken and the types of pears grown in it]),
4 neither DWR cross-examiner requested the location, GPS data or other information
5 pertaining to the alfalfa field sampling sites that are the subject of this Subpoena.
6 Moreover, no formal or informal discovery requests were made of Protestants
7 sponsoring Dr. Leinfelder-Miles' or Mr. Pritchard's testimony.

8
9 **B. Rebuttal Phase**

10 On March 23, 2017, Protestants LAND et al. submitted the written rebuttal
11 testimony of Dr. Leinfelder-Miles as exhibit LAND-78 and her December 2016 project
12 report update as LAND-79. Dr. Leinfelder-Miles' direct rebuttal testimony was
13 presented on May 19, 2017.

14 At that time DWR had a second opportunity to cross-examine Dr. Leinfelder-
15 Miles with regard to her December 2016 project report update. (LAND-79.) Again,
16 DWR performed a lengthy cross-examination inquiring about, among other topics, salt
17 resistant alfalfa strains, root depth, and precipitation effects on salinity. (May 19, 2017
18 Transcript, pp. 37-60.) Though DWR asked Dr. Leinfelder-Miles whether she kept
19 records of the location of sampling sites (May 19, 2017 Transcript, pp. 37-39), DWR
20 again failed to request location information for any alfalfa study sampling site. In
21 addition, no formal or informal discovery requests were made of Protestants
22 sponsoring Dr. Leinfelder-Miles' or Mr. Pritchard's testimony.

23 **C. Sur-Rebuttal Phase**

24 On June 9, 2017, the SDWA Parties submitted the joint sur-rebuttal testimony
25 of Dr. Leinfelder-Miles. (SDWA-263.) On June 23, 2017 Dr. Leinfelder-Miles provided
26 sur-rebuttal testimony responding to Dr. Joel Kimmelshue's critique of her work in his
27 rebuttal testimony. (DWR-85.) Specifically, Dr. Leinfelder-Miles' testimony addressed
28 Dr. Kimmelshue's testimony on peer review, experimental methodology, and sources

1 of salinity in agricultural systems, precipitation leaching, and alfalfa variety salinity
2 tolerance. (June 23, 2017 Transcript, pp. 16-28.) In this testimony, Dr. Leinfelder-
3 Miles explained that providing GPS location information of sampling sites was
4 unnecessary to test the validity of the study. (June 23, 2017 Transcript, p. 18:7-10;
5 see also Leinfelder-Miles Decl., ¶ 11.)

6 During cross-examination, DWR questioned Dr. Leinfelder-Miles extensively on
7 the differences between three versions of her alfalfa study project report (June 23,
8 2017 Transcript, pp. 30-37 [discussing SDWA-139, SDWA-140, and LAND-79]), Dr.
9 Leinfelder-Miles clarified that all three versions contained, and were premised on, the
10 same data (June 23, 2017 Transcript, pp. 30:17-20, 35:12-13, 35:25; see also
11 Leinfelder-Miles Decl, ¶ 2, 3). At this point DWR made its very first specific request for
12 the location of the sampling sites, despite having had multiple opportunities to make
13 this request over the prior eleven months:

14 MS. MCGINNIS: So, Hearing Officer, DWR believes the studies that, you
15 know, set forth the leaching fractions for these seven locations in the
16 South Delta, that we need to understand the basis for the conclusions
17 there and that the location of the sampling sites and study sites are
18 critical to understand the data. So, you know, already in this hearing, raw
19 data has been provided even after we provided -- DWR provided charts
20 that showed the data. So I'd like to request, under Government Code
21 11450.10(a), that a subpoena be issued for producing the locations.

22 (June 23, 2017 Transcript, p. 41:3-8.)

23 Counsel for Protestants and for DWR provided initial oral arguments regarding
24 the need for and propriety of release of the locations and data. (June 23, 2017
25 Transcript, pp. 40-42.) Among other issues, counsel for LAND expressed concern
26 about the proprietary nature of the data and its intended use in published research.
27 (*Id.* at p. 40: 5-8.) DWR argued that one of its witnesses recently had to produce “raw
28 data”, intimating the Protestants should as well. DWR’s references to its provision
of the spreadsheets underlying certain rebuttal testimony provided by Mr.
Leaigh in DWR-10 (June 23, 2017 Transcript, pp. 41-42), however, are

1 inapposite. As explained by counsel in support of the Subpoena issued for the data
2 behind Mr. Leaheigh's testimony, DWR was not prejudiced by provision of the
3 information because:

- 4 • DWR had already produced the information in PDF form and it was only
5 a matter of emailing the already existing excel format of the same
6 documents already provided in PDF form.
- 7 • The requested electronic version of DWR's "master spreadsheet" of
8 operational data was public information. DWR is a public agency
9 operating the State Water Project pursuant to permits issued by and
10 subject to the jurisdiction of the State Water Resources Control Board. It
11 cannot claim that the information in the spread sheet is proprietary or
12 otherwise confidential

13 (SJC Affidavit In Support of Notice and Subpoena Duces Tecum, June 2, 2017, p. 4.)

14 After the colloquy by counsel, the Hearing Officer suggested that DWR "give it
15 some thought, and if [DWR] still [felt] inclined to request this data, to issue the
16 subpoena and we will take it from there." (June 23, 2017 Transcript, p. 43:15-17.)

17 Later this same day, SDWA Parties requested that their sur-rebuttal exhibits, including
18 Dr. Leinfelder-Miles written sur-rebuttal testimony (SDWA- 263) be moved into
19 evidence. DWR did not object, and the exhibits were accepted into evidence. (June
20 23, 2017 Transcript, p. 75:4-18.)

21 On June 29, 2017, DWR served the Subpoena on Dr. Leinfelder-Miles. On July
22 5th, the Subpoena was served on the Hearing Service List. Though Dr. Leinfelder-
23 Miles is an employee of the University of California, the Subpoena was not served on
24 the University of California.

25 **D. Meet and Confer Regarding Subpoena**

26 After service of the Subpoena on Protestants presenting Dr. Leinfelder-Miles'
27 testimony, counsel for the SDWA Parties and LAND et al., as well as counsel for the
28

1 University of California, met and conferred with counsel for DWR regarding the
2 potential for alternative resolution of the Subpoena. In particular, the parties
3 discussed the possibility of Dr. Leinfelder-Miles answering a series of interrogatories
4 about her research sites and data instead of releasing the raw data and locations.
5 The possibility of a confidentiality agreement and/or in camera review was also
6 discussed. Though there was initially an indication that such an alternative should be
7 explored further, the parties were ultimately unable to agree on an alternative that
8 avoided briefing the merits and propriety of a Subpoena at this juncture in the
9 proceedings. In particular, there did not appear to be a way to satisfy DWR in a
10 manner that also permanently protected the confidentiality of the study locations and
11 raw data. In addition, the late stage of the hearing process made unclear the possible
12 relevance of any information provided pursuant to the Subpoena. Sur-rebuttal also
13 concluded in the time period after service of the Subpoena, and there was no
14 identified pathway for admission and acceptance of new evidence into the hearing
15 process.

16 While DWR has attempted to argue that the alfalfa study locations and raw data
17 would somehow be relevant and useful to Part 1 of the hearing, DWR has also
18 requested this week that Part 1 of the hearing be concluded. (See DWR's Opposition
19 to SVWU's Request to Keep Open Part 1 of the Hearing, July 17, 2017, p. 7.) As
20 explained below, DWR's Subpoena is ill-considered and a protective order should
21 issue to prevent damage that would otherwise be caused by the release of the
22 Subpoenaed locations and raw data from Dr. Leinfelder-Miles' alfalfa research.

23 24 **II. LAW AND ARGUMENT**

25 26 **A. Discovery in the CWF Hearing May Be Limited By a Protective Order.**

27 A party served with a subpoena may object to the terms of the subpoena or
28 notice by a motion for a protective order. (Gov. Code, § 11450.30, subd. (a).) The

1 hearing officers may issue any order that is appropriate to protect the parties or the
2 witness from unreasonable demands. (Gov. Code § 11450.30, subd. (b).)

3 The right to obtain discovery through a subpoena is not unlimited. The Hearing
4 Officers may issue a protective order prohibiting or limiting depositions in order to
5 protect a party or deponent from undue burden and expense. (Code Civ. Proc., §
6 2025.420, subd. (b), Wat. Code § 1100, Gov. Code § 11400 *et. seq.*; Cal. Code. Regs.,
7 tit. 23, §§648, 648.4.) The Hearing Officer may issue a protective order if the discovery
8 sought would be “unreasonably cumulative or duplicative, or is obtainable from some
9 other source that is more convenient, less burdensome, or less expensive.” (Code Civ.
10 Proc., §§ 2025.420, subd. (b), 2019.030, subds. (a), (b).)

11 For the following reasons, a Protective Order should issue in regards to the
12 information requested within the Subpoena.

13
14 **B. The Subpoena is Untimely**

15 It is axiomatic that litigants have an obligation to proceed with reasonable
16 diligence. Subpoenas and subpoenas duces tecum should be issued at reasonable
17 times. (See Gov. Code, § 11450.10.) Protestants’ case-in-chief exhibits and testimony
18 were submitted nearly eleven months ago on September 1, 2016 yet DWR did not
19 issue the Subpoena until June 29, 2017. Protestants’ rebuttal testimony and exhibits
20 were submitted on March 23, 2017. Protestants’ sur-rebuttal testimony and exhibits
21 were submitted on June 9, 2017.

22 Dr. Leinfelder-Miles submitted has testimony and exhibits in all three phases
23 (case in chief, rebuttal and sur-rebuttal) of these proceedings. Dr. Leinfelder-Miles
24 presented direct oral testimony in each phase of the proceedings and was cross-
25 examined by DWR attorneys each time. It was not until the cross examination of Dr.
26 Leinfelder-Miles by DWR on June 23, 2017, during the sur-rebuttal phase of the
27 proceedings, that DWR asked for the GPS data and other information pertaining to the
28 alfalfa field sampling sites that are the subject of the Subpoena. On June 23, 2017,

1 the SDWA Parties requested that their sur-rebuttal exhibits, including Dr. Leinfelder-
2 Miles written sur-rebuttal testimony (SDWA- 263) be moved into evidence. DWR did
3 not object, and the exhibits were accepted into evidence.

4 The date of production requested by the Subpoena is July 26, 2017. However,
5 the presentation of sur-rebuttal testimony for Part 1 of the CWF proceedings
6 concluded on July 11, 2017. No further hearing days are scheduled and DWR is
7 opposing Sacramento Valley Water User's ("SVWU's") Request to keep Part I open.
8 Thus, even if the information requested by the Subpoena was properly discoverable,
9 which it is not, there is no proper procedural justification for the production of new
10 evidence at this time. Neither DWR, nor any of the parties for that matter, would have
11 any opportunity to cross-examine Dr. Leinfelder-Miles even if the data were produced,
12 and Dr. Leinfelder-Miles would not have the ability to explain the data beyond the
13 thorough explanations she has already provided.

14 DWR's inexplicable delay in seeking the information that is the subject of the
15 Subpoena renders its request effectively moot. Even if Part 1 of the proceedings were
16 to be reopened for whatever reason, it would be unreasonable to for Dr. Leinfelder-
17 Miles to be required to appear for a fourth round of cross-examination on topics which
18 have already been thoroughly explored.

19
20 **C. The Information Sought Is Cumulative and Duplicative**

21 The Hearing Officer may issue a protective order if the discovery sought would
22 be "unreasonably cumulative or duplicative." (Code Civ. Proc., §§ 2025.420, subd.
23 (b), 2019.030, subds. (a), (b).) Dr. Leinfelder-Miles has already provided all of the
24 information required to evaluate her work. The additional information requested is
25 thus both duplicative and cumulative and the Hearing Officers should grant a
26 Protective Order.

27 Dr. Leinfelder-Miles' testimony and project reports have been in evidence since
28 September 2016. Within her testimony and project updates, Dr. Leinfelder-Miles

1 provided extensive data and information that allowed DWR and other parties to
2 assess the validity of her findings. Dr. Leinfelder-Miles' sur-rebuttal testimony also
3 provided an explanation of why providing specific sampling sites would not provide
4 additional analytical benefit. (Leinfelder-Miles Decl., ¶¶ 7, 11.) Dr. Leinfelder-Miles
5 has explained her methodology in both choosing sites that are representative of
6 agricultural lands in the South Delta, and characterizing the soil of those sites.
7 (Leinfelder-Miles Decl., ¶¶ 12, 13.) In addition, she has provided summary data on
8 groundwater depth and quality, soil salinity, irrigation water salinity, and precipitation
9 to contextualize her findings. (Leinfelder-Miles Decl., ¶ 14 [citing LAND-79].)

10 Dr. Leinfelder-Miles' testimony also described why providing the precise
11 sampling locations is unnecessary to analyzing her results, and may in fact expose
12 her data to being misinterpreted. In the scientific community, work is reviewed based
13 on the soundness of the methodology and whether it is sufficiently described such that
14 a second researcher could reproduce the experiment. A study, and its findings, is not
15 invalid for failure to disclose the precise location the study was performed.
16 (Leinfelder-Miles Decl., ¶ 11.) Moreover, raw data is only useful to a party if they have
17 the expertise to analyze it; it is unclear whether DWR possesses the expertise to do
18 so. (Leinfelder-Miles Decl., ¶ 7.)

19 As described above, DWR cross-examined Dr. Leinfelder-Miles on her methods
20 and findings multiple times, beginning in November 2016. At no point has DWR
21 identified any mistakes or deviations from the scientific process that would justify the
22 need for release of the underlying raw data and sampling locations. (Leinfelder-Miles
23 Decl., ¶ 9.) All of the relevant information necessary to assess Dr. Leinfelder-Miles'
24 testimony and project reports has already been provided. (Leinfelder-Miles Decl., ¶¶
25 11-16.) This Subpoena then does nothing to elicit further testimony and evidence
26 relevant to the proceeding. Rather, the Subpoena seeks unnecessary and duplicative
27 information, which has no additional utility in this proceeding.
28

1 so until after it had cross-examined Dr. Leinfelder-Miles on these reports three times.
2 The information sought is also cumulative or duplicative because Dr. Leinfelder-Miles
3 has already produced extensive information describing the relevant factors that would
4 allow DWR to perform an independent review of her work. Providing GPS location
5 data of sampling sites provides no additional analytical benefit. Finally, requiring
6 production of this confidential information would put an undue burden on Dr.
7 Leinfelder-Miles because she would be forced to breach agreements with private
8 landowners to keep their information confidential. This would impair Dr. Leinfelder-
9 Miles' opportunities for future research relationships, and could affect other scientists
10 as well. Therefore, irrespective of whether the Hearing Officers leave Part I of the
11 Hearing open for other reasons, this Motion should be granted and no further
12 proceedings should be allowed with regard to the evidence of Dr. Michelle Leinfelder-
13 Miles, which has already been accepted into evidence.

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16 Date: July 21, 2017.

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