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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' RESPONSE TO SOUTH
DELTA WATER AGENCY, CENTRAL
DELTA WATER AGENCY, LAFAYETTE
RANCH, HERITAGE LANDS, MARK
BACHETTI FARMS, AND RUDY MUSSI
INVESTEMENTS L.P. OBJECTION TO
WRITTEN TESTIMONY AND EXHIBITS
SUBMITTED BY PETITIONERS U.S.
BUREAU OF RECLAMATION AND
CALIFORNIA DEPARTMENT OF
WATER RESOURCES**

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17 California Department of Water Resources ("DWR") submits this response to the
18 objections to evidence submitted by Protestants South Delta Water Agency, Central
19 Delta Water Agency, Lafayette Ranch, Heritage Lands, Mark Bachetti Farms, and Rudy
20 Mussi Investments L.P. (collectively "SOUTH DELTA et al.") in the matter of DWR and
21 U.S. Bureau of Reclamation's (collectively "Petitioners") Request for a Change in Point
22 of Diversion for California Water Fix. Where applicable in this response, DWR cites to
23 the Master Response to Similar Objections Made by Protestants Collectively ("Master
24 Response") filed on July 20, 2016, which also provides a common Statement of Facts
25 and Evidentiary Standards for DWR's separate responses to individual Protestants'
26 objections.
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INTRODUCTION

1 Protestants SOUTH DELTA et al. object to much of the Petitioners' evidence and
2 testimony in this proceeding and "object to the Hearing Officers' consideration of it for
3 purposes of this proceeding." (Objections, p. 2.) For the most part, SOUTH DELTA et
4 al.'s objections challenge the overall sufficiency of the evidence submitted in support of
5 the Petition, seeking to argue the merits of the Petition, or specific evidence, rather than
6 the admissibility of the evidence. The Board should reject such attempts to use a forum
7 intended for objections to evidence to instead interject testimony and argument. For the
8 reasons herein, SOUTH DELTA et al.'s objections to evidence should be overruled.

ARGUMENT

10 A. SOUTH DELTA et al.'s Objections to Commencing Proceedings in Advance 11 of the Final CWF EIR/EIS and Update to the Bay Delta Water Quality Control Plan 12 Should Be Disregarded as an Improper De Facto Motion for Judgment

13 SOUTH DELTA et al. objects essentially on jurisdictional grounds, asserting that
14 the Water Board may not exercise its Water Code section 1700 (et. seq) change petition
15 authority in advance of the Final CWF EIR/EIS and the update to the Bay Delta Water
16 Quality Control Plan. See Sections F and I of DWR's Master Response on pages 18-20
17 and 22-25, respectively, for DWR's response to these objections, and is incorporated
18 herein.

19 B. SOUTH DELTA et al.'s Objection to Proceeding Prior for Lack Economic and 20 Financial Feasibility Analyses Should Be Disregarded As A Defacto Motion For Judgment

21 Discussion of the sufficiency of the evidence and of the Board's authority to
22 proceed is provided in Sections F and J [sic] of the Master Response, and is
23 incorporated herein.

24 C. SOUTH DELTA et al.'s Objections to Sufficiency of Scientific or Technical 25 Evidence or Purported Failure to Meet the "Kelly-Frye" Standard Are Without Merit

26 SOUTH DELTA et al.'s argument raises objections to the "scientific" evidence,
27 including modeling results, submitted by Petitioners. (Objections, p. 5) SOUTH DELTA
28 et al. cites an incorrect evidentiary standard for the admissibility of such evidence, the

1 “Kelly-Frye standard.” DWR’s Master Response, Section E (pp. 14-18) addresses this
2 common objection to the modeling analyses, and is incorporated herein. As stated in
3 the Master Response, the Kelly-Frye standard does not apply to administrative
4 proceedings before the Board.¹ Further, the Master Response provides extensive
5 discussion regarding the wide acceptance and credibility of the modeling utilized by
6 Petitioners. For these reasons, SOUTH DELTA et al.’s objections to the modeling
7 analyses and, by extension, the testimony that relies on such analyses is without merit.

8 Further discussion of the adequacy of foundation for testimony, the admissibility of
9 the model programs, and the sufficiency of the evidence is provided in sections B, D, E,
10 and F of the Master Response, and is incorporated herein. For these reasons, the Board
11 should overrule these objections.

12 D. SOUTH DELTA et al.’s Objections to Opinion Testimony Apply the Wrong
13 Standards and Should Be Overruled

14 Protestants SOUTH DELTA et al. object to testimony of witnesses supporting
15 Petitioners’ conclusions that CWF will not result in injury to other legal users of water,
16 contending that such evidence is wholly lacking in foundation and an improper attempt to
17 influence the hearing officers with legal opinion testimony (Objections, p. 9), and
18 specifically request exclusion of the testimony of Maureen Sergent, John Leahigh, Dr.
19 Nader-Tehrani, and Armin Munevar, and specific evidence contained in DWR 3,
20 DWR 4, DWR 5, DWR 51, DWR 53, DWR 61, DWR 114, DWR 117, DWR 71, DWR 66,
21 DWR 513, DWR 514, DWR 515, and DWR 413. (Objections, p. 11.) These objections
22 are discussed at length in Sections A, B, D, F, H, and J [sic] of the Master Response,
23 and are incorporated herein. For these reasons the Board should overrule these
24 objections.

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26 ¹ See also the Board’s March 18, 2016 Ruling on Motions filed in the enforcement
27 proceedings against Byron-Bethany Irrigation District and the West Side Irrigation District in
28 which the Board explained the reasons why the Kelly-Frye standard does not fully translate to the
administrative context, including proceedings before the Board.

1 E. SOUTH DELTA et al.'s Objections to Witnesses for Failure to Submit Testimony
2 by the May 31, 2016 Deadline Is Without Merit and Should Be Overruled

3 Protestants SOUTH DELTA et al. object to the testimony of twelve witnesses for
4 failure to submit "meaningful testimony" by the May 31, 2016 deadline (Objections,
5 p. 11).

6 DWR opposes the objections submitted by SOUTH DELTA et al. on the grounds
7 that DWR's written submissions sufficiently demonstrate that those witnesses are
8 qualified experts and may give opinion testimony. To the extent SOUTH DELTA et al.
9 have questions about this testimony and the exhibits, it will have the opportunity to
10 cross-examine these witnesses about their testimony and the exhibits. DWR
11 incorporates herein by reference such general objections regarding expert witnesses
12 and evidence contained within DWR's Master Response in all sections, as applicable.
13 Further, these witnesses are offered to provide supplemental information as may be
14 reasonable, prudent, and in the interests of a fair hearing to inform the Hearing Officers
15 on such matters as may be raised during cross-examination which may be foundational
16 and/or which exceed the scope of the written and oral testimony of experts on direct
17 which was submitted in advance of the commencement of the hearing.

18 **CONCLUSION**

19 For the foregoing reasons, Protestants SOUTH DELTA et al.'s objections should
20 be overruled. DWR reserves the right to provide additional written and oral responses
21 to these objections and to respond to other objections that may be raised later.

22 Dated: July 22, 2016

CALIFORNIA DEPARTMENT OF WATER
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