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9 California Water Impact Network

10 **BEFORE THE**

11 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

12 HEARING IN THE MATTER OF  
13 CALIFORNIA DEPARTMENT OF WATER  
14 RESOURCES AND UNITED STATES  
15 BUREAU OF RECLAMATION  
16 REQUEST FOR A CHANGE IN POINT OF  
17 DIVERSION FOR CALIFORNIA WATER  
18 FIX

19 **RESPONSE TO OBJECTIONS, OTHER  
20 THAN THOSE REGARDING SCOPE OF  
21 TESTIMONY, TO THE TESTIMONY OF  
22 CSPA ET AL. (AQUALLIANCE,  
23 CALIFORNIA SPORTFISHING  
24 PROTECTION ALLIANCE AND  
25 CALIFORNIA WATER IMPACT  
26 NETWORK) FOR PART 1B**

27 **I. INTRODUCTION**

28 The CSPA parties<sup>1</sup> submit the following response to objections to our Part 1B cases in chief. The SWRCB has not ruled on objections other than those that concern the scope of Part 1B. Proponents' and contractors' further objections are without merit. The offered testimony is relevant, reliable, and is the type of evidence that the SWRCB and water users are accustomed to relying upon in the course of their work. The CSPA parties respectfully request that the SWRCB overrule the objections in their entirety and deny SLDMWA's and DWR's motions to strike our testimony.

<sup>1</sup> AquAlliance, California Sportfishing Protection Alliance, and California Water Impact Network.

1           **II.     GENERAL RESPONSE TO OBJECTIONS**

2           Water Code 1702 requires that when a petition for change in point of diversion is filed,  
3 the petitioner must establish that the change will not operate to the injury of any legal user of the  
4 water involved. DWR, the Bureau, and their customers have failed to meet their burden of proof  
5 in Part 1A.

6           Evidence in a petition for change is admitted in accordance with Government code §  
7 11513. (Cal. Code Regs. tit. 23 §648.5.1) Under Government code §11513(c), relevant  
8 evidence must be admitted if “it is the sort of evidence on which responsible persons are  
9 accustomed to rely in the conduct of serious affairs,” regardless of any common law or statutory  
10 rule which might make improper the admission of the evidence over objections in civil actions”  
11 (Gov. Code §11513(c).) The SWRCB has previously established that hearing officers  
12 generally prefer to admit evidence using more liberal standards since the SWRCB hearing  
13 officers have talented staff and substantial subject matter knowledge and can properly evaluate  
14 and weigh the evidence.

15           The testimony of the nine CSPA et al. witnesses comes from people who mostly have  
16 previously testified before the SWRCB in hearings as recognized experts in their field, and  
17 recognized organizations that regularly play an important role in many water issues considered  
18 by the SWRCB. Each witness prepared his or her testimony to provide facts drawn directly  
19 from his or her own experience, training, skills, and education, and provided the source  
20 materials for those foundational facts as exhibits. CSPA et al. did nothing different in drafting  
21 its testimony than did the objecting proponents in their Part 1A case in chief. Each witness’s  
22 testimony is supported by exhibits, and the foundation for each opinion is rationally based on his  
23 or her own perceptions and observations, and will be helpful to a clear understanding of his or  
24 her testimony (Evid. Code §801). The “matter” forming the basis of each of the witnesses’  
25 testimony includes facts, data, and intangibles such as the experts’ knowledge and experience.  
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1 The argument that the exhibits from the CSPA witnesses are irrelevant and lack  
2 foundation because they are not yet authenticated is meritless. The exhibits will be  
3 authenticated when the testimony is presented in conformance with Cal. Code Regs. tit. 23,  
4 §648.4(d). Most of the exhibits objected to by the proponents and their contractors are  
5 government documents regularly relied upon by responsible people as required by Gov. Code  
6 §11513(c) and are therefore admissible in the proceeding. The fact that Dr. Lee, Mr. Custis, Mr.  
7 Jennings, Ms. Vlamis, and our other witnesses attached exhibits that they have previously  
8 prepared to their testimony in this hearing for foundational purpose is exactly how the  
9 proponents introduced facts necessary to inform their own testimony, and is relevant and not  
10 “surprise testimony.” If DWR and its contractors had not introduced the partially completed  
11 environmental documents for the WaterFix, CSPA witnesses would not have needed to show the  
12 incompleteness, the evasion, and the cherry-picking of the facts contained in their Part 1A  
13 testimony.

14 **III. RESPONSES TO SPECIFIC OBJECTIONS OF SAN LUIS AND DELTA**  
15 **MENDOTA WATER AUTHORITY AND DWR**

16 CSPA offers the following responses to specific portions of the objections of San Luis &  
17 Delta Mendota Water Authority [Water Authority] and DWR:

18 The Water Authority and DWR object to Barbara Vlamis’s testimony on the grounds of  
19 relevance, reliability, and foundation. The evidence offered by Ms. Vlamis is based on her years  
20 of experience as head of the two major regional environmental groups in the Sacramento Valley  
21 – the Butte Environmental Council and AquAlliance. It has probative value and relies on  
22 government documents and her working relationship with experts including Kit Custis, another  
23 AquAlliance witness.

24 Evidence Code 801(b) allows such testimony to be based on the fact established by her  
25 working relationship with Mr. Custis, her review of government documents, her review of DWR  
26 and Bureau groundwater programs, and her own skill, experience, training and education, and  
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1 her perceptions formed before and at this hearing, that is a type that reasonably may be relied on  
2 to form an opinion. None of the matter or exhibits in her testimony is improper or speculation,  
3 and all of it is required to be admitted in this action. The testimony [AQUA-1 at pp. 3-6] is  
4 supported by evidence contained in her exhibits and the by accompanying Custis foundational  
5 facts contained in AQUA-5.

6 Kit Custis's testimony in AQUA-5 is admissible under the legal standards applicable to  
7 this hearing, and Mr. Custis's CV establishes that his testimony is exactly the kind of evidence  
8 on which responsible persons are accustomed to rely in the conduct of serious affairs. The  
9 testimony is relevant, reliable, and within the scope of the WaterFix proposal. It shows exactly  
10 how overlying water rights holders could be harmed by this project. DWR testified repeatedly  
11 on direct and cross-examination that one of the purposes of the WaterFix program is to collect  
12 additional water from below the rim dams and expand the window allowed for additional  
13 withdrawals of water at times when they cannot pump it now. Mr. Custis's testimony is directly  
14 relevant and reliable.

15 Jim Brobeck's testimony in AQUA-3 establishes him as both an AquAlliance member  
16 and a landowner with standing to protect his own water supply and that of tens of thousands of  
17 other groundwater rights holders and users of the common aquifer in the Sacramento Valley  
18 below the rim dams. He and AquAlliance are entitled to represent their members in this change  
19 petition to show the injury that will occur if the change petition is granted. His testimony, as  
20 amended, is admissible in this hearing.

21 The Water Authority and DWR object to Mr. Jennings's use of the State Board 2010  
22 Public Trust Report. [Jennings p. 2] While they admit the existence of the report and its  
23 significance to show that D-1641 has not protected the San Francisco Bay-Delta estuary, they  
24 claim the report is irrelevant. Nothing could be more untrue. The Water Authority and DWR  
25 have established consistency with D-1641 as the sole criteria to meet their W.C. 1702 duty to  
26 establish that there will be no injury to human users from the change in point of diversion. D-

1 1641 compliance proves nothing in regard to injury if compliance with D-1641 has previously  
2 degraded the Delta. The most foundational facts necessary to disprove the myth that the ability  
3 of the WaterFix to comply with D-1641 satisfies the proponents' burden to prove that approval  
4 of the WaterFix will not harm legal users of water are the facts and supporting exhibits in Mr.  
5 Jennings's testimony, which include the 2010 SWRCB document.

6 Mr. Jennings appropriately incorporated CSPA documents on the WaterFix EIR/EIS. If  
7 the comments on the EIR/EIS are hearsay, then the EIR/EIS themselves are also hearsay. If  
8 Gwen Bucholtz and Jennifer Pierre for DWR can use the EIS/EIR to support their testimony in  
9 Part 1A, then Bill Jennings can use his comments, filed in DWR's process, to lay the foundation  
10 for his opinions in his testimony in Part 1B. To find otherwise would be unfair, and to strike his  
11 testimony and leave in the Part 1A testimony of DWR witnesses would be a due process  
12 violation and give a whole new meaning to the California WaterFix. The same facts exist for  
13 the erroneous ruling striking Mr. Jennings's testimony regarding the subject of adaptive  
14 management. [Hearing Officers' ruling, November 23, 2016] DWR's witnesses Jennifer Pierre  
15 and Gwen Bucholtz testified in regard to the WaterFix's proposed reliance on adaptive  
16 management, and opined that adaptive management and operator real-time management would  
17 help to prevent injury to other water users. It was confirmed in testimony by operator Leahigh  
18 [DWR] and operator Milligan [BOR] that they do not operate the projects according to modeling  
19 criteria, nor do they propose any water right permit terms and conditions that would enable other  
20 water users to enforce such terms and conditions in the event that the WaterFix operations do  
21 harm other legal users of water. Mr. Jennings's testimony and exhibits regarding the history and  
22 effectiveness of adaptive management in the S.F. Bay-Delta estuary is relevant and reliable  
23 since he sourced the exhibits that provide the foundation for his opinion that adaptive  
24 management has failed to prevent injury in the Bay-Delta in the past. We ask that you  
25 reconsider your previous ruling on this matter or strike the Part 1A testimony of DWR's  
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1 witnesses on adaptive management and strike the concept of adaptive management from DWR's  
2 WaterFix proposal.

3         Thomas Cannon is an expert on the hydrology and water supply of the Bay-Delta, and his  
4 40 years of work in these fields as a consultant, reflected in his C.V., make that very clear. The  
5 opinions in his testimony are based upon his education, training, and experience in working in  
6 the Bay-Delta on water supply and hydrological issues for many employers. His skill is  
7 reflected in his ability to work for so many state and federal agencies, including the SWRCB  
8 and project contractors. Again, the fact that the proponents of the WaterFix project chose to  
9 posit the theory that past compliance with D-1641 and future promises to meet D-1641 would  
10 prevent legal injury to others makes this testimony relevant and requires that it be admitted  
11 under the Government Code standards [Gov. 11513].

12         Mr. Cannon presents expert testimony regarding the likely durability of the Biological  
13 Opinions for the operation of the State Water Project and the Central Valley Project, and  
14 regarding the likely durability of the requirements of D-1641. Mr. Cannon bases this testimony  
15 on forty years of professional experience working in the Bay-Delta estuary. Mr. Cannon  
16 concludes that neither the Biological Opinions nor D-1641 is likely to stand because he has  
17 witnessed first-hand their failure to protect the public trust resources of the Bay-Delta estuary.  
18 Mr. Cannon's testimony is relevant to Part 1A of the hearing because proponents DWR and the  
19 Bureau of Reclamation have based their argument on the absence of injury to legal users of  
20 water on likely future compliance with the Biological Opinions and D-1641. Mr. Cannon's  
21 testimony provides a factual basis for the conflicting argument that the lack of durability of the  
22 regulatory constraints of the Biological Opinions and D-1641 renders DWR and the Bureau's  
23 standard for injury invalid.

24         The Water Authority objects to the following statement in the testimony of Chris Shutes:  
25 "While the impact of risky water management on instream uses is not the subject of Part 1 of the  
26 WaterFix hearings, one cannot dismiss instream uses entirely because impacts to those uses are  
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1 often the mechanism through which low storage in SWP and CVP north-of-Delta reservoirs  
2 initially stress the system and ultimately cause injury to legal users of water. Sacramento River  
3 water temperatures and the management of the Shasta Reservoir to preserve its cold-water pool  
4 during 2014 and 2015 are recent obvious examples.” [CSPA-4 at p. 22.] The Water Authority  
5 objects: “This statement is irrelevant and lacks foundation. Testimony regarding instream uses  
6 is not relevant to the current issue of the change petition’s potential effects on legal users of  
7 water.” This testimony does not address the impacts of WaterFix on public trust resources, but  
8 rather how depletion of reservoir storage affects instream resources and in so doing becomes the  
9 mechanism that restricts water available to legal users of water. It is entirely relevant. The  
10 operations of the SWP and CVP in 2014 and 2015 provide the foundation that the Water  
11 Authority argues is lacking.

12 DWR objects that Mr. Shutes’s testimony regarding the expired status of the water rights  
13 permits that both DWR and the Bureau seek to change and regarding other procedural  
14 irregularities in connection with these permits is outside the scope of the hearing. This  
15 testimony goes to factual issues regarding the status of these water rights. In effect, DWR’s  
16 objections ask the Hearing Officers to pre-judge the legal issue by excluding this testimony.

17 DWR objects that Mr. Shutes has “no relevant education, training or direct work  
18 experience with such models or reservoir operations,” and thus lacks expertise. As described in  
19 his C.V., Mr. Shutes has direct work experience as a hydropower and water rights advocate over  
20 the past fifteen years. He has attended hundreds of meetings during that time with persons who  
21 represent and who operate over twenty hydropower and water supply projects, virtually all of  
22 which involve reservoir operations. He understands the operation of those projects, has  
23 discussed those operations with those who operate them, has attended modeling trainings on  
24 many of them, and has modeled some of them himself. His “special skill, experience,  
25 knowledge [and] training” [Evidence Code 801(b)] more than make up for his lack of formal  
26 education in these subjects.

1 Mr. Sjovold's testimony in regard to the history of the State Water Project's Coastal  
2 Aqueduct to Santa Barbara retail water users has been withdrawn by Board order and will be re-  
3 filed in Part 2 of this hearing. The proponents' remaining objections are to Mr. Sjovold's  
4 criticism of the use of water supply indices by the proponents and the resulting danger of using  
5 them in conjunction with the WaterFix. Since the stated purpose of the WaterFix change  
6 petition is to enable more water capture earlier in the water year, his testimony is relevant to the  
7 increased potential for injury if the change petition is granted. Mr. Sjovold's education and  
8 training as a systems analyst, plus his experience working on DWR's project reliability reports  
9 during the court-ordered re-writing of the Monterey Agreement EIR, provide the foundation for  
10 his testimony in this matter.

11 Dr. Fred Lee has been working on water quality issues in the Bay-Delta for decades.  
12 Scientists throughout the United States recognize him as one of the foremost experts in Delta  
13 water quality issues. His C.V. reflects the number of his peer-reviewed papers relating to Bay-  
14 Delta water quality. The objections to his testimony in the WaterFix hearing are that his  
15 opinions lack foundation, are irrelevant, and are hearsay evidence. His own studies show that  
16 the San Joaquin River brings high pollutant concentrations that are drawn into the Central Delta  
17 through Turner Cut. These studies also show that the operation of the WaterFix at the three  
18 northern diversions will greatly diminish the volume of fresh water presently flowing into the  
19 Central Delta.

20 These are the foundational facts that support his scientific opinion that, with the WaterFix  
21 diversions, the pollutants in Turner Cut will have an increased impact on Central Delta water  
22 quality beneficial uses, including agriculture. The idea that his testimony that the tunnel  
23 diversion will deprive the Delta of dilution flows lacks foundation is without merit.

24 Dr. Lee does use other government data summarized in his testimony for support for his  
25 opinions. This evidence supports his own work, but the main support for his testimony is his  
26 own extensive work. Hearsay is allowed under SWRCB rules as long as it is not the sole  
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1 evidence on which the testimony relies. Here it is not the only support for his opinions. The  
2 objections should be overruled, and the motion to strike which identified portions of Dr. Lee's  
3 testimony should be denied.

4 DWR and the Water Authority object to the testimony of Ed Whitelaw on the grounds  
5 that his testimony is an inadmissible expert opinion, lacks foundation, is irrelevant, and is an  
6 inadmissible opinion regarding questions of law. These objections are meritless. DWR and the  
7 Water Authority ignore California Evidence Code 805, which states: "testimony in the form of  
8 an opinion that is otherwise admissible is not objectionable because it embraces the ultimate  
9 issue, to be decided by the trier of fact."

10 The objection that an economist who has testified on economic injury in state and federal  
11 courts for 45 years cannot testify on whether, in his opinion, the proponents have failed to prove  
12 no injury is completely unsupported in logic or law. Injury is a legal term that is not specific to  
13 water rights. Dr. Whitelaw's 27-page C.V. lists specific cases in which he has testified  
14 regarding injury in water cases, in patent infringement, and in environmental injury. Here his  
15 ECONorthwest Report, his review of all of the proponents' testimony, and his review of the  
16 economic tools relevant to his finding that proponents have failed to prove that there will be no  
17 injury to other water users make his testimony admissible under any legal standard.

#### 18 IV. CONCLUSION

19 In conclusion, the objections of DWR and the Water Authority to the testimony of the  
20 CSPA parties are unfounded and must be overruled. The motion to strike should be denied.  
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22 **Dated: November 30, 2016**

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24  
25 For Michael B. Jackson  
26 Attorney for Protestants CSPA et al.  
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(California Sportfishing Protection Alliance,  
AquAlliance and California Water Impact  
Network)

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**STATEMENT OF SERVICE**

**CALIFORNIA WATERFIX PETITION HEARING  
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**RESPONSE TO OBJECTIONS, OTHER THAN THOSE REGARDING SCOPE OF TESTIMONY, TO THE TESTIMONY OF CSPA ET AL. (AQUALLIANCE, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE AND CALIFORNIA WATER IMPACT NETWORK) FOR PART 1B**

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated 15 November 2016, posted by the State Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

I certify that the foregoing is true and correct and that this document was executed on 30 November 2016.



Signature: \_\_\_\_\_  
Name: Bill Jennings  
Title: Executive Director  
California Sportfishing Protection Alliance

Party/Affiliation:  
CSPA et al. (California Sportfishing Protection Alliance  
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