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21 [ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

22 **BEFORE THE**

23 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

24 HEARING IN THE MATTER OF  
25 CALIFORNIA DEPARTMENT OF WATER  
26 RESOURCES AND UNITED STATES  
27 BUREAU OF RECLAMATION  
28 REQUEST FOR A CHANGE IN POINT OF  
DIVERSION FOR CALIFORNIA WATER FIX

**REPLY IN SUPPORT OF  
JOINT MOTION TO STRIKE PORTIONS OF  
THORNBERG TESTIMONY  
(DWR-84)**

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1 The undersigned moving protestants respectfully submit the following Reply to DWR's  
2 Response to the Joint Motion to Strike Portions of the Thornberg Testimony (DWR-84).

3 **Thornberg Testimony, DWR-84, p. 34, lines 2-3:**

4 Part 1 of this hearing focuses on the question of whether Petitioners have met their  
5 burden of proof in demonstrating that the proposed WaterFix project will result in "no injury" to  
6 legal users of water. It has nothing to do with whether the protestants have "underestimated"  
7 or even considered the alleged "economic benefits of the WaterFix."

8 Yet, DWR dismisses as "nonsensical" the moving protestants' motion to strike Dr.  
9 Thornberg's assertion that protestants "underestimate the economic benefits of the WaterFix."  
10 Adjectives are not arguments, and invoking the word "nonsensically" is no substitute for  
11 reasoned argument demonstrating that estimating the alleged economic benefits of the  
12 proposed WaterFix project is somehow a proper Part 1 issue. It is not: It is either a "public  
13 interest" argument or an "Economic Feasibility" argument. Such arguments belong in Part 2,  
14 per the Hearing Officers' unambiguous Ruling of October 7, 2016, at p. 4.

15 By operation of the Hearing Officers' October 7, 2016 Ruling, the lengthy "Benefit Cost  
16 Ratio" section of Dr. Michael's original testimony was stricken. (See SDWA-134 at pp. 15-21.)  
17 The Thornberg Testimony's discussion of alleged project benefits and the balancing of such  
18 alleged benefits against economic injury caused by WaterFix should now be stricken for the  
19 same reasons.

20 **Thornberg Testimony, DWR-84, p. 34, lines 5-8, and p. 35, lines 9-17:**

21 These lines from the Thornberg Testimony purport to balance economic injury that will  
22 result from WaterFix against "expected [economic] benefits." Again, Part 1 is about whether  
23 Petitioners have met their burden of proof with respect to the "no injury" requirement. Nothing  
24 in Water Code sections 1701 and 1702 refers to balancing "injury" against "benefits." For the  
25 reasons stated above regarding page 34, lines 2-3, this testimony should also be stricken.

26 Further, this testimony regarding potential economic impacts of the Project in non-  
27 agricultural industries is not responsive to protestants' rebuttal testimony. Although DWR  
28 contends that this testimony responds to Dr. Michael's testimony at SDWA-134-R, p. 7:4-27,

1 Dr. Michael opined specifically about decreased economic activity resulting from the temporary  
2 and permanent loss of agricultural land in the Delta—i.e., about injury to legal users of water in  
3 the Delta. The Thornberg testimony, in contrast, focuses on the potential “substantial [positive]  
4 economic impact of construction, operations and maintenance” of the Project. (DWR-84, p.  
5 35:9-11.) The potential existence of positive non-agricultural economic impacts does not rebut  
6 testimony about injurious agricultural impacts.

7 That said, however, it must be observed that these sections of the Thornberg testimony  
8 are revealing (though inadvertently so) in that they concede protestants’ core argument: that  
9 the proposed WaterFix project, if approved, will result in injury to legal users of water.

10 **Thornberg Testimony, DWR-84, p. 34, lines 13-14, and DWR-84, p. 38, lines 15-17:**

11 Nothing in Dr. Michael’s testimony addressed funding for the proposed WaterFix  
12 project, either the amount of funding needed or the sources of such funding. Indeed,  
13 throughout Part 1 any attempt to introduce evidence with respect to funding for the proposed  
14 WaterFix has been met with stern admonitions from the Hearing Officers. Any attempt by  
15 DWR to now slide such evidence into this proceeding under the guise of responding to Dr.  
16 Michael’s testimony about the likely effects of the project on in-Delta levee maintenance should  
17 be rejected. This testimony should be stricken for the same reasons the Hearing Officers have  
18 consistently prohibited protestants from introducing testimony on WaterFix funding.

19 **Thornberg Testimony, DWR-84, p. 34, lines 15-17 and p. 39, line 15 through p. 43,**  
20 **line 12:**

21 Again, the alleged statewide economic benefits of the proposed project have no place in  
22 Part 1, per the previous rulings of the Hearing Officers, as explained above. The sole issue  
23 here is whether Petitioners have satisfied their burden of proof on the question of “no injury” to  
24 legal users of water. For the same reasons stated above with respect to page 34, lines 2-3,  
25 page DWR-84, page 34, lines 5-8, and page 35, lines 9-17, these passages from the  
26 Thornberg Testimony should also be stricken.

27 Further, the Thornberg testimony on the project’s economic costs relative to its benefits  
28 does not rebut anything in Dr. Michael’s testimony. The challenged Thornberg testimony

1 references a single slide from Dr. Michael’s PowerPoint presentation. (DWR-84, p. 40, fn. 85.)  
2 DWR’s “Response” claims that the testimony rebuts Dr. Michael’s discussion on economic  
3 impacts to Delta agriculture (SDWA-134-R, p. 7:4-27), a paragraph about the general  
4 importance of Delta infrastructure (SDWA-134-R, p. 8:1-12), and a general discussion of the  
5 Project’s potential traffic impacts (SDWA-134-R, p. 11:10-21.) DWR characterizes this  
6 testimony as “opinion that Dr. Michael overestimates the cost . . . relative to the highly positive  
7 benefits.” (Response, p. 6:4-6.) Dr. Michael’s revised testimony, however, never estimates  
8 the cost of any project related impacts relative to benefits. His testimony is confined to  
9 discussion of potential injurious impacts on discrete portions of the Delta economy. As noted  
10 above, the lengthy “Benefit Cost Ratio” section of Dr. Michael’s original testimony was stricken  
11 pursuant to the October 7, 2016 Ruling. (See SDWA-134 at pp. 15-21.) In short, the  
12 Thornberg testimony on the relationship of project-related costs to benefits does not rebut Dr.  
13 Michael’s discussion of specific potential costs, i.e., “injury” to legal users of water.

14 **Thornberg Testimony, DWR-84, p. 39, lines 12-14:**

15 Here, Dr. Thornberg again focuses on the alleged benefits of the proposed project for  
16 “the rest of the state” (in the form of “supplying safe water to the rest of the state” in the event  
17 of a “huge seismic event”). Again, this has no relevance to the issue in Part 1, i.e., whether  
18 Petitioners have met their burden of proof in demonstrating “no injury” to legal users of water.  
19 For the reasons set forth above, this passage must also be stricken.

20 **Thornberg Testimony, DWR-84, p. 39, lines 24-26:**

21 This portion of the Thornberg testimony concludes that Dr. Michael underestimated the  
22 Project’s positive effects. DWR’s opposition does not cite what portion of Dr. Michael’s  
23 testimony this statement rebuts, because it cannot. Dr. Michael’s revised testimony does not

24 ///

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28 /

1 estimate the project's positive effects at all. For this reason, and for the reasons set forth  
2 above, this passage from the Thornberg testimony should be stricken.

3 Respectfully submitted,

4 Dated: May 15, 2017

**LAW OFFICE OF MICHAEL B. JACKSON**

5  
6 By:   
MICHAEL B. JACKSON

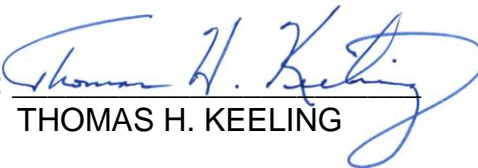
8 Dated: May 15, 2017

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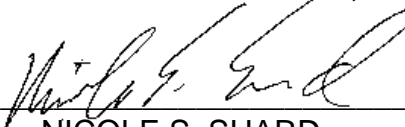
12 Dated: May 15, 2017

**FREEMAN FIRM**

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THOMAS H. KEELING

16 Dated: May 15, 2017

**SNUG HARBOR RESORTS, LLC**

17  
18 By:   
NICOLE S. SUARD

**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):

**REPLY IN SUPPORT OF JOINT MOTION TO STRIKE PORTIONS OF  
THORNBERG TESTIMONY (DWR-84)**

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 March 30, 2017, 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 May 15, 2017.

Signature:  \_\_\_\_\_  
Name: Mae Ryan Empleo  
Title: Legal Assistant for Osha R. Meserve  
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