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8 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 **HEARING IN THE MATTER OF CALIFORNIA**
10 **DEPARTMENT OF WATER RESOURCES**
11 **AND UNITED STATES BUREAU OF**
12 **RECLAMATION REQUEST FOR A CHANGE**
13 **IN POINT OF DIVERSION FOR CALIFORNIA**
14 **WATERFIX**

15 **DEPARTMENT OF WATER**
16 **RESOURCES' RESPONSE TO**
17 **RECLAMATION DISTRICT 108 ET**
18 **AL.'S OBJECTIONS TO DWR 1143**
19 **AND MOTION TO STRIKE**

20 Department of Water Resources ("DWR") submits this response to Reclamation
21 District 108 and the other Downey Brand parties' (collectively, "Downey Brand Protestants")
22 Objection to DWR-1143 and Motion to Strike ("Objection") and to any other party that
23 submits a joinder to this objection.

24 It should be noted that DWR Panel 2 witnesses were thoroughly cross examined
25 regarding tables similar to DWR-1143 and the CWF H3+ operational criteria by multiple
26 parties for over two weeks. Based on a February 28th request made by California
27 Sportfishing Protection Alliance ("CSPA"), the Hearing Officer over the objection of DWR
28 counsel, required that DWR-1143 be produced. In fact, counsel for DWR explained where
the tables existed and where the source material could be found and upon further
questioning by the Hearing Officer was told that she did not want to "cross compare" the
table to D-1641 and that it would be in DWR's "interest" to produce the operations table
with the source. (RT February 28 p. 93:2-9.) Furthermore, the Hearing Officer said that
such a table would "be helpful." (RT February 28 p. 92:16-17.) Based on the Hearing
Officer's order, DWR produced exhibit DWR-1143.

1 Now, the Downey Brand Protestants and others object and attempt to strike DWR-
2 1143 based on 1) hearsay 2) surprise testimony, and 3) lack of foundation.

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4 A. DWR-1143 Is Not New Substantive Evidence

5 "Hearsay evidence may be used for the purpose of supplementing or explaining other
6 evidence but over timely objection shall not be sufficient in itself to support a finding unless
7 it would be admissible over objection in civil actions. An objection is timely if made before
8 submission of the case or on reconsideration." Cal. Gov't Code § 11513(d). Here, DWR-
9 1143 is not attempting to introduce new substantive evidence, rather at the Hearing
10 Officer's request, it is compiling testimony provided by DWR/USBR witnesses and explains
11 other admissible evidence. (RT February 28 p. 93:2-9.) DWR is not relying on DWR-1143
12 to establish any element of its requested relief rather DWR-1143 is a summary intended to
13 help the Hearing Officers and the Parties.

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15 B. DWR-1143 Is Not Surprise Testimony

16 The request for DWR-1143 was to memorialize the CWF H3+ operational criteria DWR
17 and USBR witnesses had been testifying to and cross examined on for nearly 2 weeks.
18 Additionally, DWR objected to providing DWR-1143 but was ordered to produce it. It is
19 difficult to understand how this testimony was "sprung" on the Downey Brand Protestants.
20 Group 7, to which the Downey Brand Protestants are a party, cross examined these
21 witnesses for at least 6 hours including extensive questioning regarding operational criteria
22 and specifically spring outflow. To characterize this as surprise testimony is disingenuous.
23 The Downey Brand Protests Objection even admits "the Consolidated Chart includes
24 general citations of documents already offered into evidence in this hearing..." Objection p.
25 4)

26 The Downey Brand Protestants Objection seems to be founded almost singularly on
27 their objection to DWR's witnesses' testimony of the spring outflow criteria and the October
28 18, 2017, Clarification Letter. It is odd that this would lack foundation, be surprise

1 testimony or hearsay since it was discussed by the DWR witnesses at length. The Downey
2 Brand Protestants also argue that the spring outflow is internally inconsistent and thus
3 confusing. (Objection, p. 6: 4-26.) However, as explained by DWR witnesses, the source
4 of the criteria for the spring outflow requirement includes the October 18, 2017 clarification
5 letter to the ITP. If the Downey Brand Protestants want to argue about DWR operator's
6 testimony regarding how DWR will implement the criteria, they may do so in their closing
7 brief but that doesn't make the exhibit internally inconsistent. Rather it highlights the stated
8 purpose for developing the chart for the benefit of all Protestants and the Hearing Officers
9 to easily cite and understand the source of the CWF H3+ operating criteria.

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11 C. Conclusion

12 In summary, it is difficult to imagine how DWR-1143 is surprise testimony when the
13 Downey Brand Protestants cross examined Panel 2 on the operational criteria at length and
14 very thoroughly on the spring outflow criteria in the ITP. It is almost incomprehensible that
15 the Downey Brand Protestants argue that DWR-1143 lacks foundation when it simply
16 compiles the testimony of Panel 2 witnesses and other admissible operational criteria
17 tables. DWR-1143 is not hearsay because it doesn't attempt to introduce new substantive
18 evidence, rather at the Hearing Officer's request, it is compiling testimony provided by
19 DWR/USBR witnesses. Finally, the claim made by Downey Brand Protestants that DWR-
20 1143 "does not meaningfully assist the Hearing Officers in making their determinations
21 regarding the proposed changes" (Objection, p. 7) is without merit given the Hearing Officer
22 already stated that this information was "helpful" and requested DWR to compile and
23 submit this exhibit. (RT February 28 p. 92:16-17.)

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For the foregoing reasons, the Hearing Officer should admit DWR-1143.

Dated: March 13, 2018

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

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