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23 **BEFORE THE**

24 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

**LOCAL AGENCIES OF THE NORTH DELTA
ET AL., ISLANDS, INC., AND THE SAN
JOAQUIN COUNTY PROTESTANTS'
MOTION IN OPPOSITION TO
PETITIONERS' MODELING EVIDENCE**

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1 **INTRODUCTION**

2 Protestants Local Agencies of the North Delta et al., Islands, Inc., the County of San
3 Joaquin, San Joaquin County Flood Control and Water Conservation District, and the
4 Mokelumne River Water and Power Authority oppose the surprise submission of exhibits not
5 previously noticed by the Department of Water Resources (“DWR”) and the U.S. Bureau of
6 Reclamation (“USBR”) (collectively “Petitioners”).

7 **FACTS**

8 On May 25, 2016, Petitioners made additional modeling available to the public. This
9 modeling evidence was in addition to the RDEIR/SDEIS modeling made available to the public
10 on July 10, 2015 and generally referenced in the Change Petition submitted on August 25,
11 2015. (See, e.g., pp. 19-20.)

12 The Hearing Officers’ April 25, 2016, ruling set a May 31, 2016, deadline for submission
13 of Petitioners’ exhibits and exhibit lists. After submittal of the exhibits on May 31, 2016, the
14 June 10, 2016 Hearing ruling provided Petitioners an additional 22 days to revise exhibit lists
15 to designate staff exhibits as exhibits in Petitioners’ case in chief. On June 22, 2016,
16 Petitioners added some of the staff exhibits to their list of exhibits, but did not add the modeling
17 study packages, posted on the website by the Hearing Team staff, to the list. DWR’s July 20,
18 2016 “Master Response To Similar Objections Made By Protestants Collectively” made clear
19 that Petitioners had not and did not intend to submit the modeling as part of their case in chief:

20 Petitioners do not believe it is necessary to include the complete model packages
21 for CalSim II and DSM2 in their testimony as ***the testimony includes the***
22 ***relevant input and output information used in their analysis.*** However, the
23 model packages have been made available to all parties, upon request. In
February, March, and May 2016, DWR and Reclamation made available the
CalSim II and DSM2 modeling packages used in analyzing CWF and Alternative
4A.

24 (See p. 17, footnote 14, emphasis added.) Petitioners thus had ample opportunity to
25 submit the modeling study packages as exhibits, but chose not to do so.

26 During the course of cross-examination of Petitioners’ witnesses, it became clear that
27 the conclusions of Petitioners’ experts were based on outputs from the modeling made
28 available on May 25, 2016, in addition to the results summarized in Petitioners’ cases in chief.

1 For instance, Petitioners' witnesses (e.g., Nader-Tehrani and Sergent) testified that they had
2 reviewed the results of certain nodes not included in any exhibits, and based determinations of
3 injury on that information. When Protestants later asked for the additional node outputs from
4 the model for those locations, the request was denied. (See, e.g., Exhibit LAND-72.)

5 On September 27, 2016, Part 1A of the Hearing concluded. DWR and USBR then
6 attempted to submit not only the noticed exhibits, but the modeling made unofficially available
7 on May 25, 2016. (Sept. 27, 2016, SWRCB Hearing Transcript, pp. 111-112.) The Hearing
8 Officer requested that Petitioners submit revised exhibit lists by noon on September 28, 2016.
9 On September 28, 2016, DWR included the May 25, 2016, "Modeling Package" as Exhibit
10 DWR-500 in its Exhibit list and argued for its acceptance into evidence.

11 **ARGUMENT**

12 Rather than straightforwardly presenting the modeling evidence they claim supports
13 their petition, Petitioners have played shell games with the modeling and held so many
14 different positions on it that it is very difficult to discern what Petitioners case in chief really is.
15 Their latest maneuver—transparently calculated to avoid subjecting their modeling to
16 meaningful scrutiny and cross-examination—would, if allowed, make a mockery of the rules
17 and principles governing this Hearing. Procedures applicable to this Hearing preclude this
18 result and require rejection of Petitioners' late modeling submittal. In the alternative, if the
19 Hearing officers choose to accept the offered modeling into evidence, major changes in the
20 Hearing schedule are necessary to ensure due process and a fair proceeding.

21 California law and policy strongly discourage the introduction of surprise testimony and
22 exhibits. (See Cal. Code Regs., tit. 23, § 648.4.) Petitioners' late "surprise" submission should
23 be excluded based on the prejudice to other parties:

24 Where any of the provisions of this section have not been complied with, the
25 presiding officer may refuse to admit the proposed testimony or the proposed
26 exhibit into evidence, and ***shall refuse to do so where there is a showing of
prejudice to any party or the Board.*** This rule may be modified where a party
27 demonstrates that compliance would create severe hardship.
28

1 (Cal. Code Regs. tit. 23, § 648.4, subd. (e), emphasis added; see also, Cal. Code Civ.
2 Proc., § 1094.5, subd. (b) [importance of “a fair trial” in reviewing agency orders and
3 decisions].)

4 The Hearing Officers previously made decisions based on Petitioners’ assertions that
5 the modeling was not submitted as an exhibit.¹ In their June 10, 2016 ruling, the Hearing
6 Officers denied Protestants’ requests for a 60-day extension of time to submit objections, and
7 a delay of the start of the hearing to examine the complex modeling evidence. The ruling was
8 based on Petitioners’ adamant representation that the modeling package itself was not
9 submitted as an exhibit:

10 The petitioners submitted a letter on June 3, 2016, opposing other parties’
11 requests to extend the deadlines for the hearing. The petitioners state that time
12 extensions are not needed because they submitted “**concise testimony (133
13 pages for a total of 8 lead witnesses)**” and a majority of submitted testimony
14 and exhibits have been publicly available since **February 2016**.

15 (...)

16 For the reasons stated in petitioners’ opposition letter, additional time beyond the
17 27-day extension to review petitioners’ testimony and exhibits is not warranted.
18 Many parties stated that they need more time to review the modeling data
19 provided by the petitioners on May 25, 2016. Any procedural or evidentiary
20 objections at this stage of the hearing, however, should concern petitioners’
21 testimony or exhibits, and **petitioners have not submitted the May 25
22 modeling data as an exhibit**. For these reasons, the requests to extend all
23 hearing deadlines by two months, and to delay the beginning of the hearing, are
24 denied.

25 (June 10, 2016, Ruling, p. 2, emphasis added.)

26 Because the modeling package was not submitted as an exhibit, it was never
27 considered, and there was no cross-examination on authentication and related issues.²
28 Accordingly, this Board should deny Petitioners’ belated attempt to submit the modeling
package into evidence as a “surprise” exhibit in this proceeding.

However, if Petitioners are allowed to submit the modeling package as a surprise
exhibit, the undersigned Protestants request that the Hearing Officers make appropriate

¹ Pacific Coast Federation of Fishermen’s Associations/Institute for Fisheries Research
submitted objections on June 3, 2016, requesting that a 60-day extension be granted.
California Water Research also joined in that request, and other parties made similar requests.

² California Water Research’s June 9, 2016, letter requested information needed to
authenticate the modeling for its proposed use in the hearing.

1 changes to the Hearing schedule, to ensure that protestants' due process rights under the XIV
2 amendment to the U.S. Constitution and Article I, § 7 of the California Constitution are
3 protected in this Hearing.

4 These rights include the right to fully examine and rebut evidence (*Int. Com. Comm. v.*
5 *Louis. & Nash. R.R.* (1913) 227 U.S. 88, 93, *Massachusetts Bonding & Insurance Co. v.*
6 *Industrial Acc. Com.* (1946) 74 Cal.App.2d 911, 914), and to conduct cross-examination on all
7 evidence (*Manufactured Home Communities v. County of San Luis Obispo* (2008) 167
8 Cal.App.4th 705, 712 [board's denial of right of cross-examination was a violation of due
9 process and required reversal and remand to the commission]). (See also, *Fremont Indemnity*
10 *Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 ["[t]he right of cross-
11 examination of witnesses is fundamental, and its denial or undue restriction is reversible error"
12 and "administrative efficiency at the expense of due process is not permissible"]; *Fireman's*
13 *Fund Indem. Co. v. Industrial Accident Com.* (1963) 223 Cal.App.2d 350, 352 [right to cross-
14 examine expert did not arise until his report was "admitted into evidence," that the right had not
15 been waived, and that denial of the right of cross-examination was a denial of due process];
16 Cal. Code Civ. Proc., § 1094.5, subd. (b).)

17 **Modeling Discussed at CWF Water Right Change Proceedings**

18 Petitioners' treatment of modeling for purposes of this Hearing has been confusing at
19 best, and obfuscatory at worst. According to the letter submitted by Petitioners on March 11,
20 2016, "the modeling conducted for the BA is the basis of the information that will be used in the
21 case-in-chief in the Hearing process." (See last page of letter.) On May 31, 2016, however,
22 Petitioners did not include any modeling results from the Draft BA in their case in chief, instead
23 providing only witness testimony and summaries of modeling results. (See, e.g., Exhibits
24 DWR-5, DWR-66, DWR-71, DWR-513, DWR-514.) Additionally, the testimony and summaries
25 submitted by Petitioners with conclusions regarding the likelihood of injury to legal users of
26 water does not clearly identify upon which modeling packages the opinions are based. (See,
27 e.g., Exhibits DWR-5, DWR-66, DWR-71, DWR-513, DWR-514.) Without this critical
28 information, there is no way to verify or test the validity of these conclusions.

1 The attached Summary Table attempts to catalogue pertinent information regarding the
2 modeling that has been discussed in the Hearing thus far. (See Exhibit A.) The table shows
3 that the Draft BA uses 82 years of water quality data, providing a potentially more complete
4 comparison of conditions as they may exist with and without the WaterFix. In their March 11,
5 2016 letter, Petitioners stated this Draft BA modeling would be the basis of their case in chief.
6 However, Petitioners' case in chief instead relied on only 16 years of water quality data using
7 CALSIM II 2015. The modeling package now belatedly requested for inclusion in Petitioners'
8 case in chief does not represent the latest version of the project for which a petition is being
9 sought (H3+ from the Draft BA), further complicating the parties' assessment of and
10 formulation of appropriate responses to Petitioners' case in chief. (See Exhibits LAND-10 and
11 SC-1, slide 3.)

12 **REQUESTED RELIEF**

13 **Modeling Evidence Submission Should Be Denied**

14 As explained above, Petitioners' newly proffered modeling evidence should be
15 excluded. The Petitioners and the Hearing Officers represented that this modeling package
16 was not being offered into evidence. Protestants relied on these representations in developing
17 their cases in chief, believing that the exhibits listed as evidence on May 31, 2016, constituted
18 Petitioners' case in chief. Thus, the modeling package should not be accepted.

19 **If Modeling Evidence Is Admitted, the Hearing Schedule Must Change**

20 If this Board allows Petitioners' late submission of the "surprise" modeling package into
21 evidence, the following changes to the hearing schedule will be necessary:

- 22 (1) The October 20, 2016 start of the hearing must be postponed to allow Protestants
23 time to examine the complex modeling evidence and revise their cases in chief if
24 necessary. LAND et al. suggest a 60-day time period after any decision to admit
25 Petitioners' modeling evidence for submission of amendments to Protestants' cases
26 in chief. Protestants must also be provided an opportunity to object to the
27 authentication, foundation, etc. for the modeling.

1 (2) After Petitioners have been provided an opportunity to provide any new objections
2 to revisions in Protestants' cases in chief, presentation of Protestants' cases in chief
3 should begin.

4 (3) After the 60-day review period but prior to the start of presentation of Protestants'
5 cases in chief, recall of the Petitioners' witnesses to allow protestants to conduct
6 cross-examination on the newly offered modeling evidence. At a minimum, this
7 would include Petitioners' Modeling and Water Rights panels.

8 **If Petitioners Modeling Is Accepted as Evidence, the Draft BA Modeling Should Also Be**
9 **Included as Evidence**

10 If Exhibit DWR-500 is accepted into evidence, the BA modeling should also be admitted
11 into evidence at the same time in order to allow use of this data, which includes a longer period
12 of record and uses the 2015 version of CalSim. In addition, Petitioners should amend their
13 submittals to clearly identify upon which modeling package each conclusion relies.

14 **CONCLUSION**

15 Protestants Local Agencies of the North Delta et al., Islands, Inc., the County of San
16 Joaquin, San Joaquin County Flood Control and Water Conservation District and the
17 Mokelumne River Water and Power Authority appreciate the Hearing Officers' consideration of
18 these critical evidentiary issues and respectfully request that relief be granted as outlined
19 above, or in an alternative form the Hearing officers deem just and proper. Such relief is
20 essential to address the unfairness that would otherwise occur as a result of Petitioners'
21 belated attempt to slip the "surprise" modeling package into evidence in this proceeding.

22 Dated: October 6, 2016

SOLURI MESERVE,
A LAW CORPORATION

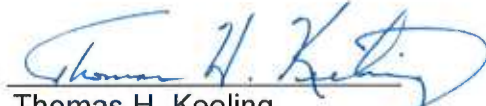
23
24 By: 

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Diablo Vineyards and Brad Lange/DWLC
Stillwater Orchards/DWLC

1 Dated: October 6, 2016

FREEMAN FIRM,

2
3 By:

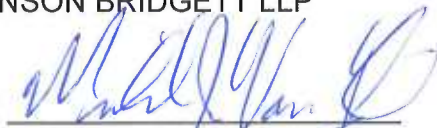


4 Thomas H. Keeling
5 Attorneys for Protestants County of San Joaquin,
6 San Joaquin County Flood Control and Water
7 Conservation District, and
8 Mokelumne River Water and Power Authority

9 Dated: October 6, 2016

HANSON BRIDGETT LLP

10 By:



11 Michael J. Van Zandt
12 Attorneys for Protestants Islands, Inc.

EXHIBIT A

Summary of Modeling Referenced in CWF Water Rights Proceedings*

Modeling Prepared For:	Draft BA	RDEIR/SDEIS	Final EIR/EIS	CWF Case in Chief
Model Version	CALSIM II BDCP 2015**	CALSIM II BDCP 2010	CALSIM II BDCP 2010	CALSIM II BDCP 2015
Years Included	82 years of water quality modeling	16 years of water quality modeling	16 years of water quality modeling	16 years of water quality modeling
Information Included	Daily avg, max and min EC	Daily avg EC	Daily avg, max and min EC	Daily avg EC fingerprints
Baseline	Base model w/current climate, future demand	Existing Conditions	Existing Conditions	N/A
No Action Alternative	ELT revised per ESA requirements	ELT	ELT with Fremont Weir Updates	ELT (identical to Draft BA)
Preferred Alternative	4A	4A	4A	4A
Operating scenarios	H3+	ALT 4, H3, H4	H3+	H3, H4, Boundary 1, Boundary 2
Model Results ID	N/A	SWRCB-3	N/A	DWR-513, DWR-514
Modeling Exhibit ID	N/A	N/A	N/A	DWR-500
Date Made Available to Public	February 3, 2016	July 10, 2015	February 3, 2016	May 25, 2016
Date Modeling Submitted as Evidence	N/A March 11, 2016 DWR/BOR letter states Draft BA modeling is basis of case in chief.	N/A	N/A	Petitioners requested acceptance into Evidence on September 27 th and 28 th , 2016

* Information in table based on Petitioners' March 11, 2016 letter re: Information Requests and DWR-71, among other sources.
 ** BDCP/WaterFix 2015 is the same as BDCP 2010 model with the 2015 SWP Delivery Reliability Report changes merged. (See Aug. 25, 2016 SWRCB Hearing Transcript, p. 262.)

1 **STATEMENT OF SERVICE**

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

4 I hereby certify that I have on this 6th day of October 2016, submitted to the State Water
5 Resources Control Board and caused a true and correct copy of the following document(s):

6 **LOCAL AGENCIES OF THE NORTH DELTA ET AL., ISLANDS, INC., AND**
7 **THE SAN JOAQUIN COUNTY PROTESTANTS'**
8 **MOTION IN OPPOSITION TO PETITIONERS' MODELING EVIDENCE**

9 to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current**
10 **Service List** for the California WaterFix Petition Hearing, dated October 6, 2016, posted by the
11 State Water Resources Control Board at
12 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfi](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
13 [x/service_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

14 I certify that the foregoing is true and correct and that this document was executed on
15 October 6, 2016.

16 Signature:  _____

17 Name: Mae Ryan Empleo

18 Title: Legal Assistant for Osha R. Meserve
19 Soluri Meserve, A Law Corporation

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