

1 THOMAS H. KEELING (SBN 114979)
FREEMAN FIRM
2 1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207
3 Telephone: (209) 474-1818
Facsimile: (209) 474-1245
4 Email: tkeeling@freemanfirm.com

5 J. MARK MYLES (SBN 200823)
Office of the County Counsel
6 County of San Joaquin
7 44 N. San Joaquin Street, Suite 679
Stockton, CA 95202-2931
8 Telephone: (209) 468-2980
Facsimile: (209) 468-0315
9 Email: jmyles@sigov.org

10 Attorneys for Protestants County of San Joaquin,
11 San Joaquin County Flood Control and
Water Conservation District, and
12 Mokelumne River Water and Power Authority

13 [ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

14
15 **BEFORE THE**
16 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

17 HEARING IN THE MATTER OF
18 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
19 BUREAU OF RECLAMATION
20 REQUEST FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
21 FIX

**RESPONSE OF THE SAN JOAQUIN
COUNTY PROTESTANTS AND THE
LOCAL AGENCIES OF THE NORTH
DELTA, ET AL. TO SAN LUIS & DELTA-
MENDOTA WATER AUTHORITY'S
OBJECTIONS TO EXHIBITS SUBMITTED
FOR ADMISSION BY GROUPS 18, 19, 21,
24, 27, 31, 32, 37, 38, 39 INTO EVIDENCE
AT CLOSE OF PART 1B CASES IN CHIEF**

1 JENNIFER SPALETTA (SBN 200032)
2 SPALETTA LAW PC
3 P.O. BOX 2660
4 LODI, CA 95241
5 Telephone: (209) 224-5568
6 Facsimile: (209) 224-5589
7 Email: jennifer@spalettalaw.com

8 Attorneys for Protestants County of San Joaquin,
9 San Joaquin County Flood Control and
10 Water Conservation District, Mokelumne River
11 Water and Power Authority and the North San Joaquin Water
12 Conservation District

13 OSHA R. MESERVE (SBN 204240)
14 SOLURI MESERVE, A LAW CORPORATION
15 1010 F Street, Suite 100
16 Sacramento, CA 95814
17 Telephone: (916) 455-7300
18 Facsimile: (916) 244-7300
19 Email: osha@semlawyers.com

20 Attorneys for Protestants
21 Local Agencies of the North Delta
22 Bogle Vineyards / Delta Watershed Landowner Coalition
23 Diablo Vineyards and Brad Lange / Delta Watershed Landowner Coalition
24 Stillwater Orchards / Delta Watershed Landowner Coalition
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1 **I. INTRODUCTION**

2 San Luis & Delta-Mendota Water Authority (“SLDMWA”) contends that exhibits
3 submitted by the County of San Joaquin, the San Joaquin County Flood Control and Water
4 Conservation District, and Mokelumne River Water and Power Authority (collectively, the “San
5 Joaquin County Protestants”¹) and by the Local Agencies of the North Delta, Bogle
6 Vineyards/Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange/Delta
7 Watershed Landowner Coalition, Stillwater Orchards/Delta Watershed Landowner Coalition,
8 and Islands, Inc. (collectively, “LAND, et al.”²) are hearsay. Based on that objection,
9 SLDMWA seeks to exclude those exhibits “to the extent they are offered for the truth of the
10 matters asserted therein.” (SLDMWA Objections to Exhibits, etc., dated 12/30/16 [“SLDMWA
11 Objections”], p. 1.)

12 As a preliminary matter, SLDMWA’s objections lack specificity. SLDMWA made no
13 effort to identify with any specificity the portions of the challenged documents that it contends
14 contain objectionable hearsay. On that ground alone, the objections should be overruled.

15 Further, the challenged exhibits are part of the direct testimony of the witnesses,
16 incorporated into the witnesses’ written and oral summaries of testimony, submitted in
17 compliance with the Hearing Officers’ procedural requirements for the presentation of
18 testimony in this Hearing, and were subject to cross-examination during the course of the
19 witnesses’ oral summaries of testimony. They are properly admissible under the rules, rulings
20 and standards applicable to this proceeding, including Cal. Gov. Code, § 11513 and previous
21 rulings of this Board. In addition, the challenged exhibits are also properly admissible as
22 basis evidence for expert testimony, regardless of whether they may contain hearsay. That
23 would be true in any California court of law, and it is even more true in the context of the
24 standards applicable to the WaterFix Hearing.

25 Some of the material SLDMWA would now exclude as hearsay was generated by
26 governmental agencies. This foundational information is plainly admissible, reliable, and is in
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¹ The San Joaquin County Protestants are designated Group 24 in Part 1 of the WaterFix Hearing.

² The LAND, et al. protestants are designated Group 19 and 20 in Part 1 of the WaterFix Hearing.

1 fact precisely the type of information on which the State Board is “accustomed to rely in the
2 conduct of serious affairs.” (*Aengst v. Board of Medical Quality Assurance* (1980) 110
3 Cal.App.3d 275, 283.)

4 To the extent some of the challenged exhibits may contain hearsay, they are
5 nonetheless admissible: SLDMWA’s attack on these exhibits goes to weight, not
6 admissibility.

7 For these reasons, the San Joaquin County Protestants and LAND, et al. respectfully
8 request that the Hearing Officers overrule the SLDMWA Objections in their entirety.

9 **II. BACKGROUND**

10 The Hearing Notice issued on October 30, 2015 (“Notice”) directed the parties to
11 submit their “testimony on factual or other evidentiary matters” in writing, including sufficient
12 information in support of technical evidence to “clearly identify and explain the logic,
13 assumptions, development, and operation of the studies or models.” (Notice, Enclosure D, at
14 33.) Parties were directed to provide PowerPoint presentations or other visual aids that
15 witnesses intended to use while summarizing their testimony with their other exhibits, together
16 with a written summary of each witness’s direct testimony. (January 15, 2016 Ruling Letter
17 Re: Service List of Participants, List of Interested Parties, and Pre-Hearing Conference
18 Agenda, pp. 5-6.) The Notice prohibited parties from reading their written testimony directly
19 into the record, directing them, instead, to use their time on direct examination “to summarize
20 or emphasize their written testimony.” (Notice, Enclosure D, at 35.) The Notice confirmed
21 that “written testimony affirmed by the witness is direct testimony.” (*Ibid.*)

22 In compliance with the directions set forth in the Notice and other rulings and orders of
23 the Hearing Officers, on September 2, 2016 the San Joaquin County Protestants and LAND,
24 et al. filed and served written summaries of testimony and statements of qualifications for their
25 expert and non-expert witnesses, PowerPoint presentations to be used in conjunction with the
26 witnesses’ oral testimony, and a number of exhibits, some of which provided additional
27 evidentiary support for the testimony and some of which constituted demonstrative evidence,
28

1 i.e., material prepared to illustrate and explain the testimony rather than as underlying
2 evidentiary support.

3 Direct and cross-examination of witnesses on both the Physical Injuries Focus Panel
4 and the San Joaquin County and Harmful Algal Bloom Focus Panel took place in November,
5 2016. At the direction of the Hearing Officers, the San Joaquin County Protestants and LAND
6 et al. later timely offered into evidence all of the testimony and exhibits submitted in
7 connection with those Focus Panels.

8 On December 30, 2016, SLDMWA filed a written objection to the following exhibits,
9 asserting that they are hearsay:

10	LAND-2	Excerpt of the Conceptual Engineering Report. Volume 2 – Maps. Page 34
11	LAND-3	Map - Intakes Overview Figure
12	LAND-4	Map - Local Agencies of the North Delta Coalition Member Districts
13	LAND-5	Map – Bogle Water Rights Injuries from CWF Tunnels
14	LAND-6	Map – LangeTwins Water Rights Injuries from CWF Tunnels LAND-7
15	LAND-8	Excerpts from the July 30, 2014 Power Point Presentation from Tara Smith. Titled: “Top Seven Insights from the 2014 Delta Drought Modeling. Municipal Water Quality Investigations Annual Meeting”
16	LAND-40	Atwater 1982
17	LAND-41	Frazier and Osanik 1969
18	LAND-50	Russell Van Loben Sels Water Rights associated with S021406
19	LAND-52	Daniel Wilson water rights as described in the protest filed on January 5, 2016
20	LAND-53	Richard Elliot water rights as described in the protest filed on January 5, 2016
21	LAND-54	Diablo Vineyards water rights as described in the protest filed on January 5, 2016
22	LAND-55	LAND member agency property owners’ water rights as described in the protest filed on January 5, 2016
23	LAND-57	Map- Private Properties Needed for Water Tunnel, Intake No. 2, 3, and 5
24	LAND-58	Map- Sacramento County Wells in Vicinity of Tunnels
25	LAND-59	Map – San Joaquin County Wells in Vicinity of Tunnels LAND-60
26	LAND-65	Conceptual Engineering Report: Modified Pipeline / Tunnel Option “Clifton Court Forebay Pumping Plant, Volume 2 – Conceptual Engineering Report Drawings
27	LAND-66	2002, CCF DWR Correspondences
28	LAND-69	2014, Draft DCE CM1 Property Acquisition Management Plan
	LAND-72	August 29, 2016 Email from James Mizell, Department of Water Resources, to Osha R. Meserve re Request for Modeling Outputs

(SLDMWA Objections, pp. 8-9.) SLDMWA seeks to exclude these exhibits “to the extent they are offered for the truth of the matters asserted therein.” (*Id.* at p. 1.)

1 **III. STANDARDS APPLICABLE TO THIS PROCEEDING**

2 This administrative hearing is governed by Title 23 of the California Code of
3 Regulations, section 648 et seq.; Chapter 4.5 of the Administrative Procedure Act
4 (commencing with Gov. Code section 11400); Evidence Code sections 801-805; and Gov.
5 Code section 11513, (Cal. Code Regs., tit. 23, section 648, subd. (b).) As DWR itself
6 reminded this Board earlier in this proceeding:

7 This is not a civil or criminal trial, nor even a formal adjudicative hearing under
8 Chapter 5 of the Administrative Procedures Act. The Board is not required to
9 conduct adjudicative hearings according to the technical rules relating to
10 evidence and witnesses in trial court (Cal. Gov. Code, § 11513, subd.(c)).
11 Instead, **“[a]ny relevant evidence will be admitted if it is the sort of
12 evidence on which responsible persons are accustomed to rely in the
13 conduct of serious affairs, regardless of the existence of any common
14 law or statutory rule which might make improper the admission of the
15 evidence over objection in civil actions.”** (*Id.*)

16 (DWR’s Master Responses to Objections, filed herein on July 20, 2016, at p. 5, emphasis
17 added; see, also, p. 17 [DWR explaining: “The Board is not bound to conduct this evidentiary
18 hearing using technical rules related to evidence and witnesses. . . . Any relevant evidence is
19 admissible as long as it is the sort of evidence on which responsible persons are accustomed
20 to rely in the conduct of serious affairs.” (Citations omitted).])

21 The Board has recognized that the Gov. Code section 11513, subd. (c) standard is
22 more permissive than that applied in civil actions, observing that “hearing officers generally
23 prefer to admit evidence that would be admissible under the State Water Board’s regulations,
24 using the more liberal standards applicable to administrative proceedings.” (SWRCB Ruling
25 on Joint Objections to Truckee-Carson Irrigation District’s Exhibits in the Truckee River
26 Hearing (Aug. 11, 2010, p. 1).)

27 Regarding hearsay evidence specifically, DWR underscored the relaxed standard
28 applicable here. Said DWR:

Hearsay evidence is admissible and may be used to supplement or explain
other evidence. ([Cal. Gov. Code], § 11513, subd.(d)). Over a timely objection,
however, hearsay is not sufficient in itself to support a finding unless it would be
admissible over objection in a civil action. (*Id.*) The goal of any adjudicative
hearing is to gain information without undue expense to the parties, and thus the
Hearing Officers may “exclude evidence if its probative value is substantially

1 outweighed by the probability that its admission will necessitate undue
2 consumption of time.” (*Id.*, § 11513, subd.(f)).

3 (DWR’s Master Responses to Objections, filed herein on July 20, 2016, at pp. 5-6.)

4 In the course of responding to objections based on lack of foundation, DWR also
5 explained that in the context of this Hearing those objections are more properly viewed as
6 going to the weight of the evidence, not to admissibility. As DWR observed: “The parties will
7 have ample opportunity to argue the weight of the evidence.” (DWR’s Master Responses to
8 Objections, filed on July 20, 2016, at p. 11.)

9 The same observation applies with equal force to the hearsay objections SLDMWA has
10 asserted against the testimony and exhibits submitted by the San Joaquin County Protestants
11 and LAND, et al.

12 Board orders and decisions, as well as other records and rulings in prior hearings, may
13 be accepted into evidence either by reference or by official notice. (Cal. Code Regs. Tit. 23,
14 §§ 648.2 and 648.3.)

15 Further, formal authentication of documents is not required under the Board’s adopted
16 regulations. (Cal. Code Regs. Tit. 23 § 648.5.1, Gov. Code § 11513(c).) The Board’s
17 practice in prior hearings has been to admit public agency reports and records, scientific
18 journal publications, and publish maps based on prima facie considerations.

19 **IV. ARGUMENT**

20 The challenged exhibits were submitted as part of the written testimony in this Hearing.
21 At the direction of the Hearing Officers, that testimony was summarized during the witnesses’
22 oral presentations. SLDMWA’s Objections, submitted well after examination and cross-
23 examination of those witnesses was completed, fail because they lack the required specificity.
24 They fail, also, because the challenged exhibits are not inadmissible hearsay, are admissible
25 under an exception to the hearsay rule, and/or because the rules governing the conduct of
26 this Hearing do not limit the SWRCB’s consideration and use of these materials.

27 At best, SLDMWA’s Objections go to the weight of the evidence, not to the question of
28 its admissibility in this Hearing.

1 **A. The Objections Should Be Overruled Because They Lack the Required**
2 **Specificity and Are Not Timely.**

3 Objections to the admission of hearsay evidence must be timely and specific.
4 (September 9, 2016 Ruling; Gov. Code § 11513(d); *Rodriguez v. McDonnell Douglas Corp.*
5 (1978) 87 Cal.App.3d 626, 659-660; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 339.)
6 SLDMWA's Objections, filed long after the witnesses' direct and cross-examinations were
7 completed, lack any meaningful discussion of the basis for the Objections.

8 A hearsay objection "must be made in such a way as to alert the trial court to the
9 nature of the anticipated evidence and the basis on which exclusion is sought, and to afford
10 the [opposing party] an opportunity to establish its admissibility." (*People v. Rivera* (2011)
11 201 Cal.App.4th 353, 361.) In scatter-shot fashion, SLDMWA has objected to a broad swath
12 of protestants' exhibits on hearsay grounds to the extent they were offered to prove the truth
13 of the matter stated therein, but SLDMWA made no effort to explain what matters each
14 specific exhibit is purportedly offered as the truth of, beyond merely listing the title of each
15 document. SLDMWA does not explain to the parties or the Hearing Officers which
16 statements in which exhibits they object to on the ground that they are out of court statements
17 offered for the truth of the matter stated therein. A general evidentiary objection such of this is
18 not sufficient as a basis for excluding evidence "without specific identification of the evidence
19 to which the party objects and the reason for that objection." (See SWRCB Order WR 2012-
20 0012, p. 11, fn. 28.)

21 Further, these objections are untimely; the proper time to raise and resolve a hearsay
22 objection to any particular exhibit is during the witness's testimony, not on a cold record
23 months thereafter.

24 **B. Under Government Code Section 11513, the Objections Should be**
25 **Overruled.**

26 While SLDMWA objects to the admission of the exhibits at issue herein, it does not
27 dispute the relevance or reliability of these exhibits, and beyond its vague and conclusory
28 hearsay objection it offers no legal support for exclusion. That is not surprising, as Gov. Code
§ 11513, sub. (c) unambiguously provides: where evidence is "relevant and such as could be

1 relied on by responsible persons,” there exists a “statutory mandate” that it be admitted.
2 (*Martin v. State Personnel Bd.* (1972) 26 Cal.App.3d 573, 582.)

3 SLDMWA’s invocation of Gov. Code § 11513 is perversely misplaced. Rather than
4 barring the Board from relying on hearsay evidence generally, Gov. Code § 11513(d) provides
5 that hearsay may be used to supplement or explain other evidence “but is not sufficient in
6 itself to support” a finding by the SWRCB in the face of a hearsay objection, unless it would
7 be otherwise admissible in a civil action. (Gov. Code § 11513(d); see, also, Notice, Enclosure
8 D, p. 36.) In short, the SWRCB may rely upon even civilly inadmissible hearsay evidence in
9 making a finding, provided that it also relies on non-hearsay evidence in doing so.

10 Some of the exhibits to which SLDMWA objects are documents generated by
11 governmental agencies. This foundational information is plainly admissible, reliable, and is in
12 fact precisely the type of information on which the State Board is “accustomed to rely in the
13 conduct of serious affairs.” (*Aengst v. Board of Medical Quality Assurance* (1980) 110
14 Cal.App.3d 275, 283.)

15 Further, statements in official records of a public agency are not hearsay, provided that
16 the statements were made by and within the scope of duty of a public employee, the writing
17 was made at or near the time of the act, condition or event, and the sources of information
18 and method and time or preparation were such as to indicate its trustworthiness. (Evid. Code
19 § 1280.) Thus, statements in publications or records of public agencies are not inadmissible
20 hearsay. Under the standard established by Gov. Code § 11513(b), objections to such
21 publications and records should be overruled. LAND-40, for example, is a publication of the
22 U.S. Department of the Interior (U.S. Geological Survey). It is properly admissible.

23 LAND-41 is a scientific study published in a respected scientific journal. As such, it is
24 precisely the type of material expert witnesses commonly and properly consider and rely upon
25 in forming their opinions. Again, under Gov. Code § 11513(b) it should be admitted into
26 evidence.

27 Furthermore, Exhibits LAND-50-55 were submitted in this proceeding expressly by
28 reference to 23 CCR § 648.3, and, based thereon, are plainly the type of evidence this Board

1 would normally admit under the standards established by Gov. Code § 11513(b) and prior
2 rulings of the Board.

3 **C. The Challenged Exhibits are Properly Admissible Basis Evidence in**
4 **Support of the Witnesses' Testimony.**

5 The challenged exhibits were introduced primarily in support of expert opinion testimony.
6 Because an expert's opinion "is no better than the facts on which it is based" (*People v.*
7 *Gardeley* (1996) 14 Cal.4th 605, 618), experts are allowed to testify to all the facts upon which
8 they base their opinions. (See *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324-1325;
9 *People v. Hill* (2011) 191 Cal.App.4th 1104, at p. 1128.) California law permits an expert to
10 base opinions on technical reports and scientific literature, provided the matter is "of a type that
11 reasonably may be relied upon by an expert in forming an opinion upon the subject to which his
12 testimony relates." (Evid. Code § 801(b); *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.)
13 Further, objections such as SLDMWA's hearsay objections go "only to the purpose for which
14 the challenged statements may be received," and for that reason a trial court ruling on such
15 objections "need only confirm that it is not accepting the challenged statements as proof of the
16 matters asserted, but only as a foundation for the accompanying opinions." (*Cole v. Town of*
17 *Los Gatos* (2012) 205 Cal.App.4th 749, 766.)

18 The exhibits at issue here were primarily used in the expert witnesses' written and/or
19 oral summaries of testimony. The witnesses testified as to the bases for their opinions; those
20 bases were supported, in part, by information and analysis in the challenged exhibits. For this
21 reason, too, they are admissible in this proceeding.

22 For example, LAND-41 is a scientific study published in a respected scientific journal.
23 As such, it is precisely the type of material expert witnesses commonly and properly consider
24 and rely upon in forming their opinions.

25 Similarly, LAND-57, an aerial map of the North Delta Intake area that includes
26 landowner parcel numbers, contains no information that is not publicly available and readily
27 verifiable. LAND-58 and LAND-59 are aerial maps showing well and potential well locations.
28 The underlying maps – from generally reliable sources (e.g., BSK Associates) bear sufficient

1 indicia of reliability that an expert may reasonably rely on them in forming and explaining his
2 or her opinions. The expert – highly experienced in Delta groundwater issues -- may also
3 reasonably rely on his own experience in gauging the general accuracy of the well location
4 approximations reflected on these maps (e.g., those located on LAND-59 by a San Joaquin
5 County engineer based on data from the San Joaquin County Environmental Health
6 Department). Again, any questions about the foundation or reliability of the maps goes to the
7 weight, not the admissibility of the exhibits.

8 For the same reasons, LAND-60 (based on a BSK aerial map) may be properly
9 admitted into evidence. Further, this exhibit was used primarily as an illustration, i.e., as
10 demonstrative evidence. As such, its utility lay largely in its explanatory nature and not so
11 much in the data underlying the exhibit. The hearsay rule has no applicability to such
12 evidence.

13 SLDMWA also objects to the LAND-2 and LAND-65, consisting of portions of DWR's
14 Conceptual Engineering Report, based on hearsay. This is odd, to say the least. While there
15 are many fatal deficiencies in the Report that (as protestants demonstrated in their cross-
16 examinations) should doom the proposed project, hearsay is surely not an objection one can
17 make with a straight face in response to a protestant using the Conceptual Report in its case-
18 in-chief. The Report itself has already been admitted into evidence at DWR's request. In any
19 event, as a publication of a State agency, the Conceptual Report is certainly admissible under
20 Evid. Code § 1280 and Gov. Code § 11513(b). Again, it is the type of evidence upon which
21 an expert can ordinarily rely.³

22 **V. CONCLUSION**

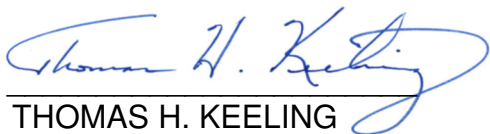
23 In sum, the SLDMWA Objections lack the required specificity and are untimely. The
24 challenged exhibits are also properly admissible under the rules, rulings and standards
25 applicable to this proceeding, including Cal. Gov. Code, § 11513 and previous rulings of this
26

27 _____
28 ³ With respect to foundational objections and other objections to these exhibits, LAND, et al.
and the San Joaquin County Protestants previously responded by way of their "Responses"
filed herein on or about November 2, 2016. That Response is hereby incorporated herein by
this reference.

1 Board. The challenged exhibits are also properly admissible as basis evidence for expert
2 testimony, regardless of whether they contain hearsay; that would be true in a California court
3 of law, and it is even more true in the context of the standards applicable to the WaterFix
4 Hearing. Finally, to the extent any of the exhibits may contain hearsay, they are nonetheless
5 admissible in this proceeding – SLDMWA’s attack on these exhibits goes to weight, not
6 admissibility. The Objections should therefore be overruled.


7
8 Dated: January 6, 2017

Respectfully submitted,
FREEMAN FIRM,

9
10 By: 
THOMAS H. KEELING
11 Attorneys for Protestants County of San
12 Joaquin, San Joaquin County Flood Control
13 and Water Conservation District, and
14 Mokelumne River Water and Power
15 Authority


16
17 Dated: January 6, 2017

SPALETTA LAW PC,

18 By: 
JENNIFER L. SPALETTA
19 Attorneys for Protestants County of San
20 Joaquin, San Joaquin County Flood Control
21 and Water Conservation District, and
22 Mokelumne River Water and Power Authority
23 and North San Joaquin Water Conservation
24 District

25
26 Dated: January 6, 2017

**SOLURI MESERVE,
A LAW CORPORATION**

27 By: 
OSHA R. MESERVE
28 Attorneys for Protestants
Local Agencies of the North Delta,
Bogle Vineyards/DWLC,
Diablo Vineyards and Brad Lange/DWLC,
Stillwater Orchards/DWLC

STATEMENT OF SERVICE

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

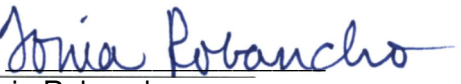
I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

RESPONSE OF THE SAN JOAQUIN COUNTY PROTESTANTS AND THE LOCAL AGENCIES OF THE NORTH DELTA, ET AL. TO SAN LUIS & DELTA-MENDOTA WATER AUTHORITY'S OBJECTIONS TO EXHIBITS SUBMITTED FOR ADMISSION BY GROUPS 18, 19, 21, 24, 27, 31, 32, 37, 38, 39 INTO EVIDENCE AT CLOSE OF PART 1B CASES IN CHIEF

RESPONSE OF THE SAN JOAQUIN COUNTY PROTESTANTS AND THE LOCAL AGENCIES OF THE NORTH DELTA, ET AL. TO CALIFORNIA DEPARTMENT OF WATER RESOURCES' OBJECTIONS TO EXHIBITS SUBMITTED IN SUPPORT OF PROTESTANTS' CASES-IN-CHIEF

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 November 15, 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

I certify that the foregoing is true and correct and that this document was executed on January 6, 2017.

Signature: 
Name: Tonia Robancho
Title: Legal Assistant for Thomas H. Keeling
Freeman Firm

Party/Affiliation:
County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority

Address:
Freeman Firm, A Professional Law Corporation
1818 Grand Canal Blvd., Suite 4, Stockton, CA 95207

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