

1 DOWNEY BRAND LLP  
 2 KEVIN M. O'BRIEN (Bar No. 122713)  
 3 STEVEN P. SAXTON (Bar No. 116943)  
 4 DAVID R.E. ALADJEM (Bar No. 152203)  
 5 MEREDITH E. NIKKEL (Bar No. 254818)  
 6 621 Capitol Mall, 18th Floor  
 7 Sacramento, CA 95814-4731  
 Telephone: 916.444.1000  
 Facsimile: 916.444.2100  
kobrien@downeybrand.com  
ssaxton@downeybrand.com  
daladjem@downeybrand.com  
mnikkel@downeybrand.com

8 Attorneys for Protestants  
 9 TEHAMA-COLUSA CANAL AUTHORITY,  
 RECLAMATION DISTRICT 108, et al.

10 J. MARK ATLAS (Bar No. 65086)  
 Attorney at Law  
 11 332 West Sycamore Street  
 Willows, CA 95988  
 12 Telephone: 530.934.5416  
 Facsimile: 530.934.3508  
 13 jma@jmatlaslaw.com

14 Attorney for Protestants  
 15 TEHAMA-COLUSA CANAL AUTHORITY,  
 GLENN VALLEY WATER DISTRICT,  
 16 MYERS-MARSH MUTUAL WATER COMPANY

17 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

18  
 19 In the matter of Hearing re California  
 20 WaterFix Petition for Change

**OBJECTIONS TO WRITTEN  
 TESTIMONY AND EXHIBITS  
 SUBMITTED BY PROTESTANTS**

21  
 22  
 23 **I. INTRODUCTION**

24 The Sacramento Valley Group<sup>1</sup> (SVG) and Tehama-Colusa Canal Authority, and water  
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26 <sup>1</sup> The Sacramento Valley Group consists of protestants Carter Mutual Water Company, El Dorado Irrigation District,  
 27 El Dorado Water & Power Authority, Howald Farms, Inc., Maxwell Irrigation District, Natomas Central Mutual  
 Water Company, Meridian Farms Water Company, Oji Brothers Farm, Inc., Oji Family Partnership, Pelger Mutual  
 28 Water Company, Pleasant-Grove Verona Mutual Water Co., Princeton-Codora-Glenn Irrigation District, Provident  
 Irrigation District, Reclamation District 108, Sacramento Municipal Utility District, Henry D. Richter, et al., River

1 service contractors in its service area<sup>2</sup> (collectively, TCCA), object to portions of the written  
 2 testimony and exhibits submitted by Protestants California Sportfishing Protection Alliance  
 3 (CSPA), South Delta Water Agency et al., Restore the Delta, and Save the California Delta  
 4 Alliance (Protestants) as part of their case in chief for Part 1 of the California WaterFix petition  
 5 for change proceeding. These portions of testimony and related exhibits fail to address the key  
 6 issues identified for Part 1 in the Notice of Petition and are therefore not relevant to Part 1 of the  
 7 hearing. Elsewhere, the testimony and exhibits contain legal argument lacking in foundation and  
 8 relevance. For these reasons, as more particularly described herein, the SVG and TCCA request  
 9 that the State Water Resources Control Board (Board or SWRCB) exclude portions of the  
 10 testimony of specific witnesses and the accompanying exhibits relied on by these witnesses.

## 11 **II. PROCEDURAL BACKGROUND**

12 Water Code section 1702 governs the SWRCB's consideration of the California WaterFix  
 13 change petition and states:

14 Before permission to make such a change is granted the petitioner shall establish,  
 15 to the satisfaction of the board, and it shall find, that the change will not operate to  
 the injury of any legal user of the water involved.

16 Consistent with Water Code section 1702, in its October 30, 2015 Notice of Petition, the  
 17 SWRCB stated the following key issues for Part 1 of this hearing:

- 18 1. Will the changes proposed in the Petition in effect initiate a new water right?
- 19 2. Will the proposed changes cause injury to any municipal, industrial or agricultural uses  
 20 of water, including associated legal users of water?
  - 21 a. Will the proposed changes in points of diversion alter water flows in a manner  
 22 that causes injury to municipal, industrial, or agricultural uses of water?
  - 23 b. Will the proposed changes in points of diversion alter water quality in a manner

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24 Garden Farms Company, South Sutter Water District, Sutter Extension Water District, Sutter Mutual Water  
 25 Company, Tisdale Irrigation and Drainage Company, Windswept Land and Livestock Company.

26 <sup>2</sup> The water service contractors within the service area of the Tehama-Colusa Canal Authority are Colusa County  
 27 Water District, Corning Water District, Cortina Water District, Davis Water District, Dunnigan Water District, 4M  
 28 Water District, Glenn Valley Water District, Glide Water District, Holthouse Water District, Kanawha Water  
 District, Kirkwood Water District, La Grande Water District, Myers-Marsh Mutual Water Company, Orland-Artois  
 Water District, Proberta Water District, Thomes Creek Water District and Westside Water District.

1 that causes injury to municipal, industrial, or agricultural uses of water?

2 c. If so, what specific conditions, if any, should the State Water Board include in  
3 any approval of the Petition to avoid injury to these uses?

4 (October 30, 2015 Notice of Hearing, p. 11.) SWRCB's pre-hearing conference ruling clarified  
5 that Part 1 would include the submission of evidence relating to flood-control issues and  
6 environmental justice considerations. (See March 4, 2016 Ruling, at p. 5-6.)

7 On September 2, 2016, Protestants submitted written testimony and exhibits in opposition  
8 to the Petition.<sup>3</sup> As described below, certain portions of Protestants' testimony and related  
9 exhibits do not respond to the original issues identified for Part 1, nor do they concern flood-  
10 control or environmental justice concerns. Elsewhere, Protestants' testimony lacks the necessary  
11 foundation for the conclusions and exhibits offered, or provides legal opinions instead of factual  
12 testimony.

### 13 **III. ARGUMENT**

#### 14 **A. The SWRCB Should Exclude Protestants' Evidence Because It Is Not** 15 **Relevant To the Issues Identified For Part 1 of This Hearing.**

16 In administrative hearings the evidence "must be relevant and reliable" to be admissible.  
17 (*Aengst v. Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.) Protestants Save  
18 the California Delta Alliance, Restore the California Delta, CSPA, and South Delta Water  
19 Agency have offered evidence that does not concern the issues identified by the SWRCB for Part  
20 1. It instead concerns environmental and recreational uses, flow requirements, the economic  
21 feasibility of WaterFix, and various statutory requirements that have no bearing on the issues set  
22 out by the Board for Part 1. Because that evidence is not relevant to the SWRCB's consideration  
23 under Water Code section 1702 and the Part 1 issues identified by the SWRCB, the SWRCB  
24 should exclude that evidence from Part 1 of this hearing.

25 Based on the foregoing, the SVG and TCCA object to the following testimony and

26 \_\_\_\_\_  
27 <sup>3</sup> SVG and TCCA reserve all rights to object to additional evidence Protestants or other parties may later submit in  
28 connection with Part 1, as well to any evidence submitted in connection with Part 2 of the WaterFix Hearing. In  
addition, if the State Water Board overrules the objection contained in this Motion, the SVG and TCCA plan to  
object to specific portions of the testimony and exhibits at the time that it is offered.

1 exhibits:

2 1. Save the California Delta Alliance, Exhibit SCDA-25 (Testimony of Frank  
3 Morgan), in its entirety. Mr. Morgan's testimony pertains to the impacts of WaterFix on his  
4 business conducting recreational boat cruises in the Delta. The question of whether the changes  
5 proposed in the Petition will "unreasonably affect fish and wildlife or recreational uses of water,  
6 or other public trust resources" is specifically reserved for Part 2 of this Hearing. (Notice of  
7 Petition, at p. 11; Feb. 11 Ruling, p. 10.)

8 2. Save the California Delta Alliance, Exhibit SCDA-48 (Testimony of  
9 Michael Brodsky), at 3:10-5:6, 7:13-10:22 (Legal argument on the project's consistency with the  
10 Delta Reform Act).

11 3. Restore the Delta, Exhibit RTD-10 (Testimony of Tim Stroshane), at pp.  
12 pp. 2-5, ¶¶ 5-11; p. 48, ¶ 145; pp. 49-51, ¶¶ 149-159 (WaterFix is contrary to Delta Reform Act of  
13 2009 and proposed terms and conditions to comply with Act); pp. 21-24, ¶¶ 66-75 (WaterFix has  
14 failed to obtain sufficient financing).

15 4. Restore the Delta, Exhibit RTD-11 (Stroshane Powerpoint), at pp. 2-3, 8  
16 (Presentation on consistency with Delta Reform Act).

17 5. Restore the Delta, Exhibit RTD-131 (C-WIN Water Availability Analysis,  
18 2012), in its entirety, which provides recommendations on flow requirements and public trust  
19 uses but does not address the presence or absence of injury to a legal user of water, or to the  
20 question of whether a petition for a new right is required.

21 6. Restore the Delta, Exhibits RTD-70 (Testimony of Roger Mammon) and  
22 RTD-71 (Mammon presentation), in their entirety. Mr. Mammon's testimony and the associated  
23 presentation relate to impacts to fisheries and recreation, which are reserved for Part 2 of this  
24 Hearing.

25 7. Restore the Delta, Exhibits RTD-80 (Testimony of Xuily Lo) and RTD-81  
26 (Lo presentation), in their entirety. Ms. Lo's testimony and the associated presentation relate to  
27 impacts to fisheries, which are reserved for Part 2 of this Hearing.

28 8. CSPA, Exhibit CSPA-2 (Testimony of Bill Jennings), at section VIII, pp.

1 24-28. This testimony is entirely legal argument regarding the inclusion of public trust arguments  
2 in Part 1, which is expressly reserved for Part 2 of the Hearing.

3 9. South Delta Water Agency, Exhibit SDWA-134 (Testimony of Dr. Jeffery  
4 Michaels), at section III. This testimony relates to the economic feasibility of WaterFix, which is  
5 outside the scope of Part 1.

6 10. South Delta Water Agency et al, SDWA-151 (Testimony of Dante John  
7 Nomellini), at 2:6-13:12, 21:3-38:12. This testimony is legal argument regarding the project's  
8 compliance with the California Environmental Quality Act ("CEQA") and the National  
9 Environmental Policy Act ("NEPA"), and the legislative authorization of the CVP and SWP,  
10 which are beyond the scope of Part 1.

11 **B. Opinion Testimony Regarding the Nature and Impact of Legal Obligations**  
12 **Lacks Foundation and Should Be Excluded.**

13 An adjudicative body "may, and upon objection shall, exclude testimony in the form of an  
14 opinion that is based in whole or in significant part on matter that is not a proper basis for such an  
15 opinion." (Evid. Code, § 803.) In particular, opinion testimony must be based on the proper  
16 foundation and "provide a reasonable basis for the particular opinion offered." (*Lockheed*  
17 *Litigation Cases* (2004) 115 Cal.App.4th 558, 564.)

18 In a recent enforcement proceeding, the SWRCB explained that it will "disregard  
19 testimony that has no bearing on the facts to be determined, including conclusory testimony as to  
20 ultimate issues raised in these proceedings where the testimony does not make clear the  
21 underlying factual foundations for the opinion offered." (Ruling on Motions Filed in the Matters  
22 of Administrative Civil Liability Complaint Against Byron-Bethany Irrigation District and Draft  
23 Cease and Desist Order Against the West Side Irrigation District ("BBID Ruling") (Mar. 18,  
24 2016, at 4); *see also id.* at 7 ("We will disregard any testimony that we find to be entirely  
25 conclusory or lacking foundation.")) Indeed, "[t]here are limits to expert testimony, not the least  
26 of which is the prohibition against admission of an expert's opinion on a question of law."  
27 (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) Although there is no risk of  
28 prejudicing a jury in this instance, legal conclusions should be disregarded because they do not

1 aid the Hearing Officers in their fact-finding. (See BBID Ruling at 5 (“To the extent that we find  
2 [an expert] has offered conclusory legal opinions that do not assist us in our factual  
3 determinations, we will disregard them.”).)

4 Testimony offered by Mssrs. Brodsky, Stroshane, Jennings, and Nomellini, each of whom  
5 have been identified as expert witnesses, includes opinions on the nature and impact of the  
6 obligations imposed by the Delta Reform Act of 2009, Petitioners’ CEQA and NEPA obligations,  
7 and the legislative authorizations extended to the project. The testimony does not lay the  
8 necessary foundation for how the witnesses are qualified as experts on these topics, how the  
9 opinions were arrived at or why the Board should consider unsupported and conclusory  
10 statements as probative. Moreover, testimony of attorneys on legal issues is not helpful for the  
11 Board in determining factual issues. Rather, the hearing procedures outlined in the Notice of  
12 Petition provide an opportunity to make legal argument. (See Notice of Petition, p. 36.) Exhibits  
13 submitted in support of the case-in-chief are not that opportunity. (*Id.*, p. 33 (“Exhibits include  
14 written testimony, statements of qualifications of expert witnesses, and other documents to be  
15 used as evidence.”) Legal argument is not instructive or helpful when introduced in the evidence  
16 phase, where the Hearing Officers are tasked with making a factual determination regarding the  
17 issues before them.

18 Based on the foregoing, the SVG and TCCA object to the following testimony and  
19 exhibits:

- 20 1. Save the California Delta Alliance, Exhibit Number SCDA-48 (Testimony  
21 of Michael Brodsky), at 3:10-5:6, 7:13-10:22 (Legal argument on the project’s consistency with  
22 the Delta Reform Act).
- 23 2. Restore the Delta, Exhibit Number RTD-10 (Testimony of Tim Stroshane),  
24 at pp. 2-5, ¶¶ 5-11; p. 48, ¶ 145; pp. 49-51, ¶¶ 149-159 (WaterFix is contrary to Delta Reform Act  
25 of 2009 and proposed terms and conditions to comply with Act); pp. 9-11, 19-20, ¶¶ 29-34, 61-65  
26 (legal argument regarding the legislative authorization for the project).
- 27 3. CSPA Exhibit Number CSPA-2 (Testimony of Bill Jennings), at p. 5  
28 (beginning at “Increasing degradation of the Delta’s water...), through p. 7 (ending at ...public

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trust resources.”) (argument on the project’s consistency with the Delta Reform Act).

4. South Delta Water Agency et al, SDWA-151 (Testimony of Dante John Nomellini), at 2:6-13:12, 21:3-38:12. This testimony is legal argument regarding the project’s compliance with CEQA and NEPA, and the legislative authorization of the CVP and SWP, which is beyond the scope of Part 1.

**IV. CONCLUSION**

The witness testimony submitted by Protestants includes material not relevant to Part 1, improper legal argument, and materials lacking in foundation. For these reasons, the SVG and TCCA object to the Board’s consideration of the evidence discussed herein.

1 DATED: September 21, 2016

DOWNEY BRAND LLP

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By: 

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DAVID R.E. ALADJEM

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Attorney for CARTER MUTUAL WATER COMPANY, EL DORADO IRRIGATION DISTRICT, EL DORADO WATER & POWER AUTHORITY, HOWALD FARMS, INC., MAXWELL IRRIGATION DISTRICT, NATOMAS CENTRAL MUTUAL WATER COMPANY, MERIDIAN FARMS WATER COMPANY, OJI BROTHERS FARM, INC., OJI FAMILY PARTNERSHIP, PELGER MUTUAL WATER COMPANY, PLEASANT-GROVE VERONA MUTUAL WATER COMPANY, PRINCETON-CODORA-GLENN IRRIGATION DISTRICT, PROVIDENT IRRIGATION DISTRICT, RECLAMATION DISTRICT 108, SACRAMENTO MUNICIPAL UTILITY DISTRICT, HENRY D. RICHTER, ET AL., RIVER GARDEN FARMS COMPANY, SOUTH SUTTER WATER DISTRICT, SUTTER EXTENSION WATER DISTRICT, SUTTER MUTUAL WATER COMPANY, TISDALE IRRIGATION AND DRAINAGE COMPANY, WINDSWEPT LAND AND LIVESTOCK COMPANY

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16 DATED: September 21, 2016

DOWNEY BRAND LLP

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By: 

STEVEN P. SAXTON

Attorney for Protestant

TEHAMA-COLUSA CANAL AUTHORITY

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20 DATED: September 21, 2016

J. MARK ATLAS

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By: 

J. MARK ATLAS

Attorney for Protestants

TEHAMA-COLUSA CANAL AUTHORITY, GLENN VALLEY WATER DISTRICT, MYERS-MARSH MUTUAL WATER COMPANY

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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);

**OBJECTIONS TO WRITTEN TESTIMONY AND EXHIBITS SUBMITTED BY  
PROTESTANTS**

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 September 20, 2016, posted by the State of 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):

*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

**For Petitioners Only:**

	I caused a true and correct hard <b>copy</b> of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:  Method of <b>Service:</b> _____
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I certify that the foregoing is true and correct and that this document was executed on September 21, 2016.

Signature: Catharine Irvine

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814