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## State Water Resources Control Board

May 30, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

### **CALIFORNIA WATERFIX HEARING – RULING DENYING MOTION TO EXCLUDE REBUTTAL EXHIBITS OFFERED BY LAND**

#### **Objections to LAND Exhibits**

During the hearing on May 19, 2017, the Department of Water Resources (DWR) moved to exclude portions of rebuttal exhibit LAND-79, and rebuttal exhibits LAND-75, -76, and -77, which were offered into evidence by Local Agencies of the North Delta et al. (LAND). This motion was joined by San Luis Delta-Mendota Water Authority and the State Water Contractors. We requested that DWR submit the motion in writing, and DWR did so on May 22, 2017. LAND submitted a written response on May 23, 2017.

#### **Rebuttal Exhibit LAND-79**

Rebuttal exhibit LAND-79 is a December 2016 version of a report by Dr. Michelle Leinfelder-Miles titled “Leaching Fractions Achieved in South Delta Soils under Alfalfa Culture Project Report.” Prior versions of the report were accepted into evidence as SDWA-139 and SDWA-140, dated February 2015 and August 2016, respectively. Dr. Leinfelder-Miles refers to the December 2016 updated report (LAND-79) in her written testimony (LAND-78) in support of her opinion about appropriate sampling methods for evaluating how water salinity may impact soil salinity and crop yield. Sampling methods are discussed on pages 4 through 6 of the December 2016 updated report (LAND-79).

DWR moved to exclude LAND-79, with the exception of pages 4 through 6, on the grounds that it is improper and irrelevant rebuttal testimony. In the alternative, DWR moved to exclude LAND-79 in its entirety, on the same grounds.

LAND-79 is proper rebuttal evidence. The subject matter of the report (LAND-79) responds to petitioners’ case-in-chief and can be admitted without sponsoring testimony. (See February 21, 2017 Ruling on Evidentiary Objections, p. 16.) The report describes the study conducted by Dr. Leinfelder-Miles and information obtained about current leaching fractions being achieved in South Delta alfalfa soils and how surface water quality and rainfall affect the leaching fraction. This evidence responds to petitioners’ claim that compliance with water quality requirements established by Water Right Decision 1641 is sufficient to prevent injury to legal users, and that a change in water quality below a certain threshold would not cause injury. (See, e.g., DWR-53, p. 13:12-20 [testimony of Maureen Sergent]; R.T. (Sept. 23, 2016) 11:4-7 [cross examination of Maureen Sergent]; R.T. (Aug. 25, 2016) 11:21-12:8 [cross examination of Dr. Nader-Tehrani].) Although earlier versions of the report have already been admitted into evidence, the revisions

include additional information that is appropriate for rebuttal. The motion to exclude is overruled.

**Rebuttal Exhibits LAND-75, -76, and -77**

Rebuttal exhibits LAND-75, -76, and -77 are copies of protests submitted in this proceeding by Bogle Vineyards (LAND-75), Diablo Vineyards (LAND-76), and Stillwater Orchards (LAND-77). Each protest includes a list and description of water rights claimed by the protestant and a map depicting the points of diversion of the claimed rights. During its case-in-chief, LAND attempted to submit by reference evidence related to the water rights of its members. We declined to admit the exhibits because LAND failed to identify a specific document or set of documents that it sought to incorporate by reference. We did accept LAND's protest into evidence as LAND-62.

DWR objects to exhibits LAND-75, -76, and -77 on the grounds that they are outside of the scope of rebuttal because they do not respond to evidence presented in connection with another party's case-in-chief. We disagree. The protests respond to petitioners' evidence related to lack of injury to legal users of water. DWR also asserts that LAND's offer of the three protests as rebuttal exhibits is an attempt to remedy a gap in LAND's case-in-chief. This may be true, but the exhibits are proper rebuttal evidence and LAND was not required to submit them during its case-in-chief. In fact, LAND could have participated through rebuttal only because petitioners bear the burden of demonstrating no injury to legal users of water, although there were strategic advantages to presenting a case-in-chief. For example, if the protests had been offered into evidence during LAND's case-in-chief, LAND would have had an opportunity to respond to any rebuttal evidence produced by the other parties. Instead, other parties will have an opportunity to respond to LAND-75, -76, and -77 during sur-rebuttal, and LAND will have no further opportunity to respond during Part 1 of the hearing. The motion to exclude LAND-75, -76, and -77 is overruled.

**Disposition:** LAND Rebuttal Exhibits LAND-75, LAND-76, LAND-77, LAND-78, LAND-79, and LAND-80 are admitted into the evidentiary record. The admissibility of LAND rebuttal exhibits introduced during cross-examination will be addressed in a forthcoming ruling.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY:*

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Felicia Marcus, State Water Board Chair  
WaterFix Project Co-Hearing Officer

*ORIGINAL SIGNED BY:*

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Tam M. Doduc, State Water Board Member  
WaterFix Project Co-Hearing Officer