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10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11
12
13 In the matter of Hearing re California
14 WaterFix Petition for Change

**SVWU'S RESPONSE TO SLDMWA'S AND
WESTLANDS' NOVEMBER 16, 2016
OBJECTIONS TO EXHIBITS
SUBMITTED FOR ADMISSION INTO
EVIDENCE BY GROUPS 7 AND 9 AT THE
CLOSE OF THEIR CASE IN CHIEF**

DOWNEY BRAND LLP

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 17 FARMS WATER COMPANY, OJI BROTHERS FARM,
 18 INC., OJI FAMILY PARTNERSHIP, PELGER MUTUAL
 19 WATER COMPANY, PLEASANT-GROVE VERONA
 20 MUTUAL WATER COMPANY, PRINCETON-
 21 CODORA-GLENN IRRIGATION DISTRICT,
 22 PROVIDENT IRRIGATION DISTRICT, RECLAMATION
 23 DISTRICT 108, SACRAMENTO MUNICIPAL UTILITY
 24 DISTRICT, HENRY D. RICHTER, ET AL., RIVER
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1 San Luis & Delta-Mendota Water Authority (“SLDMWA”) and Westlands Water
2 District’s (“Westlands”) assert that certain exhibits submitted by the Sacramento Valley Water
3 Users (“SVWU”) are hearsay, and that therefore the State Water Resources Control Board
4 (“SWRCB”) may not admit or rely upon those exhibits in this Hearing. As a preliminary matter,
5 SLDMWA and Westlands’ Objections to Exhibits Submitted for Admission Into Evidence By
6 Groups 7 and 9 at the Close of Their Case In Chief (the “Objection”) is lacking in both timeliness
7 and specificity, and should be overruled on those grounds alone. The Objection is likewise
8 meritless because the contested exhibits simply are not hearsay. These materials are not out-of-
9 court-statements, but rather direct testimony authored and affirmed by SVWU’s witnesses,
10 incorporated into the witnesses’ written and oral summaries of testimony, submitted consistent
11 with the Hearing Officer’s procedural requirements for the presentation of testimony in this
12 Hearing, and then subject to considerable cross examination during the witnesses’ oral summary
13 of testimony.

14 Even if the contested exhibits could be considered hearsay (which they are not), the
15 relaxed rule for use of hearsay under Government Code section 11513 does not limit the
16 admission or use of the exhibits offered by the SVWU. Rather, these relevant and reliable
17 materials supplement other direct testimony, and would be admissible over objection in a civil
18 action. Accordingly, SVWU respectfully requests that the Hearing Officers overrule the
19 Objection in its entirety.

20 **I. BACKGROUND**

21 The Hearing Notice issued in this proceeding directed that any party “proposing to present
22 testimony on factual or other evidentiary matters” submit that testimony in writing, including
23 sufficient information in support of technical evidence to “clearly identify and explain the logic,
24 assumptions, development, and operation of the studies or models.” Notice, Enclosure D, at 33.
25 In keeping with the SWRCB’s policy of discouraging surprise testimony, parties were directed to
26 provide PowerPoint presentations or other visual aids that witnesses intended to use while
27 summarizing their testimony with their other exhibits, together with a written summary of each
28 witness’s direct testimony. January 15, 2016 Ruling Letter Re: Service List of Participants, List

1 of Interested Parties, and Pre-Hearing Conference Agenda, pp. 5-6. The Notice barred parties
2 from reading written testimony directly into the record, instead directing them to use their time on
3 direct examination “to summarize or emphasize their written testimony.” Notice, Enclosure D, at
4 35. Consistent with that direction, the Notice confirmed that “written testimony affirmed by the
5 witness is direct testimony.” Notice, Enclosure D, at 35.

6 Consistent with those directions, on September 1, 2016 SVWU submitted to the SWRCB
7 and provided to all parties written summaries of testimony and curriculum vitae of its two experts
8 (SVWU-100, 101, 105, and 106), six technical memoranda authored by one or both experts
9 (SVWU-102, 103, 104, 107, 108, and 109), and a PowerPoint presentation to be used in
10 conjunction with the experts’ oral testimony (SVWU-110). *See* Second Revised Notice of Public
11 Hearing, May 11, 2016, at p. 3. Mr. Bourez’s written summary of testimony (SVWU-100)
12 incorporated into it the substantial technical work performed by Mr. Bourez and his colleagues in
13 the form of Exhibits SVWU-102, 103, 104, 107, 108, and 109. *See* SVWU-100, ¶¶ 4-22; October
14 20 Hearing video, 00:42:41 through 00:47:42.¹ The deadline for the written procedural or
15 evidentiary objections to exclude such testimony was September 21, 2016. Co-Hearing Officer’s
16 Ruling on Department of Water Resources’ Request for Time, Sept. 9, 2016 (“September 9th
17 Ruling”); *see also* Ruling on Submittal Deadlines, Rebuttal Process, and Scheduling, December
18 19th, 2016 (“December 19th Ruling”) (confirming that further objections seeking exclusion
19 would be rejected “unless they are based on new information that was presented during cross-
20 examination.”). On September 21, 2016, SLDMWA objected to certain portions of exhibit
21 SVWU-100 (Mr. Walter Bourez’s written summary of testimony) as hearsay.² Westlands joined
22 in that objection. This was the sole objection to SVWU testimony filed by either Westlands or
23 SLDMWA by the deadline.

24 In accordance with the Hearing Notice, on October 20, 2016, Mr. Bourez provided an oral
25 summary of his testimony, affirming each exhibit and the expert opinions contained therein. Oct.

26 _____
27 ¹ Citations to the hearing video are to the SWRCB’s archived videos, available on the Hearing website, and are in the
28 form [hour]:[minute]:[second]. A written transcript was not available at the time this response was submitted.

² At the time of filing of this response, no ruling had been issued on the hearsay objection asserted by SLDMWA and Westlands on September 21, 2016.

1 20, 2016 Hearing video, at 00:42:32 through 2:32:44. After summarizing the technical analysis
2 that he and his team performed, Mr. Bourez concluded his direct examination by testifying that,
3 in his expert opinion, the modeling that was performed for WaterFix failed to provide the
4 SWRCB with sufficient information to understand the project's effects on water users, and was
5 based on unrealistic assumptions of Project operations. Oct. 20, 2016 Hearing video, at 2:29:04
6 through 02:30:15.

7 DWR objected to Mr. Bourez's oral testimony regarding Exhibits SVWU-107, SVWU-
8 108, and SVWU-109, on the grounds that this level of detail was not contained in SVWU-100
9 (Mr. Bourez's written summary of testimony), and it was therefore improper to offer oral
10 testimony regarding contents of those exhibits. The SWRCB recognized the interrelated nature of
11 the prior-submitted exhibits and the oral summary of testimony offered in this Hearing, and
12 rejected DWR's argument:

13 BERLINER: I am afraid I have to object... This is the second instance in Mr. Bourez's
14 testimony where he is supposed to be summarizing, yet he is introducing new evidence
15 that's not included in his testimony. The first example is the chart that was shown, and
16 while it's in one of the exhibits, its not in his direct testimony. The current explanations
17 that he's given are not found in his direct testimony. He's expanding on this PowerPoint
18 slide that is included in his package, and which is directly out of his testimony, but it was
19 our understanding that when a witness comes, their job is to testify, summarizing the
20 written testimony that they have given. This was not supposed to be a hunting expedition
21 where we were expected to plow through piles of exhibits wondering which parts of those
22 exhibits a witness was going to testify about. The exhibits were supposed to support the
23 written testimony. We were quite surprised that Mr. Bourez's testimony was as short as it
24 is. I think the fact that he's got a nine-page testimony and is planning to testify for two
25 hours speaks directly to the fact that his testimony was merely conclusions with no
26 supporting documentation or text within the testimony that would have allowed us to
27 understand what he's testifying to at this point.

28 HEARING OFFICER DODUC: Mr. Lilly?

MR. LILLY: I think that was the key. Mr. Berliner said there's no supporting
documentation, and that's just not true. There is a lot of supporting documentation, and it
is exhibits SVWU-107, 108, and 109, and they are part of his testimony. He has said on
direct at the beginning of this today that those are reports that he prepared and that were
prepared by him and Mr. Easton. So, his testimony is not just exhibit 101. It includes
those as well, and everything he is saying so far is summarizing points that were made in
those exhibits. They had plenty of time to review those...and also, his summary
testimony clearly cross references 107, 108, and 109, so it is clearly appropriate for him
to include in his summary today matters that were contained in 107, 108, and 109, and that
is what he is doing.

1 HEARING OFFICER DODUC: Thank you Mr. Lilly. Mr. Berliner, your objection is
 2 overruled. I actually was going to compliment Mr. Bourez on the fact that I appreciated
 3 his outline testimony a lot. It was clear, it was succinct, and it did refer back to these
 other documents that provide the substantive technical issues to which he is testifying.
 So, I recognize Mr. Lilly's argument, and overrule Mr. Berliner's objection.

4 Oct. 20, 2016 Hearing video, 00:57:37 through 00:1:00. Neither SLDMWA nor Westlands
 5 objected to the oral testimony offered by Walter Bourez or Dan Easton at the Hearing, and each
 6 declined to conduct any cross-examination of these witnesses. Oct. 21, 2016 Hearing video at
 7 00:59:20 through 00:59:37.

8 On November 2, 2016, at the direction of the Hearing Officers, SVWU formally offered
 9 all of the SVWU exhibits discussed in oral testimony into evidence. On November 16, 2016,
 10 SLDMWA and Westlands filed a written objection to Exhibits SVWU-102, 103, 104, 107, 108,
 11 109, and 110 ("the Exhibits") on the grounds that those exhibits are hearsay, and that therefore
 12 the SWRCB may not admit or rely upon these materials in making its findings.

13 **II. ARGUMENT**

14 Each of the Exhibits was submitted by SVWU first on September 1 as part of the written
 15 testimony in this hearing, and then, at the direction of the Hearing Officers, summarized and
 16 affirmed during the witnesses' oral summary of testimony at the Hearing. October 20, 2016
 17 Hearing video, 00:47:08 through 00:51:12. The Objection, submitted nearly two months after the
 18 deadline to object to the admission of such testimony, is fatally flawed in that it was not timely
 19 and lacks specificity. Substantively, the arguments raised in the Objection also fail: the Exhibits
 20 are not hearsay, and none of the rules governing the conduct of this Hearing limit the SWRCB's
 21 consideration or use of these materials.

22 **A. The Objection Does Not Comply with the Board's Rules and So Should be** 23 **Rejected.**

24 Objections to the admission of hearsay evidence must be timely and specific. September
 25 9th Ruling; Gov. Code § 11513(d); *Rodriguez v. McDonnell Douglas Corp.* (1978) 87
 26 Cal.App.3d 626, 659–660; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 339. This Objection,
 27 filed long after the September 21, 2016 deadline for objections to exclude testimony, and lacking
 28 any meaningful discussion of the basis for the objection, does not meet this standard.

1 An objection “must be made in such a way as to alert the trial court to the nature of the
2 anticipated evidence and the basis on which exclusion is sought, and to afford the People an
3 opportunity to establish its admissibility.” *People v. Rivera* (2011) 201 Cal.App.4th 353, 361.
4 SLDMWA and Westlands object to the admission of a long list of exhibits “to the extent
5 each...are offered to prove the truth of the matter stated,” but the Objection does not explain what
6 matters those exhibits are offered as the truth of, beyond listing the title of each document. Obj.
7 2:15. A general evidentiary objection like this one is not sufficient to exclude evidence “without
8 specific identification of the evidence to which the party objects and the reason for that
9 objection.” SWRCB Order WR 2012-0012, p. 11, fn. 28.

10 SLDMWA and Westlands characterize the Objection as a challenge to “non-testimony”
11 evidence that is therefore not subject to the September 21 deadline for motions to “disqualify
12 witnesses or to exclude a witness’s testimony, in whole or in part.” Obj., 1:7-12; *see* September
13 9th Ruling. This is a distinction without a difference. The Objection repackages the same
14 argument against the inclusion of these exhibits in testimony that the Hearing Officer rejected on
15 October 20, 2016. As the Hearing Officers recognized then, the Exhibits are part of the testimony
16 offered by the SVWU witnesses, and were properly included in the witnesses’ oral summary of
17 testimony. The deadline for seeking to exclude this testimony has passed, and SLDMWA and
18 Westlands have not identified any new information that would justify this late Objection. *See*
19 December 19th Ruling.

20 SLDMWA and Westlands, having had ample opportunity to test the admissibility,
21 validity, and credibility of these exhibits, cannot now rely on semantics to evade the deadline set
22 by the Hearing Officers and obtain a second bite at the apple. The Objection, insofar as it seeks
23 to exclude evidence, should be overruled because it is untimely and not specific.

24 **B. The Exhibits are Not Hearsay.**

25 It is true that in traditional civil proceedings, “[d]ocuments like letters, reports, and
26 memoranda are often hearsay because they are prepared by a person outside the courtroom and
27 are usually offered to prove the truth of the information they contain.” *People v. Sanchez* (2016)
28 63 Cal.4th 665, 674-675. However, an expert’s opinion “is no better than the facts on which it is

1 based” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618), and experts are therefore generally
2 allowed to testify to *all* facts upon which they base their opinions, including the underlying work
3 and observations performed by the expert. *See People v. Bordelon* (2008) 162 Cal.App.4th 1311,
4 1324-1325.

5 It is a fundamental premise of the hearsay rule that neither the rule or its exceptions “are
6 concerned with the credibility of witnesses who testify directly to the jury.” *People v. Cudjo*
7 (1993) 6 Cal.4th 585, 608. Here, Mr. Bourez testified to the facts which he based his expert
8 opinions, each of which was supported by the analysis in the Exhibits. For example, he testified
9 that Exhibits SVWU-102, 103, and 104 demonstrated that issues identified in prior comments on
10 modeling approaches had not been addressed, leading to his opinion that “this material can’t be
11 relied upon to determine the effects of the California WaterFix.” *See, e.g.* October 20, 2016
12 Hearing video, 00:47:08 through 00:51:12; *see also* SVWU-100 at ¶¶ 9-18. He went on to testify
13 that MBK “made numerous improvements to the model to better explain the way that the
14 California WaterFix would operate and the No Action Alternative would operate,” and that
15 analysis was reflected in SVWU-107. Oct 20, 2016 Hearing Video at 1:56:14 through 1:56:31;
16 *see also* SVWU-100 at ¶¶ 19-22. He offered his opinion, based on the analysis contained in
17 SVWU-108 and SVWU-109, that the proposed WaterFix project would make it “more difficult
18 to...make adequate water available to the Sacramento River Settlement Contractors as required
19 under their contracts,” and that the boundary analysis upon which the WaterFix analysis was
20 premised “fails in its purported purpose of bounding the range of potential effects of the
21 California Water Fix.” Oct. 20, 2016 Hearing video at 00:53:08 through 00:53:23, and 1:48:33
22 through 1:48:45; *see also* SVWU-100 at ¶¶ 6-8. Moreover, the presentation slides to which
23 SLDMWA and Westlands now object were the centerpiece of Mr. Bourez’s extensive direct oral
24 testimony. Oct. 20, 2016 Hearing video at 00:45:16 through 2:32:44.

25 Moreover, the theory underlying the hearsay rule is that “the many possible deficiencies,
26 suppressions, sources of error and untrustworthiness, which lie underneath the bare untested
27 assertion of a witness, may be best brought to light and exposed by the test of cross-
28 examination.” *Buchanan v. Nye* (1964) 128 Cal.App.2d 582, 585. Accordingly, an expert’s

1 report “los[es] its hearsay nature” when the expert is made available for cross examination.”
 2 *Hope v. Arrowhead & Puritas Waters, Inc.* (1959) 174 Cal.App.2d 222, 231. The credibility
 3 concerns that drive the hearsay rule are not at play here, where the Exhibits were each authored
 4 by a witness who was not only available to testify, but in fact was the subject of extensive cross-
 5 examination regarding those very Exhibits. *See, e.g.* Oct. 20, 2016 Hearing video at 5:20:18
 6 through 6:35:00 (cross examination by DWR on modeling methodology and findings of SVWU-
 7 102, 103, and 107, among others); Oct. 21, 2016 Hearing video at 00:56:01 through 00:59:13
 8 (cross examination by the State Water Contractors, discussing modeling results and methodology
 9 in SVWU-102). SLDMWA and Westlands were each offered the opportunity to conduct cross
 10 examination with Mr. Bourez and Mr. Easton, and each declined to do so. Oct. 21, 2016 Hearing
 11 video at 00:59:20 through 00:59:37; *see also Hope v. Arrowhead & Puritas Waters, Inc.*, 174
 12 Cal.App.2d at 231-232 (plaintiff’s failure to cross-examine a witness regarding the report he
 13 authored “render[ed] ineffective” plaintiff’s hearsay argument.).

14 The Exhibits, affirmed by Mr. Bourez and incorporated at considerable length into his oral
 15 summary of testimony, are as much a part of Mr. Bourez’s direct testimony as his written
 16 summary (SVWU-100) and the opinions he offered during the course of his oral summary of
 17 testimony and cross-examination at the Hearing on October 20 and 21, 2016. SLDMWA and
 18 Westlands’ assertion that these Exhibits are evidence of “a statement made other than by a
 19 witness other than while testifying at the hearing” (*see* Obj., 2:8-11) is not supported by the facts
 20 or law.

21 **C. Government Code Section 11513 Does Not Limit the Admission or Use of the**
 22 **Exhibits**

23 Though SLDMWA and Westlands “object to the admission” of the Exhibits (Obj. 2:15-
 24 16), they do not dispute the Exhibits’ relevance or reliability, and offer no legal support for the
 25 proposition that these Exhibits must be excluded. Indeed, no such support exists, because
 26 section 11513, subdivision (c), is unambiguous: where evidence is “relevant and such as could be
 27 relied on by responsible persons,” there is a “statutory mandate” that it be admitted. *Martin v.*
 28 *State Personnel Bd.*, (1972) 26 Cal.App.3d 573, 582.

1 Instead, SLDMWA and Westlands seek to limit the use of the Exhibits under Government
2 Code section 11513(d), arguing that the SWRCB must disregard the Exhibits because it “cannot
3 base a finding upon hearsay unless it corroborates non-hearsay evidence.” Obj. 2:4-13. This
4 misstates the rule. Rather than barring the SWRCB from relying on hearsay evidence generally,
5 the Government Code provides that hearsay may be used to supplement or explain other evidence
6 “but is not *sufficient in itself* to support” a finding by the SWRCB in the face of a hearsay
7 objection, unless it would be otherwise admissible in a civil action. Gov. Code, § 11513(d)
8 (emphasis added); *see also* Notice, Enclosure D, p. 36. In other words, the SWRCB is free to rely
9 even upon civilly inadmissible hearsay evidence in making a finding, provided that it also relies
10 on non-hearsay evidence.

11 Here, the Exhibits would be admissible over objection in a civil action, because as a
12 matter of law, the Exhibits are not hearsay. Also, the Exhibits are not offered in isolation. Even
13 if they could be considered hearsay (which they are not), Section 11513(d) allows the use of such
14 evidence to “supplement or explain” other evidence. Exhibits SVWU-102, 103, 104, 107, 108,
15 and 109 all help to explain the opinions Mr. Bourez offered during oral testimony, including that
16 the WaterFix modelling contained “unrealistic assumptions” such as modelling spring outflow in
17 a manner that fundamentally changed the resulting modeled effects, and failed to properly reflect
18 the integrated nature of the proposed facilities in the larger system. *See* Oct. 20, 2016 Hearing
19 video, at 2:29:04 through 02:30:15. Exhibit SVWU-110, which Messrs. Easton and Bourez used
20 as a visual aid during their oral summary of testimony, supplements and helps to explain that
21 testimony. Accordingly, each of the Exhibits may be used together with other direct testimony to
22 support the SWRCB’s findings, even in the face of this Objection.

23 **III. CONCLUSION**

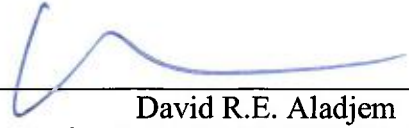
24 The Objection is impermissibly untimely and unspecific. Moreover, the SVWU exhibits
25 to which SLDMWA and Westlands object are not hearsay, and would be admissible over
26 objection in any civil action. For the reasons discussed herein the Objection should be overruled
27 in its entirety.

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DATED: December 22, 2016

DOWNEY BRAND LLP

By: 

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DATED: December 22, 2016

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DATED: December 22, 2016

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By: /s/Andrew M. Hitchings

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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);

**SVWU'S RESPONSE TO SLDMWA'S AND WESTLANDS' NOVEMBER 16, 2016
OBJECTIONS TO EXHIBITS SUBMITTED FOR ADMISSION INTO EVIDENCE
BY GROUPS 7 AND 9 AT THE CLOSE OF THEIR CASE 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 of Water Resources Control Board at
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 copy 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 Service: _____
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I certify that the foregoing is true and correct and that this document was executed on December 22, 2016.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814