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7 NORTH DELTA WATER AGENCY

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

**NORTH DELTA WATER AGENCY'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 AND
JOINDER IN THE RESPONSE OF SVWU
TO THAT OBJECTION**

17 San Luis & Delta-Mendota Water Authority ("SLDMWA") and Westlands Water
18 District's ("Westlands") assert that certain exhibits submitted by North Delta Water Agency
19 ("NDWA") are hearsay, and that therefore the State Water Resources Control Board ("SWRCB")
20 may not admit or rely upon those exhibits in this Hearing. As a preliminary matter, SLDMWA
21 and Westlands' Objections to Exhibits Submitted for Admission Into Evidence By Groups 7 and
22 9 at the Close of Their Case In Chief (the "Objection") is lacking in both timeliness and
23 specificity, and should be overruled on those grounds alone. The Objection is likewise meritless
24 because the contested exhibits simply are not hearsay. These materials are not out-of-court-
25 statements, but rather direct testimony authored and affirmed by NDWA's witnesses,
26 incorporated into the witnesses' written and oral summaries of testimony, submitted consistent
27 with the Hearing Officer's procedural requirements for the presentation of testimony in this
28 Hearing, and then subject to cross examination during the witnesses' oral summary of testimony.

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

7 **I. BACKGROUND**

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

21 Consistent with those directions, on September 1, 2016 NDWA submitted evidence in
22 support of its case in chief, including a written summary of testimony for each witness proposed
23 to testify at the Hearing (NDWA-3, NDWA-5, NDWA-7, and NDWA-9); a technical
24 memorandum prepared by Messrs. Kienlen and Parvathinathan of MBK Engineers (NDWA-32
25 and NDWA-32-errata); and four comment letters authored by Ms. Terry in her capacity as the
26 General Manager of NDWA (NDWA-35 and NDWA-36) and as the Executive Director of the
27
28

1 California Central Valley Flood Control Association (NDWA-37 and NDWA-38).¹

2 The deadline for the written procedural or evidentiary objections to exclude such
3 testimony was September 21, 2016. Co-Hearing Officer's Ruling on Department of Water
4 Resources' Request for Time, Sept. 9, 2016 ("September 9th Ruling"); *see also* Ruling on
5 Submittal Deadlines, Rebuttal Process, and Scheduling, December 19th, 2016 ("December 19th
6 Ruling") (confirming that further objections seeking exclusion would be rejected "unless they are
7 based on new information that was presented during cross-examination."). On September 21,
8 2016, SLDMWA objected to certain portions of exhibits NDWA-3, NDWA-5, NDWA-7, and
9 NDWA-9 hearsay. Westlands joined in that objection. This was the sole objection to NDWA
10 testimony filed by either Westlands or SLDMWA by the deadline.²

11 At the Hearing on October 20, 2016, Mr. Walter Bourez offered testimony that included a
12 discussion of several technical exhibits previously submitted by the Sacramento Valley Water
13 Users ("SVWU"). Oct. 20, 2016 Hearing Video at 00:42:32 through 2:32:44.³ The Department
14 of Water Resources ("DWR") objected, on the grounds that the exhibits were not part of Mr.
15 Bourez's "direct testimony." Oct. 20, 2016 Hearing Video at 00:57:37 through 00:58:59. Counsel
16 for SVWU explained that Mr. Bourez's testimony was not just the written summary of testimony
17 provided as SVWU-100, but also the exhibits prepared by Mr. Bourez and offered by SVWU.
18 Oct. 20, 2016 Hearing Video at 00:58:59 through 00:59:57. Recognizing the interrelated nature
19 of the exhibits and oral testimony in this hearing, Hearing Officer Doduc ruled:

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

26 Oct. 20, 2016 Hearing video, 00:59:57 through 1:00:24. Neither SLDMWA nor Westlands
27 objected to the oral testimony offered by Mr. Bourez at the Hearing, and each declined to conduct

28 ¹ The California Central Valley Flood Control Agency letters (NDWA-37 and NDWA-38) were also incorporated by
reference into NDWA-35 and NDWA-36 (*see* NDWA-35 at p. 5; NDWA-36 at p. 2).

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.

³ Citations to the hearing video are to the SWRCB's archived videos, available on the Hearing website, and are in the
form [hour]:[minute]:[second]. A written transcript was not available at the time this response was submitted.

1 any cross-examination regarding those exhibits. Oct. 21, 2016 Hearing video at 00:59:20 through
2 00:59:37.⁴

3 In accordance with the Hearing Notice, on October 28, NDWA’s panel of witnesses
4 provided their oral summaries of testimony, and were subject to cross-examination. SLDMWA
5 and Westlands declined to cross-examine these witnesses. Oct. 28, 2016 Hearing Video at
6 2:13:55 through 2:14:07. On October 28, 2016, following that oral testimony, NDWA offered all
7 of its exhibits into evidence. On November 16, 2016, SLDMWA and Westlands objected to the
8 admission of Exhibits NDWA-32, NDWA-32-errata, NDWA-35, NDWA-36, NDWA-37, and
9 NDWA-38 (“the Exhibits”) on the grounds that those exhibits are hearsay evidence, and that
10 therefore the SWRCB may not admit or rely upon these materials in making its findings.

11 **II. ARGUMENT**

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

19 **A. The Objection Does Not Comply with the Board’s Rules and So Should be** 20 **Rejected.**

21 Objections to the admission of hearsay evidence must be timely and specific. September
22 9th Ruling; Gov. Code § 11513(d); *Rodriguez v. McDonnell Douglas Corp.* (1978) 87
23 Cal.App.3d 626, 659–660; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 339. This Objection,
24 filed long after the September 21, 2016 deadline for objections to exclude testimony, and lacking
25 any meaningful discussion of the basis for the objection, does not meet this standard.

26 An objection “must be made in such a way as to alert the trial court to the nature of the

27 _____
28 ⁴ Certain of the SVWU exhibits are also objected to as hearsay in the Objection. As explained below, NDWA joins in SVWU’s Response to that Objection.

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

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

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

23 **B. The Subject Exhibits Are Direct Testimony, Not Hearsay**

24 The Hearing Officers have already considered and rejected a claim that exhibits submitted
25 by parties are not properly considered part of those parties’ testimony. *See* Oct. 20, 2016
26 Hearing, at 00:57:37 through 00:1:00. It is true that in traditional civil proceedings, “[d]ocuments
27 like letters, reports, and memoranda are often hearsay because they are prepared by a person
28 outside the courtroom and are usually offered to prove the truth of the information they contain.”

1 *People v. Sanchez* (2016) 63 Cal.4th 665, 674-675. However, an expert's opinion "is no better
 2 than the facts on which it is based" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618), and experts
 3 are therefore generally allowed to testify to *all* facts upon which they base their opinions,
 4 including the underlying work and observations performed by the expert. *See People v. Bordelon*
 5 (2008) 162 Cal.App.4th 1311, 1324-1325.

6 Hearsay is "generally excluded because the out-of-court declarant is not under oath and
 7 cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and
 8 because the jury (or other trier of fact) is unable to observe the declarant's demeanor." *People v.*
 9 *Cudjo* (1993) 6 Cal.4th 585, 608. However, it is a fundamental premise of the hearsay rule that
 10 neither the rule or its exceptions "are concerned with the credibility of witnesses who testify
 11 directly to the jury." *People v. Cudjo* (1993) 6 Cal.4th 585, 608. The theory underlying this rule
 12 is that "the many possible deficiencies, suppressions, sources of error and untrustworthiness,
 13 which lie underneath the bare untested assertion of a witness, may be best brought to light and
 14 exposed by the test of cross- examination." *Buchanan v. Nye* (1964) 128 Cal.App.2d 582, 585.
 15 Accordingly, an expert's report "los[es] its hearsay nature" when the expert is made available for
 16 cross examination. *Hope v. Arrowhead & Puritas Waters, Inc.* (1959) 174 Cal.App.2d 222, 231.

17 The Exhibits are not hearsay, but are part of the direct testimony offered by Mr. Kienlen
 18 and Ms. Terry, submitted in accordance with the procedures set out by the Hearing Officers. In
 19 his oral summary of testimony, Mr. Kienlen offered expert opinions regarding the potential
 20 impact of the WaterFix project on NDWA. The technical work contained in NDWA-32 (and
 21 NDWA-32-errata) provided a basis for Mr. Kienlen's written summary of testimony (*see*
 22 NDWA-5, ¶¶ 30, 32, 37, 40, 42), and the contents of this exhibit were incorporated, affirmed, and
 23 discussed at length during Mr. Kienlen's oral summary of testimony and cross-examination on
 24 October 28. *See* Oct. 28, 2016 Hearing Video at 1:55:02 through 2:06:34. For example, Mr.
 25 Kienlen testified at the Hearing that the DSM2 modeling conducted for the Biological
 26 Assessment for the project shows degradation to water quality and reductions in water levels
 27 within NDWA resulting from the project, and that 1981 Contract would not prevent those impacts
 28 from occurring. *See* Oct. 28, 2016 Hearing Video at 1:55:02 through 2:14:40; *see also* NDWA-3

1 at ¶¶ 7-9, 17-29, 32.

2 Likewise, Ms. Terry's written testimony explains that "for the past several years, NDWA
3 has participated in good faith in various regulatory and administrative processes relating to
4 potential new water diversion and conveyance facilities in the north Delta. NDWA has
5 consistently and repeatedly asserted in these processes that any projects, programs or actions,
6 including but not limited to the WaterFix, must be: (i) based on the best available science, (ii)
7 consistent with the contractual obligations of the State of California under the 1981 Contract, and
8 (iii) undertaken in accordance with all applicable state and federal laws." NDWA-7, 6:21-7:2.
9 NDWA-35, 36, 37, and 38 reflect NDWA's ongoing participation in this regulatory process, and
10 each identify flaws that remain unaddressed in the proposed WaterFix project. Ms. Terry's oral
11 summary of testimony and responses on cross-examination reiterated those flaws, and confirmed
12 the Agency's position that the project must be based on the best available science, consistent with
13 the 1981 Contract, and undertaken in accordance with all applicable state and federal laws. *See*
14 Oct. 28, 2016 Hearing Video at 2:19:01 through 2:30:01.

15 The credibility concerns that drive the hearsay rule are simply not at play here.
16 SLDMWA and Westlands were each offered the opportunity to conduct cross examination with
17 Ms. Terry and Mr. Kienlen, and each declined to do so. October 28, 2016 Hearing Video at
18 2:13:55 through 2:14:07; *see also Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal.App.2d at
19 231-232 (plaintiff's failure to cross-examine a witness regarding the report he authored
20 "render[ed] ineffective" plaintiff's hearsay argument.). The Exhibits, affirmed by Mr. Kienlen
21 and Ms. Terry incorporated into their written and oral testimony, are as much a part of those
22 witnesses' direct testimony as the other opinions offered by the witnesses during their oral
23 summary of testimony and cross-examination at the Hearing on October 28, 2016. SLDMWA
24 and Westlands' assertion that these Exhibits are evidence of "a statement made other than by a
25 witness other than while testifying at the hearing" (*see* Obj., 2:8-11) is not supported by the facts
26 or law.

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

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

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

19 Here, the Exhibits would be admissible over objection in a civil action, because as a
20 matter of law, the Exhibits are not hearsay. Also, the Exhibits are not offered in isolation. Even
21 if they could be considered hearsay (which they are not), Section 11513(d) allows the use of such
22 evidence to “supplement or explain” other evidence. NDWA-35, NDWA-36, NDWA-37, and
23 NDWA-38 are each comment letters, authored and signed by Ms. Terry in her official capacity,
24 and are offered to explain and supplement Ms. Terry’s testimony regarding NDWA’s historic
25 participation in this process, and the agency’s ongoing concerns regarding the WaterFix project as
26 proposed. NDWA-32 and NDWA-32-errata provide the technical basis for the expert opinions
27 offered by Mr. Kienlen at the Hearing, and likewise supplement and explain that testimony. *See*
28 Gov. Code § 11513(d). Accordingly, each of the Exhibits may be used together with other direct

1 testimony to support the SWRCB's findings, even in the face of this Objection.

2 **D. NDWA joins in SVWU's Response to Objections.**

3 NDWA hereby joins and incorporates in full by reference the Sacramento Valley Water
4 Users' Response to SLDMWA's and Westlands' November 16, 2016 Objections to Exhibits
5 Submitted for Admission into Evidence by Groups 7 and 9 at the Close of Their Case in Chief,
6 filed on December 22, 2016.

7 **III. CONCLUSION**

8 For the reasons outlined herein SLDMWA and Westlands' objections to the exhibits
9 presented by NDWA should be overruled in their entirety.

10 DATED: December 29, 2016

DOWNEY BRAND LLP

11
12 By: 

13 MEREDITH NIKKEL
14 Attorney for Protestant
15 NORTH DELTA WATER AGENCY
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DOWNEY BRAND LLP

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);

**NORTH DELTA WATER AGENCY'S RESPONSE TO SLDMWA AND
WESTLAND'S NOVEMBER 16, 2016 OBJECTIONS TO EXHIBITS SUBMITTED
FOR ADMISSION INTO EVIDENCE BY GROUPS 7 AND 9 AT THE CLOSE OF
THEIR CASE IN CHIEF AND JOINDER IN THE RESPONSE OF SVWU TO
THAT OBJECTION**

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

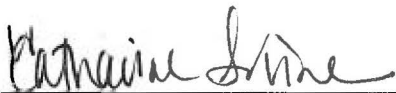
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

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 29, 2016.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814